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PART IV

CONSTITUTIONALIZATION AND FUNDAMENTALIZATION OF CIVIL PROCEDURAL GUARANTEES AND PRINCIPLES

CHAPTER 2

CONSTITUTIONALIZATION AND FUNDAMENTALIZATION OF ACCESS TO JUSTICE

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1 ACCESS TO A COURT

1.1 Constitutionalization of Access to a Court

1 The basic idea that civil disputes between private parties should be decided by courts was widely established long before the first international human rights instruments were created. Nonetheless, such instruments have been an important driver of the constitutionalization of the right of access to a court. Even today, an explicit guarantee of this right is not a uniform feature of national constitutions. These often contain institutional guarantees, such as the separation of powers or the independence of judges from the executive power, without spelling out an individual right of access to a court. Where an explicit guarantee is lacking, scholars and courts have often distilled it from other provisions or general principles.

2 Overall, though, there are significant differences between national approaches as regards a constitutional right to sue. The differences seem even more pronounced than with respect to fair trial guarantees, where there is at least a minimum common core of accepted principles. The following examples are meant to illustrate the differences in approaches for a selection of jurisdictions, as well as to show how these approaches were shaped by the historical development of constitutional rights as well as by the broader constitutional context in the respective jurisdictions.

3 *Grundrechte des deutschen Volkes* (The Bill of Rights of the German People) of 1848 contained rules on the structure of courts, on judicial independence, and on the right to a lawful judge. It also laid down the principles of orality and publicity for court proceedings. Yet while this Bill of Rights was highly influential for the future debate, its legal status was weak. It was in force only for a brief period, and only in a small part of the German Empire. When the German Code of Civil Procedure (GCCP) was enacted, there was no fundamental rights catalogue at the level of the German Empire setting out the constitutional principles along which civil procedure should be designed. Article 77 of the Constitution of 1871 did contain a rule on a complaint to the *Bundesrat* (Federal Council)[1] as a remedy for denial of justice by a member state. But it was at the Federal Council's discretion whether to accept the complaint, and this constitutional provision had little import for the discussion on the basis and rationale of the right of access to a court.

4 The situation was similar in Austria at the time when the Code of Civil Procedure was enacted in 1895. Article 11(1) of the *Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger* (Constitutional Act on the Citizens' General Rights) of 1867 guaranteed the right to petition the government, which was later understood as a legal basis also for the

[1] This was a hybrid organ (with legislative, executive and adjudicative functions) of the German Empire that consisted of representatives of the Empire's member states.

right to bring judicial proceedings.[2] Apart from that, there were no explicit constitutional guarantees for individuals in relation to court proceedings.

5 The focus of German-speaking scholarship in the nineteenth and early twentieth century was not on the constitution as the basis for the right of access to justice. The nineteenth century is generally considered as the time when German-speaking academic procedural jurisprudence emerged. Earlier treatises on civil procedure were primarily practical handbooks. They focused on technicalities and paid special attention to 'procedural traps'.[3] In the nineteenth century and in the first half of the twentieth century, there was a turn to the 'big questions' of civil procedure, that is, its purpose and basic structures, and the methods of procedural scholarship.[4] Today's German-speaking academic discourse on civil procedure is largely still rooted in this scholarly tradition. It continues to be dominated by a legal doctrinal approach. There are few empirical studies, and there is limited engagement with the social sciences.[5] Writing about the nuts and bolts and the practical functioning of procedure is to some degree still frowned upon and dismissed as unscientific.[6] The current debate on access to justice mostly builds upon this older literature on the principles and foundations of civil procedure. Ideas discussed there often have been constitutionally reframed, particularly in the second half of the twentieth century.

6 The positive basis in the current German constitution for the right of access to court in civil cases is mostly considered to be the principle of rule of law enshrined in Article 20(3) of the *Grundgesetz* (Basic Law)[7] in conjunction with the fundamental rights guaranteed by the constitution, particularly the right to the free development of personality (Article 2(1) of the Basic Law).[8] Other constitutional provisions referenced in case law and literature in this context are Articles 101(1) (right to a lawful judge), 103(1) (right to be heard) and 92 of the Basic Law (the constitutional provision conferring the judicial power exclusively on the courts).[9] The explicit right to recourse to a court under Article 19(4) of the Basic Law only applies to cases where a person's rights are violated by a public authority.

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[2] See WH Rechberger and D-A Simotta, *Zivilprozessrecht,* (9th edn, Manz 2017) para 18.
[3] W Brehm in Stein/Jonas, vol 1 (23rd edn Mohr Siebeck 2014), introduction to § 1 ZPO (GCCP), para 47.
[4] For an overview, see Ibid para 47 ff.
[5] See, however, S Ekert, C Meller-Hannich, M Nöhre, A Höland, K Gelbrich, Lisa Poel, L Hundertmark and A Moser, *Abschlussbericht zum Forschungsvorhaben "Erforschung der Ursachen des Rückgangs der Eingangszahlen bei den Zivilgerichten"* (Bundesministerium der Justiz 2023) and the project 'Zugang zum Recht in Berlin' (Access to Justice in Berlin), https://wzb.eu/de/forschung/dynamiken-sozialer-ungleichheiten/recht-und-steuerung-im-kontext-sozialer-ungleichheiten/projekte/zugang-zum-recht-in-berlin accessed 5 August 2024.
[6] See eg, Brehm in Stein/Jonas (n 3) para 47.
[7] Case 1 PBvU 1/79 (Federal Constitutional Court, Germany), Order 11 June 1980, BVerfGE 54, 277, 291.
[8] Case 1 PBvU 1/02 (Federal Constitutional Court, Germany), Order 30 April 2003, BVerfGE 107, 395, 401 [ECLI:DE:BVerfG:2003:up20030430.1pbvu000102].
[9] L Rosenberg, KH Schwab and P Gottwald, *Zivilprozessrecht* (18th edn, CH Beck 2018) § 4 para 4.

7 In Austria, the prevailing view is that Article 6(1) European Convention on Human Rights (ECHR), which has constitutional rank in Austria, is the only basis for a subjective constitutional right of access to a court.[10] From the perspective of national law, the basis for this right is mainly § 19 of the *Allgemeines Bürgerliches Gesetzbuch* (General Civil Code), according to which 'anyone who assumes that their rights were infringed is free to bring a complaint before the authority designated by law'. On the constitutional level, this is supplemented by the right of petition laid down in Article 11 of the State Constitutional Act on the General Rights of Citizens (*Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger*) of 1867[11], which does not, however, contain an explicit guarantee of access to a court for individuals.

