



# Revisiting Procedural Human Rights

Fundamentals of Civil Procedure and the  
Changing Face of Civil Justice

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CIVIL JUSTICE**

**1. Introduction**

The idea of human rights as fundamental rights of every individual is certainly one of the most powerful ideas of our modern age. Since the American and French revolutions, human rights have been the strongest link between law and democracy. They played a crucial role when defining notions of constitutionalism and the rule of law.

While some human rights were made famous by national mottos like the French *liberté, égalité et fraternité* (or, in an Anglo-American version, *life, liberty and property*), the other human rights have not attracted such attention. Generally, substantive human rights were discussed and appreciated more than procedural human rights. Some attention of the public, media, art and literature was given to the rights of the accused in criminal proceedings, such as the right to professional legal defense and the privilege against self-incrimination. These rights attracted considerable attention among scholars of comparative procedural law.<sup>1</sup> Civil justice, on the contrary, was never considered so exciting - yet, without an effective and well-balanced set of procedural rights, the substantive rights and freedoms of almost any business and individual would not enjoy effective protection before the civil courts of law.

Based on the wish to reopen an international comparative discussion on fundamental notions of civil procedure, this book offers a number of insights in procedural human rights from different jurisdictions and different angles of view. While some previous studies focused on Northern Europe,<sup>2</sup> many of the authors in this book come from Southern and Eastern Europe (e.g. Romania, Russia, Slovenia, Croatia, but also from outside Europe, e.g. South Africa), areas where a common

<sup>1</sup> See e.g. for a comparative discussion of fair trial rights in criminal procedure. Weissbrodt & Wolfrum 1998.

<sup>2</sup> See Ervo & Nylund 2014.

understanding of procedural human rights may be an even more pressing necessity. Some initial premises are however shared by all contributors to this book.

First, the general background of the contributions collected in this book is the finding that various developments in the contemporary world do not favour procedural human rights. Two major challenges to both global and European justice systems have been particularly significant in the past decade: the economic crisis and the ever-increasing frequency of emergency situations. The economic crisis brought policies of austerity, which limited the available judicial resources and made recourse to judicial proceedings more difficult and expensive. Additionally, emergency situations, from ongoing civil wars and armed conflict to the global threat of terrorism, started to change the hierarchy of values in the eyes of legislator and national policy makers, pushing individual rights and procedural guarantees, once conceived as penultimate and inalienable, occasionally down the scale of political and legal priorities.

Second, apart from negative developments, globalization has brought positive ones in the form of emerging transnational and international standards in the area of procedural human rights. In particular, the case law of the European Court of Human Rights contributed to an increasingly harmonized understanding of the central notion in this field, i.e. the notion of fair trial. This development also led to the constitutionalization of some of the key concepts of the law of civil procedure,<sup>3</sup> i.e. the 'europeanization' of some of its fundamental features,<sup>4</sup> and to a 'judicial dialogue' between the national and the international courts.<sup>5</sup> However, the Strasbourg and Luxembourg cases also proved that the cluster of procedural human rights – the 'fair trial rights' – is often understood and applied differently in national jurisdictions, in particular where the balance between conflicting values is concerned. For example, the procedural goals of consistency of case law, and the individual right to a fair trial created tensions and divergences of views among national jurisdictions.

Third, the contributors to this book all share concerns regarding the present state of access to justice in their respective jurisdictions. As expressed by a distinguished colleague, 'as our democratic systems become more and more hollow, procedural rights can provide some concrete protection for ordinary people.'<sup>6</sup> In this context, the present volume partly continues the line of research of a previous book edited by us in the *Ius Commune* series.<sup>7</sup> Aspects of access to justice which are particularly relevant at present are related to the increased complexity and costs of judicial proceedings. Faced with budget cuts, legal aid systems are more and more

<sup>3</sup> This process was first discussed in the 1980s at the Würzburg Congress on Procedural Law (see Habscheid 1985), and was put again on the agenda in 2004 (see Gottwald 2006).