8 Similarly, until recently, there was no clear basis for a constitutional right of access to justice in Switzerland. The Federal Constitution of 1874 contained a guarantee of the lawful judge and a prohibition of courts of exception (Article 58(1)). It also abolished ecclesiastic courts (Article 58(2)). Furthermore, it contained a guarantee for non-insolvent defendants domiciled in Switzerland that they could not be sued outside their domicile for personal claims (Article 59(1)). Meanwhile, the right of access to the courts for the plaintiff was not constitutionally enshrined, at least not explicitly. When the new Swiss Federal Constitution of 1999 was enacted, it included a catalogue of fundamental judicial rights that was heavily influenced by Article 6 ECHR, but there was still no explicit provision guaranteeing access to courts. This was only included subsequently, in Article 29a of the Federal Constitution, which came into force in 2007 as part of the so-called *Justizreform* (justice reform). Yet the practical impact of this change was negligible outside administrative law. With respect to civil rights and obligations, the fundamental right of access to court was already enshrined in Article 6 ECHR which is directly applicable in Switzerland.[12]

9 The French Constitution also does not explicitly guarantee an individual right of access to a court. The *Déclaration des droits de l'homme et des libertés fondamentale*s (Declaration of human and civic rights) of 1789 continues to stand part of the body of texts forming the 'bloc de constitutionnalité'.[13] It is the most important source of constitutional rights and guarantees relating to judicial proceedings in French law. Yet its provisions are quite vague (mainly Article 16), and it was mainly through the case law of the Constitutional Council that more concrete constitutional determinants have been developed.

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[10] WH Rechberger and D-A Simotta, *Zivilprozessrecht,* (9th edn, Manz 2017) para 19.

[11] Rechberger and Simotta (n 10) para 18.

[12] Note also that Swiss courts, including the Federal Court, have no power of judicial review of the constitutionality of federal statutes (see Art 190 of the Swiss Federal Constitution). Meanwhile, at least within certain (disputed) limits, they do have the power to disapply laws that are incompatible with international law.

[13] See the French Constitutional Council's landmark decision of 16 July 1971, 71-44 DC, Liberté d'association.

10 The French debate on constitutional foundations of civil procedure seems to have been off to a comparatively late start. One possible explanation is that French civil procedure is largely regulated by governmental decrees that are not subject to constitutionality review by the Constitutional Council.[14] Another inhibiting factor may have been the traditional emphasis on the primacy of laws enacted by Parliament. The idea that a judge should be the '*bouche de la loi*' ('law's mouthpiece') and should refrain from judicial activism remains firmly rooted in French legal culture.[15] Nonetheless, there have been processes of both direct and indirect constitutionalization of judicial procedures, particularly in recent decades.[16]

11 The French constitutional provision most relevant for judicial proceedings in civil cases is Article 16 of the Declaration of human and civic rights. It states that '[a]ny society in which no provision is made for guaranteeing rights or for the separation of powers has no constitution'. This proclamation is the basis for a wide-ranging body of case law of the French Constitutional Council on the 'principle of the rights of the defence'. The right to bring court action against misuse of state power (*recours pour excès de pouvoir*) was first recognised by the *Conseil d'État* (Administrative Council), the highest French administrative court, as an element of a state governed by the rule of law (*État de droit*).[17] In the mid-1990s, the Court of cassation, the highest French civil and criminal court, also took on board the idea of a constitutional right to sue. It ruled that the effective exercise of the right of defence 'requires that everyone be guaranteed access, with the assistance of a defender, to the judge responsible for ruling on his or her claim'. [18] This means that the 'right of defence', in the Court of cassation's understanding, includes the right to actively assert a legal position before a court. Since the 1980s, the Constitutional Council has issued several decisions recognizing a constitutional right of interested persons to bring cases before the courts on this basis.[19] In 1996[20], the Constitutional Council ruled on the basis of Art 16 of the Declaration of human and civic rights that 'it follows that as a matter of principle there may be no substantial constraints on the right of interested persons to bring actions before the courts'.

12 In Korea, there is not much discussion about the right to access to a court and its nature as a fundamental right. It does seem accepted, however, that the right to a trial

[14] French report, 8.
[15] Ibid 12.
[16] Ibid 8 ff.
[17] Ibid 12.
[18] Case 94-20.302 (Court of Cassation, Plenary Assembly, France), Decision 30 June 1995, *Bull. Ass. Plén.* 1995, no 4: '*droit fondamental à caractère constitutionnel*'.
[19] *Loi de programmation 2018–2022 et de réforme pour la justice*, Case 2019-778 DC (Constitutional Council, France) Decision 21 March 2019, para 17; *Loi organique portant statut de la Polynésie française,* Case 93-373 DC (Constitutional Council, France), Decision 9 April 1996; see also already *Privatisations,* Case 86-207 DC (Constitutional Council, France), Decision 26 June 1986.
[20] *Loi organique portant statut de la Polynésie française*, Case 96-373 DC (Constitutional Council, France), Decision 9 April 1996, para 83.

guaranteed in Art 27(1) of the Constitution, which gives the people a right to effective access to a court, includes the right to file a lawsuit.[21]

13 In the US Constitution, due process is enshrined in the Fifth and Fourteenth Amendments. The Fifth Amendment restricts the federal government from depriving anyone 'of life, liberty, or property, without due process of law'. The Fourteenth Amendment extends the obligation to respect due process to the states.

14 The due process clause is often traced back to clause 39 of Magna Carta of 1215, according to which '[n]o free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.' In addition, in clause 40, King John promised that '[t]o no one will we sell, to no one deny or delay right or justice'.[22]

15 The US Supreme Court has referred to Magna Carta in several judgments dealing with due process.[23] *William Blackstone* contended that the right to a jury trial was secured in Magna Carta.[24] It has been pointed out by legal historians, though, that a tradition linking modern-day due process rights to Magna Carta does not reflect historical reality.[25] In any case, due process guarantees originally evolved in criminal cases and in other cases of government interventions regarding 'life, liberty, or property'. The importance of constitutional due process guarantees for civil cases only seems to have been recognized at a later stage.

16 To this day, the US Supreme Court has not recognized a general constitutional right of access to a court. There is also no unanimity in scholarship on the existence of such a right, much less on its constitutional basis. It has even been suggested that it is a

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[21] Case 2009Hun-Ba297 (Constitutional Court, Korea), Decision 26 July 2012.

[22] English translation of Magna Carta, available on the website of the British Library, https://www.bl.uk/magna-carta/articles/magna-carta-english-translation. Clauses 39 and 40 of Magna Carta are considered to be still part of English law, see https://www.parliament.uk/about/living-heritage/evolutionofparliament/originsofparliament/birthofparliament/overview/magnacarta/magnacartaclauses/.

[23] For a list of US Supreme Court opinions citing to Magna Carta, see RW Emerson and JW Hardwicke, 'The Use and Disuse of the Magna Carta: Due Process, Juries, and Punishment' (2021) 46(3) North Carolina Journal of International Law 571, 652 ff.

[24] W Blackstone*, Commentaries on the Laws of England, Book the Fourth* (Clarendon Press 1769) 342 f. (cited after https://www.oxfordscholarlyeditions.com/display/10.1093/actrade/9780199601028.book.1/actrade-9780199601028-div1-1). Regarding the influence of this thinking on the US Supreme Court, see Emerson and Hardwicke (n 23) 619 ff.

[25] E Jenks, 'The Myth of Magna Carta' (1904) 4 The Independent Review 260 ff. For nuanced assessments, see eg, M Radin, 'The Myth of Magna Carta' (1947) 60 Harvard Law Review 1060 ff; RH Helmholz, 'The Myth of Magna Carta Revisited' (2016) North Carolina Law Review 1475, 1479 f.; RW Emerson and JW Hardwicke (n 23) 605 ff.

fundamental difference between the US and 'the rest of the world' that US law does not focus on access to justice but on protecting the defendant.[26]

17 In its seminal judgment in *Marbury v Madison*[27], which established the principle of judicial review, the US Supreme Court said that '[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury'.[28] In this context, the Supreme Court pointed to the possibility for the British King to be 'sued in the respectful form of a petition'.[29] Yet *Marbury v Madison* did not concern a dispute over civil rights and can hardly be cited as an authority for the right of access to a court in civil cases.

18 Subsequently, the US Supreme Court rejected the proposition that due process entails a right to unrestricted access to the courts for plaintiffs.[30] It stated that 'private structuring of individual relationships and repair of their breach is largely encouraged in American life', and that the issue of full access to the court therefore normally only arises from the defendant's perspective – after a lawsuit has been initiated and, as a result, the judicial process has become 'paramount'.[31] Based on this logic, the US Supreme Court has, however, recognised a due process right of court access, including a right for indigent plaintiffs to be exempt from the obligation to pay a filing fee, where 'the judicial proceeding becomes the only effective means of resolving the dispute at hand', such as in divorce cases.[32] There is also a body of case law recognising a due process right of prisoners to access civil courts.[33] Furthermore, some litigation activities can be protected by the rights of association and political expression.[34]

19 Some US scholars have proposed a different basis for a constitutional right of access to court instead of due process, ie, the right to petition the government enshrined in the First Amendment of the US Constitution.[35] In support of this, they point, in particular, to the Supreme Court's case law on the immunity of petitioning activities, including lawsuits,[36] from antitrust liability, even if such petitioning was carried out with the intention to influence competition.[37] One should note, however, that the same line of

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[26] RA Brand, 'Access-to-Justice Analysis on a Due Process Platform, (2012) 112 Columbia Law Review Sidebar 76, 79 (with respect to opening a domestic forum for a claim).
[27] *Marbury v Madison* (Supreme Court, US) [5 U.S. 137, 162 (1803)].
[28] See the reference to this passage in CR Andrews, 'A Right of Access to Court under the Petition Clause of the First Amendment: Defining the Right' (1999) 60 Ohio State Law Journal 557.
[29] *Marbury v Madison* (n 27) 163.
[30] On the development of the Supreme Court's case law, see CR Andrews (n 28) 567 ff.
[31] *Boddie v Connecticut* (Supreme Court, US) [401 U.S. 371, 375 f. (1971)].
[32] Ibid 376.
[33] For an in-depth analysis, see Andrews (n 28) 571 ff.
[34] Ibid 576 ff.
[35] A particularly thorough treatise on this is Andrews (n 28) 576 ff.
[36] *California Motor Transport Co. v Trucking Unlimited* (Supreme Court, US) [404 U.S. 508, 510 (1972)].
[37] *Eastern Railroad Presidents Conference v Noerr Motor Freight* (Supreme Court, US) [365 U.S. 127 (1961)]; *United Mine Workers v Pennington,* (Supreme Court, US) [381 U.S. 657 (1965)]; *California Motor Transport Co. v Trucking Unlimited* (n 36).

case law is also being heavily relied upon in anti-SLAPP scholarship to justify restrictions to court access where lawsuits are directed against 'petitioning' activities.[38]

20 In any case, there is no established and uniform body of Supreme Court case law clearly spelling out a right of access to court under the US Constitution, be it based on due process or on the right of petition. Presumably this will not change under the current composition of the Supreme Court, or at least not in the direction the advocates of such a constitutional right would wish.

21 In contrast to both the US, where even the existence of a constitutional right of access to court in civil cases is disputed, and those jurisdictions where the right as such is largely undisputed but the constitutional basis is opaque, in some national constitutions the right of access to a court is explicitly enshrined and does not have to be inferred from other provisions.

22 Article 24(1) of the Italian Constitution, eg, guarantees access to justice for everyone. In conjunction with the guarantee of inviolable rights of the person in Article 2, the right of access to justice is considered by the Italian Constitutional Court to override even an obligation under public international law to respect a foreign state's immunity from court proceedings.[39]

23 Inspired by the Italian model, Article 24 of the Spanish Constitution, enacted in 1978 after the demise of the Franco regime in 1977, provides for a guarantee of 'effective judicial protection'. This includes, *inter alia,* free access to justice.[40] The Spanish Constitutional Court's case law on this provision, as regards the right of access to court, mainly revolves around rights of the defence. Meanwhile, the right to bring a lawsuit does not appear to have attracted much attention. Nonetheless, there does seem to be an understanding that the right to sue is included in the right to defend one's substantive rights.[41]

24 Article 5 of the Brazilian Federal Constitution also enshrines a range of due process rights as fundamental rights, and states in para XXXV that 'the law shall not exclude any injury or threat to a right from review by the judiciary'.[42]

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[38] See GW Pring and P Canan, *SLAPPs. Getting Sued for Speaking Out* (Temple University Press 1996) 24 ff.