<sup>4</sup> See Ervo, Gräns & Jokela 2009. Common minimum standards of civil procedure are currently high on the agenda of the leading bodies of the European Union. See Mañko 2015; Tulibacka 2009, p. 1527-1565.

<sup>5</sup> European Judicial Cooperation as a composite of the European and national highest courts which gives rise to a *dialogue des juges* in matters of fundamental procedural rights was most recently discussed in Hess 2017.

<sup>6</sup> Andrews 2012, p. 19.

<sup>7</sup> See Uzelac & Van Rhee 2009.

unable to counter this development. On the one hand, alternative forms of legal aid such as free legal advice provided by civil society organizations and legal clinics gain in importance. On the other hand, alternative forms of access to justice have become more prominent, which is manifested by the spreading of different forms of mediation and other types of alternative dispute resolution (mainly for smaller claims and consumer disputes) and arbitration (for the larger and more complex disputes). Global and European problems with the length of judicial proceedings and the massification of claims lead to the exploration of methods of collective redress as an alternative form of access to justice supplementing conventional civil procedure.

Fourth, it is the common understanding of the contributors to this book that comparative research of civil procedure is inseparable from the exploration of its historical evolution. Some contributions to this volume provide clear evidence that fundamental issues regarding fair trial rights and access to justice existed and caused controversies already in Roman law in Antiquity.

The contributions to this book have been organized under four headings:

1. The Human Right to Accessible and Foreseeable Justice;
2. Fundamental Procedural Rights from a National Angle;
3. Wheels Of History: Fair Trial Rights in Historical Perspective;
4. Equal Justice For All: Empirical and Normative Approaches to Legal Aid and Assistance in Civil and Administrative Cases.

## **2. The Human Right to Accessible and Foreseeable Justice**

In the first contribution to Part 1 of this volume by Aleš Galič, *foreseeable justice* is focused on. Foreseeable justice implies that a court should be aware of existing (settled) case law, that it duly considers this case law and, if it chooses to depart from it, offers substantiated reasons why it chooses to do so. After a discussion of the case law of the Slovenian Constitutional Court and the European Court of Human Rights, the author comes to the conclusion that the right to a fair trial is breached when there is settled case law and a lower court decides not follow this case law in an arbitrary manner, i.e. without giving reasons for the departure. The author also holds that in the absence of settled case law the 'mere existence of conflicting decisions, in itself, cannot be considered contrary to the [European] Convention [of Human Rights].' In order to determine whether the right to a fair trial has been breached as a result of conflicting judgments, the following elements should be taken into consideration according to the European Court of Human Rights: (1) whether profound and long-standing differences exist in the case law of the domestic courts; (2) whether the domestic law provides for a machinery for overcoming these inconsistencies; (3) whether this machinery has been applied; and (4) if this has indeed been done, to what effect. This means that differences in case law may exist for some time, but that ultimately there should be measures in place to overcome these differences. These measures may for example consist of a plenary sessions of the supreme court, but according to the author the best measure is a system of leave to appeal to the supreme court, resulting in a situation where the

supreme court judges only have to decide a small number of relevant cases. This will allow them sufficient time to take into consideration matters of uniformity.

The second contribution to Part 1 is by Richard Marcus and discusses *access to justice* in the United States. The author states that access to justice can be viewed as a zero-sum-game, meaning that a certain gain as regards access for the plaintiff will result in a corresponding loss of access to the defendant and vice versa. According to some, in the US excessive access to justice for plaintiffs therefore denies access to justice for defendants who cannot bear the cost or risk of litigating to judgment. The author compares the European and American traditions of civil litigation. The features of the American system that guarantee access are sometimes absent in Europe and have, since their heydays in the mid-20<sup>th</sup> century, been somewhat restricted in the US since the 1970s: low filing fees, the loser does not pay, contingency fees, emotional stress damages, punitive damages, broad discovery with the responding party bearing the cost of responding, the preponderance of evidence burden of proof, jury trial, an emphasis on demeanor evidence, and the limited judicial role in fact-finding or the review of it. That restrictions have been introduced is not without a reason. The proponents of cutting back on many of these features have stated, for a long time, it is exactly these features that they deny access to defendants. According to them, groundless claims are hard to defeat on the pleadings, responding to discovery brings very high costs with it, summary judgment ending the case is hard to obtain, and jury trial is generally unfavorable to corporate defendants. The proponents of change often refer to the civil law systems for solutions to the problems indicated by them, but these changes may be hard to introduce given the very polarized debate on the issue in the US and also because many features of the American justice system are closely linked to other features of regulation in the US.