[39] Case 238/2014 (Constitutional Court, Italy), Judgment 22 October 2014.

[40] Spanish report, 1.

[41] Spanish report, 9.

[42] Source of translation: Federal Supreme Court (Brazil), *Constitution of the Federative Republic of Brazil* (2022), https://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/brazil_federal_constitution.pdf accessed 7 July 2024.

25 Nigeria is another example of a jurisdiction where access to a court is explicitly guaranteed in the constitution.[43] Article 6(6)(b) of the Constitution of the Federal Republic of Nigeria phrases this as an institutional guarantee, stating that:

> [t]the judicial powers […] shall extend, to all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.

26 An individual right to sue is a typical feature of liberal democracies. It does not exist, or at least is not consistently implemented, in jurisdictions that do not adhere to a liberal concept of the rule of law, even if their civil procedure is otherwise structured in a similar way as in those jurisdictions that do provide for such constitutional protection.

27 Article 46(1) of the Russian Constitution contains an explicit guarantee of judicial protection of rights and freedoms that encompasses a right to sue.[44] This, along with other judicial fundamental rights, was meant to draw a firm line under the Soviet past where such a right was non-existent or at least subordinate to the governing party's will.[45] Yet even after the Constitution was enacted, parties encountered great difficulties in obtaining judicial protection in cases where there was no specific statutory provision allowing recourse to the courts, as judges, at least those of lower courts, were reluctant towards a direct implementation of constitutional guarantees.[46] The subsequent creation of a 'vertical power structure of guided democracy' has thrown the effectiveness of any constitutional guarantees into jeopardy even more.[47]

28 In China, parties cannot directly rely on the Constitution. The concept of individual constitutional rights is currently non-existent in Chinese law. Constitutional principles must be incorporated into ordinary legislation to become directly applicable. The principles of Chinese civil procedure are laid down in Chapter 1 of the Chinese Code of Civil Procedure. There is no unanimity among scholars as to which of the provisions contained there can actually be qualified as embodying procedural principles, and there does not even seem to be a common core of universally recognized principles. In any case, there is no explicit guarantee, constitutional or otherwise, of an individual right to sue.

29 These examples show that an individual constitutional right to sue is not a universal feature of national constitutions. Even where the existence of such a right is undisputed,

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[43] O Kehinde, 'Pre-action protocol and right of access to court in Nigeria', The Guardian (Nigeria) 20 September 2016 http://guardian.ng/features/pre-action-protocol-and-right-of-access-to-court-in-nigeria/ accessed 7 July 2024.
[44] Russian report, 12 f.
[45] Russian report, 2.
[46] Russian report, 2.
[47] Russian report, 6 f.

it is often not spelled out explicitly in the constitution but rather inferred from other provisions or considered as a necessary prerequisite for the effectiveness of those procedural rights that are explicitly guaranteed. Yet that is not the only possible way of looking at the issue. One could also take the view that procedural rights only become relevant once a lawsuit has been brought – but that the right to bring a lawsuit as such is not a constitutional matter. Indeed, this is the perspective taken by those US scholars who emphasize due process over access to justice.

1.2 Fundamentalization of Access to a Court

30 The right of access to a court – formulated more or less broadly – is typically an important element of international human rights instruments, both global and regional.

31 In Europe, the right of access to a court is enshrined in Article 6(1) ECHR, which states that '[i]n the determination of his civil rights and obligations […], everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' The ECtHR has explicitly recognized that this right does not only relate to proceedings already pending, but that it includes a right to institute litigation.[48] In addition, Article 13 ECHR gives '[e]veryone whose rights and freedoms as set forth in [the ECHR] are violated' the right to 'an effective remedy before a national authority'. Together with Article 35 § 1 ECHR, Article 13 ECHR has a specific function in the convention's system of safeguarding fundamental rights. It is understood to express the subsidiary character of the complaint to the ECtHR. The contracting parties are primarily responsible for implementing the rights guaranteed in the convention, and a complaint to the ECtHR is only possible after domestic remedies are exhausted.[49] At the same time, by imposing on the contracting parties the obligation to implement effective remedies for violations of convention rights, Article 13 ECHR reinforces the substantive rights guaranteed in the convention in order to ensure that individuals effectively enjoy those rights.[50] In the context of Article 6, Article 13 is only relevant with respect to the right to obtain a judgment within a reasonable time.[51] Article 13 is violated if there is no

[48] *Golder v UK,* Case 4451/70 (ECtHR), Judgment 21 February 1975 [ECLI:CE:ECHR:1975:0221JUD000445170] para 26 ff. The UK government had contended that Article 6(1) ECHR only related to the fair conduct of already pending proceedings but did not confer a right to sue, and that it was compatible with Article 6(1) ECHR to factually prevent a prisoner from bringing a libel action against a prison guard by withholding access to a solicitor.

[49] *Cocchiarella v Italy,* Case 64886/01 (ECtHR), Judgment 29 March 2006 [ECLI:CE:ECHR:2006:0329JUD006488601] para 38.

[50] *Kudła v Poland,* Case 30210/96 (ECtHR), Judgment 26 October 2000 [ECLI:CE:ECHR:2000:1026JUD003021096] para 152.

[51] European Court of Human Rights, *Guide on Article 13 ECHR – Right to an effective remedy,* updated on 31 August 2022, para 143 ff, para 145 ff.

effective remedy for delay of justice within the national systems. In other instances, Article 13 is absorbed by Article 6, as the standards of the latter provision are stricter.[52]

32 Where the disputed right is based in EU law, Article 47(1) of the Charter of Fundamental Rights of the European Union (CFR) guarantees the right to an effective remedy. Particularly before the CFR was created, the European Court of Justice (ECJ) derived certain procedural rights, including the right of effective access to a court, from substantive EU law, particularly from the four EU fundamental freedoms, but also, eg, from EU competition law.[53]

33 Article 7(1) of the African (Banjul) Charter of Human and Peoples' Rights also contains guarantees of access to justice. While limbs (b) and (c) of that provision refer to criminal cases, limb (a) more generally provides for a 'right to an appeal to competent national organs against acts of violating […] fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force', and limb (d) guarantees 'the right to be tried within a reasonable time by an impartial court or tribunal.'

34 Article 8(1) of the American Convention on Human Rights provides for an even broader guarantee of access to a court. It is not limited to criminal allegations and civil rights and gives everyone

> the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, […] for the determination of […] rights and obligations of a civil, labor, fiscal, or any other nature.

The Inter-American Commission on Human Rights has pointed out, in the context of the protection of social rights, that access to justice is a key component of the due process guarantee contained in Article 8(1) of the American Convention on Human Rights.[54]

35 On the global level, Article 14 of the UN International Covenant on Civil and Political Rights states that '[a]ll persons shall be equal before the courts and tribunals', and provides that '[i]n the determination […] of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.' The Covenant is legally binding for states that have ratified it. Article 14 contains self-executing rules that can, in principle, be directly applied in the courts of states adhering to a monist approach to international law. Yet in

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[52] European Court of Human Rights, *Guide on Article 6 ECHR – Right to a fair trial (civil limb),* updated to 31 August 2022, para 102 ff.

[53] The leading case establishing individuals' rights to claim damages for breaches of EU competition law was *Courage v Crehan,* Case C-453/99 (ECJ), Judgment 20 September 2001 [ECLI:EU:C:2001:465].

[54] Inter-American Commission on Human Rights, Access to justice as a guarantee of economic, social, and cultural rights. a review of the standards adopted by the Inter-American System of human rights (2007), http://www.cidh.oas.org/pdf%20files/ACCESS%20TO%20JUSTICE%20DESC.pdf, para 183.

many jurisdictions, not much attention is paid to this provision, and it is often mentioned only in passing, if at all. The debate mainly focuses on rules contained in regional instruments or in national constitutions.

36 In many jurisdictions, the most important practical impact of international human rights instruments was not to establish the right of access to a court in civil disputes as such, but rather to create and reinforce standards for the lawfulness and independence of courts, for the fairness of proceedings, for the right to have cases adjudicated within a reasonable time, and, more broadly, for the practical and effective nature of the right. The very essence of access to a court mainly becomes relevant in constellations where the civil nature of the disputed right is at issue, and in cases involving sovereign immunity.

37 Article 6(1) ECHR implements an autonomous and, compared with some national traditions, broad concept of civil rights and obligations. Where such rights or obligations are disputed, the affected parties must have access to a court that has the power to examine the case in full, with regard to both facts and law.[55]

38 In some jurisdictions, this has led to a significant transformation of procedures used for administrative matters, eventually even beyond the Convention's remit. In Austria, for example, a range of matters that are classified as civil under the ECHR are administrative from the perspective of national law. The Austrian model of administrative justice used to provide for an administrative court only at the supreme court level, and the court's cognition was limited. While the design of Austrian administrative procedure has been significantly influenced by civil procedure, administrative authorities are not independent tribunals as required by the ECHR for the adjudication of civil matters. To comply with Article 6(1) ECHR, Austria first introduced 'independent administrative senates' for matters that were civil from an autonomous ECHR perspective. Subsequently, it created lower-level administrative courts that can also examine the facts of the case. Parties can now appeal from administrative decisions to these courts also outside the remit of Article 6 § 1 ECHR.[56] A comparable development took place in Switzerland, where a universal constitutional guarantee of access to court, including in administrative matters, was introduced through Article 29a of the Federal Constitution in 1999 (referendum in 2000, entry into force in 2007), with the explicit purpose to address cases not covered by Article 6(1) ECHR.[57]

39 Some soft law instruments also address access to justice. Sustainable development goal (SDG) 16, for instance, calls upon addressees to 'promote peaceful and inclusive

[55] *Ramos Nunes de Carvalho e Sá v Portugal,* Cases 55391/13, 57728/13 and 74041/13 (ECtHR), Judgment 6 November 2018 [ECLI:CE:ECHR:2018:1106JUD005539113] para 176 ff.
[56] See the Austrian government's explanatory memorandum on the constitutional amendment introducing administrative courts, 1618 BlgNR XXIV GP, 3 ff.
[57] See B Waldmann in B Waldmann, EM Belser and A Epiney (ed), *Basler Kommentar Bundesverfassung* (Helbing Lichtenhahn 2015) Article 29a para 1 f.

societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'. In the UN Guiding Principles on Business and Human Rights, 'access to remedy' is one of the three central pillars. As regards access to courts, operational principle 26 specifically states that 'States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.'

40 There does seem to be a tendency in recent soft-law instruments to blur the lines between access to formal, court-based dispute resolution and enforcement mechanisms on the one hand, and informal, often voluntary 'grievance mechanisms' on the other hand. There could be a risk associated with this approach that an overly broad understanding of 'access to justice' which encompasses a broad range of judicial and extra-judicial mechanisms, could inadvertently lead to an erosion of the right to effective access to a court in the institutional sense.

1.3 Limitations

41 There are different types of limitations to constitutional or fundamental rights: (1) inherent limitations (often unwritten),[58] (2) limitations resulting from the need to reconcile competing rights (these could also be conceived of as a subtype of inherent limitations), and (3) explicit limitations or reservations. In addition, there may be factual barriers to the full enjoyment of constitutional or fundamental rights by individuals. In those cases, the question arises as to how far states have a positive obligation towards individuals to enable them to enjoy their rights fully or to prevent third parties from interfering with that right.

42 Where there are written constitutional or fundamental rights rules guaranteeing access to a court, they usually do not provide for explicit limitations. Yet that does not mean that no limitations exist.

43 An important inherent limitation arises from the circumstance that the right of access to court is often limited to certain types of disputes. For example, for Article 6(1) ECHR to apply, the dispute must, at least arguably, relate to a right under national law that is a civil right within the meaning of Article 6(1) ECHR.[59]

44 According to the case law of the ECtHR, limitations of access to court must not impair the very essence of the right enshrined in Article 6(1) ECHR. Furthermore, the limitations

[58] *Golder v UK* (n 48) para 38.