In the last contribution to Part 1, Laura Ervo is of the opinion that the present approach to civil litigation should be fundamentally changed since it does not provide adequate justice to the parties and therefore *access to justice* is at stake. She advocates redefined fair trial rights. Her starting point is that the 'modern multi-scene of the courts is no longer so much about law and legality as it is, more and more, about morality and humanity.' The redefined fair trial rights include 'service, performed by social and communicative judges, and transparency and co-operation instead of allegiance.' The author claims that one should no longer focus so much on *guaranteeing* a fair trial, but more on *producing* it. The core of the new fair trial rights is, according to the author, to get information and participate in court proceedings. 'The new list of fair trial rights includes the right to good court service, meaning easy accessibility of the court, a human and respectful reception in court, rapid processing times, transparency, understandable decisions written mainly for the parties instead of the higher courts, effective media coverage, information and good conduct on the part of court personnel.' Obviously, this approach to the civil process is diametrically opposite to the traditional approach to civil litigation, where legal technicalities are meant to serve the interests of predictability, uniformity and fairness. It may be open to debate whether this new paradigm can be embraced in practice or whether a combination of traditional and modern approaches would serve the interests of justice better.

### 3. Fundamental Procedural Rights from a National Angle

Part 2 of the volume deals with fundamental procedural rights in a national context. China, Norway, Croatia, Romania, South Africa, Russia and Slovenia are covered (in this order).

The contribution on the People's Republic of China is written by Hangping Chen. The author focuses on existing Chinese civil procedure and its reform. According to him, China is most likely among the most efficient jurisdictions in the world. However, in his opinion the price that has to be paid for this efficiency is rather high: the questionable quality of the system, a lack of public confidence and a poor finality of judgments. Fundamental principles of civil procedure are not observed. To give just a few examples: (1) Access to justice is at stake where the so-called Case Filing Division of the court decides not to accept cases when the court is required to handle politically sensitive matters or matters connected to social instability; (2) The independence of the judiciary appears to be problematic where the responsible judge submits his draft judgment to the chief judge for approval, or where the chief judge holds that a case is too complicated or sensitive, resulting in it being submitted to the court president; (3) Independence is also problematic where cases are handed over to the so-called Adjudication Committee, which has the power to direct the judge or collegial panel to enter a particular decision; and (4) The fundamental right to a reasoned judgments is problematic since Chinese civil judgments are, according to the author, known for their lack of sufficient legal reasoning and factual analysis. It is suggested that currently reforms that aim at improving Chinese civil justice do not focus on its main defects (such as the lack of judicial independence and procedural transparency) and therefore the author suggests various additional reform measures. He concludes that these measures 'will slow the civil litigation process down and cause delays', but in his opinion 'this should not be a large concern in China.'

In the second contribution to Part 2, Magne Strandberg discusses the role of Article 6(2) of the European Convention of Human Rights in civil and administrative cases from a Norwegian perspective. Even though this Article primarily concerns criminal cases, elements of it have been applied by the European Court of Human Rights in civil cases. First there is the *presumption of innocence*. This presumption played a role in civil actions brought for monetary compensation of harm resulting from a criminal offence where (1) the suspect had been acquitted in the criminal case and (2) the civil judgment included a statement imputing criminal liability. Article 6(2) was also applied in cases where it involved an act which was classified as a criminal offence under the Convention but where domestic law classified the case as civil (or administrative). These cases usually concern administrative sanctions. In these cases the requirements in Article 6(2) for the burden of proof and the standard of evidence are central. According to the author, 'it is somewhat unclear which requirements Article 6(2) actually entails' for the burden of proof and the standard of evidence and holds 'that previous Strasbourg cases show that Article 6(2) includes obstacles to shifting the burden of proof, but [that] the Court has been reluctant to require the application of a specific standard

of evidence.’ Based on these findings and a study of the rulings of the Norwegian Supreme Court, the author concludes that it seems that as regards the standard of evidence the Norwegian Supreme Courts requires a higher standard than is needed based on Strasbourg case law.

The *independence and impartiality* of the adjudicator are a central issue in the contribution of Zvonimir Jelinić. The author discusses legislative initiatives regarding pre-bankruptcy settlement proceedings in Croatia. These are quasi-collective proceedings allowing a debtor to restructure at the pre-insolvency stage. The first part of the procedure consists, amongst other things, of a review of the conditions to initiate pre-bankruptcy settlement proceedings and the creation of a restructuring plan under the jurisdiction of a professional body, the Croatian Financial Agency (FINA) and its settlement committees. This stage results in an outline of the settlement that will be submitted to the competent commercial court. The competent commercial court has narrow competence when deciding on the confirmation of the pre-bankruptcy settlement plan. The court is only required to check whether the proposal of the pre-bankruptcy settlement matches the previously accepted restructuring plan. If so, the commercial court will summon the parties and if the majority of creditors vote in favour of the adoption of the restructuring plan, the court will approve the settlement. It is not possible to initiate any other legal proceedings aiming to secure or enforce the debt. According to the author, the limited role of the court in the second stage is problematic, given the fact that the claims reported to the settlement committees relate to ‘civil rights and obligations’. According to Article 6(1) ECHR, such civil rights and obligations should be determined by an independent and impartial tribunal, and Croatian settlement committees cannot be qualified as such. This would not be problematic if the last stage of the proceedings before the commercial court would fulfil the requirements of Article 6(1) of the Convention. After all, it has been decided that Article 6(1) is complied with if the case is finally subjected to control by a tribunal – a body that has full jurisdiction to decide on all aspects of the case. It seems, however, that the Croatian commercial courts do not meet these requirements where they only rubber stamp the previously drafted settlements.

Civil litigation and fundamental procedural rights in Romania are discussed in the contribution of Sebastian Spinei. The author discusses a selection of problematic fundamental procedural rights that are explicitly stated in the new Romanian code of civil procedure (2013) and the case law of the European Court of Human Rights. In Romania, the principle of legal certainty was at stake in decisions concerning the right not to have a final decision called into question (*finality*). This was problematic due to the existence of the so-called ‘appeal for annulment’ which until 2003 could be instituted by the Prosecutor General against final judgments without any time-limits. Under the new code of civil procedure problems remain, also because obvious solutions from abroad (discussed by the author) have not been taken into consideration. Although the *publicity* of the hearings is stated as a principle, the investigation of the case may, according to the code, take place in chambers. Furthermore, an *active role of the judge* is proclaimed by the code without the duty to act actively. Other problems in Romania, addressed by European Court of Human



Rights, are *long duration of cases* and legal uncertainty as a result of the *inconsistency of case law*. It is not a surprise that these problems remain. The measures to guarantee a reasonable time, for example, are according to the author not convincing. Although there is a remedy available against delaying the proceedings, this remedy has to be brought before the same court that has caused the delay and, therefore, it may not be very effective. The absence of compensatory remedies in case of excessive delay may also be a cause of the problems. The absence of adequate measures is also where it concerns legal uncertainty caused by inconsistent case law. Obviously this issue may be addressed by the Romanian Court of Cassation (appeal on points of law). However, the criteria for cases to be admitted to the Supreme Court (the type of case and the amount in controversy) may, according to the author, not result in the right cases ending up before this court.