[59] *Naït-Liman v Switzerland,* Case 51357/07 (ECtHR), Judgment 15 March 2018 [ECLI:CE:ECHR:2018: 0315JUD005135707] para 106; *Grzęda v Poland,* Case 43572/18 (ECtHR), Judgment 15 March 2022 [ECLI:CE:ECHR:2022:0315JUD004357218] para 257 ff.

must pursue a legitimate aim, and there must be a 'reasonable relationship of proportionality between the means employed and the aim sought to be achieved'.[60]

1.4 Relationship with Substantive Rights

45 There is a complicated interdependence between the right of access to a court on the one hand, and substantive constitutional or fundamental rights on the other. The case law of the ECtHR on the relationship between the substantive rights and freedoms guaranteed by the ECHR and the procedural guarantees contained in its Articles 6 and 13 can serve to illustrate this. According to this case law, substantive fundamental rights have procedural components. Contracting states are obliged to investigate certain potential violations of such rights. If they fail to do so, this in itself can be a violation of the substantive fundamental right, without there being a need to establish that a substantive violation actually took place.[61] Where the ECtHR establishes a violation of the procedural component of a substantive fundamental right, it sometimes refrains from conducting a separate analysis from the perspective of Article 13 or Article 6(1) ECHR.[62]

46 Conversely, a violation of Article 6 or of Article 13 ECHR does not require that a substantive right was also violated. Nonetheless, for Article 13 ECHR to apply, there must be an arguable claim that the 'rights and freedoms as set forth in the Convention' were violated. This means that there must be an arguable claim under another (substantive) provision of the ECHR.[63] As regards the civil limb of Article 6(1) ECHR, the test applied by the ECtHR is whether there is (1) a 'serious and genuine dispute' regarding (2) a right that arguably has a basis in domestic law and is (3) 'civil' in nature from the perspective of the ECHR.[64] Article 13 ECHR applies regardless of whether there is a dispute over a 'civil' right but is largely absorbed by Article 6(1) ECHR if there is such a dispute.[65] Meanwhile, in contrast to Article 13 ECHR, Article 6(1) ECHR does not require that any substantive fundamental right is potentially affected.[66] Yet a party cannot rely on

[60] *Stanev v Bulgaria,* Case 36760/06 (ECtHR), Judgment 17 January 2012 [ECLI:CE:ECHR:2012:0117JUD003676006] para 230; *Zubac v Croatia,* Case 40160/12 (ECtHR), Judgment 5 April 2018 [ECLI:CE:ECHR:2018:0405JUD004016012] para 78. For examples of possible legitimate restrictions, see European Court of Human Rights (n 52) para 136 f; see also sections 1.7, 1.8, and 1.9 below.
[61] See European Court of Human Rights (n 52) para 87 ff.
[62] See eg, European Court of Human Rights, *Guide on Article 8 ECHR – Right to respect for private and family life, home and correspondence,* updated on 31 August 2022, para 39 ff.
[63] European Court of Human Rights (n 51) para 10 ff.
[64] *Z and others v UK,* Case 29392/95 (ECtHR), Judgment 10 May 2001 [ECLI:CE:ECHR:2001:0510JUD002939295] para 87 ff; European Court of Human Rights (n 52) para 5 ff.
[65] *Sporrong and Lönnroth v Sweden,* Cases 7151/75 and 7152/75 (ECtHR), Judgment 23 September 1982 [ECLI:CE:ECHR:1982:0923JUD000715175] para 88.
[66] *Boulois v Luxembourg*, Case 37575/04 (ECtHR), Judgment 3 April 2012 [ECLI:CE:ECHR:2012:0403JUD003757504] para 90

Article 6(1) ECHR without showing that there is a dispute over an arguable substantive right or obligation under domestic law.[67]

47 While procedural guarantees are often considered to be inherent in substantive rights, as these rights would be meaningless without procedural protection, conversely procedural guarantees can work as catalysts for the emergence of substantive rights. Perhaps the best-known instance of this is substantive due process as developed by the US Supreme Court,[68] even though the fate of the substantive rights and guarantees developed under that heading could be in jeopardy under the current composition of the Supreme Court.[69]

1.5 Content of the Right of Access to a Court

1.5.1 Enforcement of Law or Dispute Resolution

48 In the debate around the right of access to a court, the relevant question sometimes is indeed whether there is a constitutional or fundamental right to sue at all. As shown above,[70] the existence of such a right is disputed, or even negated, in some jurisdictions. Often, however, the more salient issues discussed under the 'access to justice' heading are barriers such as court fees or lack of legal representation that can render the right to sue ineffective. These will be addressed further below.[71] Another contentious, though more theoretical, issue is whether the right of access to a court encompasses a right to a (legally and/or factually) correct judgment.[72]

49 In German-speaking procedural doctrine, the focus on fundamentals has often made scholars reflect upon the *raison d'être* of civil procedure and its relationship with the right of access to a court, its foundations, and its content. To this day, German treatises on civil procedure tend to explain the existence of civil procedure and, at least implicitly, the right of access to a court by pointing to the prohibition of self-administered justice and to the state's monopoly on the legal use of force.[73] This is often linked to the primary purpose ascribed to civil procedure by German-speaking scholarship, ie, the enforcement of subjective rights.[74] Other purposes of civil procedure discussed by German-speaking scholars are the enforcement of objective law, the establishment of

[67] European Court of Human Rights (n 52) para 15 ff.
[68] E Chemerinsky, 'Substantive Due Process' (1999) 15 Touro Law Review 1501 ff.
[69] See eg, JL Marshfield, 'State Constitutional Rights, State Courts, and the Future of Substantive Due Process Protections' (2023) 76(3) SMU Law Review 519, 520 f.
[70] Section 1.1.
[71] Section 4.
[72] Section 1.5.2.
[73] This idea has also been endorsed by the German Federal Constitutional Court, see eg, Case 1 PBvU 1/79, Order 11 June 1980, BVerfGE 54, 277, 292.
[74] Brehm in Stein/Jonas (n 3) para 5 ff; SP Baumgartner, 'Rechtsdurchsetzung als Aufgabe des Zivilprozesses' (2017) Zeitschrift für Zivilprozess und Zwangsvollstreckung 243, 244 ff; H Roth, 'Gewissheitsverluste in der Lehre vom Prozesszweck?' (2017) Zeitschrift für die gesamte Privatrechtswissenschaft 129 ff.

legal peace through the authoritative resolution of disputes, and conflict resolution.[75] Yet most scholars regard these purposes as secondary to the enforcement of subjective rights, or even see their accomplishment as a mere reflex of that enforcement.[76]

50 Viewing courts as a substitute for brute force is a curiously Hobbesian understanding of such institutions and their functions. It is obvious that courts do not simply deliver the same results that would otherwise be brought about through self-administered justice.[77] There does indeed seem to be a universal understanding that courts should also assist those people who would not have the capacity for violent self-help in enforcing their subjective rights, and that this is included in their constitutional mission. The framing of the individual constitutional right of access to a court as a surrogate for stripping individuals of the right to violent self-help seems to have been uncritically copied from textbook to textbook. It is not the result of a serious attempt to get to the bottom of the matter.