Danie van Loggerenberg discusses *access to court* as enshrined in the South African Constitution. The author focuses first on limitations to equality and the principle of hearing both sides for litigants who are abusing court procedures. In South Africa such limitations are only allowed by an order of the court under circumstances where the malfeasant has 'persistently and without reasonable grounds instituted legal proceedings'. Subsequently three areas of civil justice are taken into consideration by the author: (1) arrest of a person to found or confirm jurisdiction, (2) arrest of a person who is suspect of fleeing the jurisdiction in order to avoid paying his debts, and (3) class actions. The first area of civil justice has seen extensive changes in South Africa in the sense that arrest to found or confirm jurisdiction has been abolished since it was deemed to cause extensive infringement of the rights to a fair civil trial, equality, human dignity, liberty, and so on. A similar development can be noted in the second area of civil justice discussed by the author. The arrest of a person suspect of fleeing in order to avoid paying his debts was found unconstitutional and therefore abolished in order to respect, protect, promote and fulfil fundamental procedural guarantees. In the third area of civil justice discussed by the author, South Africa witnessed the introduction of class actions also in ordinary civil cases in order to guarantee the fundamental procedural right of access to justice. The various rules governing class actions in South Africa are discussed by the author.

Natalia Baradanchenkova and Ksenia Sergeeva discuss judicial reform in the Russian Federation and its impact on procedural human rights, including *access to justice*. They focus on the abolition of the Higher Commercial Court in the years 2014 and the transfer of its jurisdiction to the Supreme Court of the Russian Federation (now with its main seat in Saint Petersburg). Officially the aim was to reorganize the judicial system in order to provide a unified approach to dispute resolution involving both individuals and legal entities, eliminate possible jurisdictional conflicts, establish general rules of judicial proceedings and introduce consistency to Russian court practices. At the same time it allowed the appointment of judges in the new Supreme Court according to new criteria. It is maybe telling that the majority of rejected candidates for new positions at the Supreme Court were allies of the former Higher Commercial Court president and that the changes

also brought about a reduction of powers of the commercial courts. Previously, the Higher Commercial Court had the power to interpret the meaning of laws and determine their application. This power was now transferred to the Supreme Court. Issues that were found to be problematic by the European Court of Human Rights, on the other hand, were not addressed. The Chairman of the Supreme Court and his deputies, for example, are still allowed to intervene in the procedural activities of judges: they can send any case for a new trial despite the fact that a judge of the Supreme Court has refused to do so.

The final contribution to Part 2 is written by Jorg Sladič and discusses *access to justice* and the conditions of admissibility of a civil action in Slovenia in a comparative context. The author first examines the conditions of admissibility from the point of view of human rights in international and constitutional law. Then he discusses the role and types of conditions of admissibility in Slovenian civil procedure and gives an overview of the theoretical and judicial application of these conditions in Slovenia. He terminates his contribution with a discussion of conditions of admissibility linked to international law (state immunity). The author observes that the right to access to justice is not absolute, but may be subject to limitations: it can legitimately be terminated at the stage of admissibility, but this can only be done under strict conditions. Any bar to access to the courts needs, for example, a justification based on the principle of proportionality. Furthermore, conditions of admissibility have to be defined by law and these conditions must pursue a legitimate aim.

#### **4. Wheels of History: Fair Trial Rights in Historical Perspective**

Part 3 of the present volume consists of two contributions. The first is by Ivan Miličić who discusses arbitration in Roman law as a method of *access to justice*. The author states that in Roman law the use of arbitration was a reaction to the disadvantages of Roman civil litigation which was often *de facto* inaccessible to non-citizens, risky, expensive, full of formalities and procedural situations that a disputing party should take his opponent through. In Roman times, arbitration could not be defined as an alternative to going to court, but as the only means to access justice for those who could not use the benefits of civil litigation. Additionally, arbitration was used to avoid the formalities of civil procedure. Arbitration was more aimed at dispute resolution than at obtaining a decision. In his contribution the author discusses the evolution of arbitration in Roman times. Although at the beginning, arbitration was a reaction to the inaccessibility of state-organized civil justice, later it was a means to access justice in the special types of disputes whose resolution required a knowledgeable, skilled, experienced person who understood the disputed matter.