51 Nonetheless, it becomes apparent from this approach that the enforcement of subjective rights is traditionally at the forefront of German-speaking procedural scholarship on the purposes of civil procedure. *Rechtsfrieden* (legal peace) through authoritative adjudication is a desired consequence, but not in itself an independent goal of civil procedure in most scholars' minds. According to this approach, courts are there to ensure that grievances are addressed and resolved without private violence. To achieve this, they should look carefully at the facts and evidence presented to them by the parties, make an authoritative assessment of the relevant facts, and apply the law to them. Even though most disputes are resolved through settlement, the drivers and processes of arriving at a settlement are rarely studied in detail in procedural scholarship. Textbooks generally stop at very general and basic statements such as that in disputes over disposable rights, the parties are free to settle at any time, and the judge should facilitate a peaceful resolution of the dispute. In recent years, German-speaking scholars have increasingly engaged with alternative dispute resolution, particularly mediation, and its relationship with court proceedings.[78] Yet it seems that many more settlements are negotiated and concluded in the course of litigation than in (formalized) alternative dispute resolution proceedings.

52 Common law procedural thinking seems more focused on settlement. There is a clearer perception that in many cases, the main function of initiating a lawsuit is to prepare the ground for a deal between the parties. A judgment from the court is not presented as the 'normal' outcome of a dispute in treatises on civil procedure.[79]

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[75] See eg, J Basedow, 'Rechtsdurchsetzung und Streitbeilegung' (2018) Juristenzeitung 1 ff.
[76] Roth (n 74) 134.
[77] GE Kodek and PG Mayr, *Zivilprozessrecht*, (5th edn Facultas 2021), para 8.
[78] See eg, H Eidenmüller and G Wagner (ed), *Mediationsrecht* (Otto Schmidt 2015); M Wendland, *Mediation und Zivilprozess* (Mohr Siebeck 2017).
[79] See eg, N Andrews, *Andrews on Civil Processes,* (2nd edn Intersentia 2019) para 3.07 ff, para 14.05.

53 Yet the differences between the approaches should not be overstated. In the common law world, as in the civil law jurisdictions, settlement negotiations remain a largely party-driven process, and if the parties cannot agree on negotiating and concluding a settlement, each party generally retains the right to ask the court for an authoritative resolution of the dispute. Furthermore, in the common law world, the role of courts in developing the law, in the 'shadow' of which settlement negotiations take place,[80] is even more pronounced than in civil law jurisdictions.

54 Procedural scholars generally recognize that effective access to authoritative adjudication serves an important purpose even from a settlement-friendly perspective, not only for the development of the law but also to ensure an appropriate power balance between the parties. Relegating certain types of disputes almost exclusively to extrajudicial grievance mechanisms that are not able to address power imbalances between the parties can reinforce feelings of disenfranchisement and erode citizens' trust in the legal system.[81]

55 In parts of alternative dispute resolution scholarship, however, a narrative exists according to which negotiated settlements often provide a 'win-win' solution that caters to parties' interests in a way that is superior to the outcome that would be achieved based on the law.[82] Such an approach implicitly questions whether the law, at least in most cases, ensures an appropriate balance of competing interests. It also assumes that parties will voluntarily choose superior solutions if appropriate dispute settlement methods are applied. From such a perspective, the possibility of taking the dispute to a court that will enforce a solution according to the law is not necessarily perceived as beneficial.[83]

1.5.2 Right to a Correct Judgment

56 In German-speaking scholarship, a terminological distinction is made between the *Justizanspruch* or *Justizgewährungsanspruch* (right to access to justice) which is understood as the parties' right to effective access to a court and to have their claims assessed in fair and lawful proceedings, and the *Rechtsschutzanspruch* (right to legal protection), defined as the parties' right to a correct judgment in accordance with substantive law. There has been a long-standing debate on whether there is a right to a

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[80] See RH Mnookin and L Kornhauser, 'Bargaining in the Shadow of the Law' (1979) 88(5) Yale Law Journal 950 ff. These authors argue in favour of cutting back on the role of courts in dispute resolution, but this must be seen against the background that the article deals with divorce settlements where court involvement widely remains compulsory regardless of the existence of an actual dispute between the parties.

[81] L Nader, 'Disputing Without the Force of Law' (1979) 88(5) Yale Law Journal 998, 1001 f.

[82] This narrative was shaped by R Fisher and W Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (Houghton Mifflin 1981).

[83] For a critical appraisal, see D Hensler, 'Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System' (2003) 108(1) Penn State Law Review 165 ff. See also section 1.6 below.

correct judgment, and whether it already exists before the initiation of any proceedings, or only materializes at the closure of the trial.[84] Particularly in the 1960s, some scholars contended that the parties have a subjective public right towards the state to a correct judgment.[85] In Germany, this is not usually framed as a constitutional or fundamental rights issue, presumably mainly because the debate originates from a time when constitutional and fundamental rights did not yet play an important role in procedural scholarship. Meanwhile, some modern-day Swiss authors take the view that the constitutional guarantee of access to a court is at the bottom of a procedural right to a favourable outcome for holders of substantive rights. Opponents of such an approach argue that there is no practical benefit to the idea of a procedural right to a correct outcome, as there is no institution apart from the courts themselves, and thus the potential addressees of the right, that could be called upon for its realization.[86] Yet if this is perceived as an issue of constitutional or fundamental rights, such a counter-argument does not hold water, as violations could then be addressed through complaints to constitutional courts or international human rights bodies.

57 While this debate may seem theoretical and doctrinaire, there is the practical question of how to deal with cases where a judgment is demonstrably wrong. Generally speaking, a judgment that has become *res judicata* cannot simply be set aside, even if it is clearly erroneous. This demonstrates that there is no unequivocal and enforceable right to a correct judgment. Yet procedural laws provide for extraordinary remedies that enable parties, or even public authorities, to apply for setting aside, or to ask for relief from, a judgment that has become *res judicata* in certain cases where the decision-making process was gravely compromised. While the prerequisites and procedures vary, this seems to be a universal feature of procedural laws. Furthermore, in certain cases, a party may have a claim for state liability[87] and/or a claim for damages against the opponent, regardless of whether the judgment can be formally set aside.