In the second contribution in Part 3, Tomislav Karlović focuses on the civil procedural aspects of retroactivity, both from an historical and a contemporary perspective. In civil procedural law, traditionally the rule of *tempus regit actum* is applied. This means that every procedural act should be executed according to the law in force when it was undertaken. This brings about that during a civil action the

procedural rules may change. This rule is however not undisputed and is challenged by the theory of 'procedural unity'. According to this theory the procedure should be completed under the same rules which were effective when it was initiated. However, the *tempus regit actum* seems to be the predominant rule in Roman Law in Antiquity, in Medieval Law and later. Nevertheless, in some of the influential 19th century Codes of Civil Procedure discussed by the author we find the idea of procedural unity expressed: the new procedural rules were to be applied only to newly begun lawsuits, while pending cases were to be led to their conclusion according to the earlier procedural rules. In contemporary European systems of civil procedure, however, one can note that new procedural rules usually have immediate effect, and this should also be the case according to the European Court of Human Rights: it is a generally recognized principle that, save where expressly provided to the contrary, procedural rules apply immediately to proceedings that are underway.

#### **5. Equal Justice for All: Empirical and Normative Approaches to Legal Aid and Assistance in Civil and Administrative Cases**

The final part of the present volume opens with the contribution of a team of Maastricht law students headed by Fokke Fernhout and is devoted to the realization of *access to justice* in actual court practice. The authors have executed empirical research in which the central question was the amount of time dedicated by the Dutch cantonal judge (small claims and designated subject-matter) in civil cases to those litigants who are represented by a lawyer and those who are not. As a starting point, the authors took into consideration the possibility that the Dutch judge in adversarial proceedings might be tempted to devote more time to unrepresented parties than to represented parties in order to compensate parties that do not have a lawyer. Surprisingly, the results of the empirical research executed by the authors provide evidence for the assumption that the Dutch judge tends 'to discriminate between parties in a way which is actually detrimental to the unrepresented parties.' According to the authors, this bias may be the result of judges finding it easier to communicate with lawyers as opposed to lay persons. As a result, access to justice is not attained for unrepresented parties even though costs are relatively low for these parties due to the absence of a lawyer. The contribution concludes with the recommendation that in the Netherlands legislation and practice of some other European jurisdictions should be taken into consideration in order to change the detrimental position of the unrepresented party.

Mateja Held subsequently discusses the work of the Zagreb Legal Clinic in administrative cases. This legal clinic offers *access the justice* by providing primary legal aid (legal advice, the preparation of submissions to government agencies and representation in (administrative) proceedings before government agencies). The contribution focuses on the work of the legal clinic in 405 administrative cases, and (1) pinpoints legal areas where a violation of procedural human rights occurs most frequently in Croatia, (2) shows where the reasonable time requirement is violated in Croatia, and (3) reveals the level of compliance with the rights to access to justice

in the same country. The most problematic area seems to be social rights and access to administrative bodies. Based on the cases under research, the main problems in the area of access to justice in administrative cases can be identified as uninformed citizens, untrained civil servants and faulty regulations.

Part 4 of the present volume (and the volume itself) is concluded by a contribution of Slađana Aras who discusses the question whether financial burdens prevent *access to justice* in the successor states of former Yugoslavia. Within this context the author discusses the current laws on attorney's fees and legal aid in these jurisdictions. As elsewhere, attorney's fees comprise a major proportion of the total costs of civil litigation in the area under consideration and this is especially problematic in case of mandatory representation in court. Legal aid systems may impose conditions under which qualifying cases are selected and in this context the author discusses the merits and means test for primary legal aid (legal advice, the preparation of submissions to government agencies and representation in (administrative) proceedings before government agencies) and secondary legal aid (legal advice, drafting pleadings in court proceedings, legal assistance and representation in court cases). Although the legal framework is in place, it is problematic that especially in Croatia an extremely low amount of money is spent in legal aid per inhabitant. The author states that indeed one needs a legal framework, but that it is also important that this legal framework is applied in practice.

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