58 Even if such limits to the binding effect of wrong but final judgments are acknowledged, this does not necessarily require accepting a procedural right to a correct judgment. Instead, the right to set aside or to override egregiously wrong judgments can be conceived as emanating from substantive constitutional or fundamental rights, or by such rights in combination with procedural principles. In particular, this seems to be the ECJ's approach to such cases. Substantive EU law in conjunction with the principle of effectiveness serves as the basis for overriding final judgments given by national courts,

[84] On this debate, see Rosenberg, Schwab and Gottwald (n 9) § 3 para 1 ff.
[85] A leading proponent was A Blomeyer, *Zivilprozessrecht: Erkenntnisverfahren* (Springer 1963) § 1 III.
[86] Rosenberg, Schwab and Gottwald (n 9) § 4 para 8 f.
[87] Often there are strict prerequisites for state liability for judicial decisions, as there is a concern that the legal peace created by a judgment that has become *res judicata* otherwise could be undermined; see eg, § 839(2) of the German *Bürgerliches Gesetzbuch* (Civil Code).

and it is not necessarily the gravity of a procedural error[88] but rather the importance of the violated substantive rules that is considered to justify disregarding the *res judicata* effect.[89]

59 Practical differences between the two approaches can emerge especially, but not only, in situations where the substantive right at the heart of the dispute is not grounded in a constitutional or fundamental right.

1.5.3 Other Outcome Measures

60 Some scholars have addressed access to justice from an outcome perspective in a different manner, focusing on how well the system as a whole 'delivers' for rightsholders, or for 'users' in general. Such an approach is sometimes used to argue that traditional courts and procedures should be replaced by new methods of law enforcement or dispute resolution, at least in certain areas. Thus, it has been suggested that regulatory enforcement is more effective than civil justice in securing the enforcement of consumers' rights, mainly on the basis of more and faster payments to consumers.[90] Yet this is a problematic way to measure 'delivering', as it cannot capture whether the claims were justified.

61 In a similar vein, the idea has been put forward that online courts using various innovative technologies would deliver better outcomes and improve access to justice.[91] Here, the outcome measure is not how much is paid out to claimants but rather how quickly disputes are resolved, and how satisfied 'users' are with the 'service' delivered. While this approach seems preferable to one focusing mainly on outcomes for a certain group, it still carries problems.

62 First and foremost, it may be an important one, but it is not the only purpose of courts to 'deliver' for 'users'. In a democratic society, they also have other important functions, regardless of whether these are framed as primary, or only as secondary or incidental.

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[88] See, however, the ECJ's judgment in the leading case *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren*, Case C-453/00, Judgment 13 January 2004 [ECLI:EU:C:2004:17], where one of the decisive factors was that the national court had violated the obligation to ask for a preliminary ruling; see also *Impresa Pizzarotti & C. SpA v Comune di Bari*, Case C-213/13 (ECJ), Judgment 10 July 2014 [ECLI:EU:C:2014:2067].

[89] As a general rule, the ECJ only requires national courts to disregard the *res judicata* effect of judgments violating EU law if national law provides for a basis to do so, see *Rosmarie Kapferer v Schlank & Schick GmbH,* Case C-234/04 (ECJ), Judgment 16 March 2006 [ECLI:EU:C:2006:178]. Yet in 'highly specific' (see *Impresa Pizzarotti & C. SpA v Comune di Bari*, Case C-213/13 [ECJ], Judgment 10 July 2014 [ECLI:EU:C:2014:2067]) situations, particularly in the context of State aid, the ECJ sometimes considers that final judgments must be disregarded even without such a basis in national law; see *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA*, Case C-119/05 (ECJ), Judgment 18 July 2007 [ECLI:EU:C:2007:434]; *Klausner Holz Nordrhein-Westfalen GmbH v Land Niedersachsen,* Case C-505/14 (ECJ), Judgment 11 November 2015 [ECLI:EU:C:2015:742].

[90] C Hodges and S Voet, *Delivering Collective Redress: New Technologies* (Hart/Beck 2018).

[91] R Susskind, *Online Courts and the Future of Justice* (Oxford University Press 2019).

Courts are also there to enforce objective law, and to develop the law, though the latter function can be more or less pronounced depending on the relationship between legislation and case law in the particular jurisdiction. Focusing almost exclusively on dispute resolution negates even the central purpose ascribed to civil procedure in many jurisdictions, ie, the enforcement of subjective rights after ascertainment of the underlying facts.[92]

63 Some of the more radical proposals purportedly aiming at better 'outcomes' tend to attack both the institutions and the procedures of civil justice, which are presented as clumsy, burdensome, and old-fashioned. Shortcomings of an under-resourced and crisis-ridden justice system are painted in grim colours. Yet the 'new technologies' that are presented as superior alternatives – sometimes as a convenient narrative to justify continued resource deprivation of the 'old-fashioned' courts – also depend on the availability of sufficient resources. Furthermore, at least most of them can only 'deliver' if they exist alongside a functioning civil justice system, not as a replacement. They can occupy rooms in a 'multi-door courthouse'[93], giving parties different options for resolving their dispute, and at the same time serving to reduce the judicial case load. Yet it seems highly problematic to suggest abolishing or largely side-lining courts and judicial processes in favour of 'new technologies', instead of tackling the lack of resources that is at the heart of the crisis in the justice system.[94]

1.5.4 Enforcement of Judgments

64 Both the ECtHR and national courts have emphasized that for the right to access to a court to be practical and effective, it must include the effective implementation, and where necessary, enforcement of the judgment resulting from the proceedings.[95] The French Constitutional Council has also derived the duty of state authorities such as the police to assist in the enforcement of a court order from the constitutional principle of

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[92] See eg, C Chainais, F Ferrand, L Mayer and S Guinchard, *Procédure civile,* (36th edn Dalloz 2022) para 35; D Hensler, 'Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System' (2003) 108(1) Penn State Law Review 165 ff; for a comprehensive and spirited defence of the merits of litigation, see A Lahav, *In Praise of Litigation* (Oxford University Press 2017).

[93] The concept of the 'multi-door courthouse' was laid out by F Sander in a conference address at the 1976 Pound Conference (see also n 110), reprinted as Varieties of Dispute Processing, 70 Federal Rules Decisions 111 (1976), also reprinted as Article 4.1 in A Hinshaw, A Kupfer Schneider and S Rudolph Cole (ed), *Discussions in Dispute Resolution: The Foundational Articles* (Oxford University Press 2021).

[94] See eg, on the catastrophic situation of French civil justice Rapport Sauvé, *Rendre justice aux citoyens*, April 2022, https://www.vie-publique.fr/files/rapport/pdf/285620.pdf.

[95] *Hornsby v Greece,* Case 18357/91 (ECtHR), Judgment 19 March 1997 [ECLI:CE:ECHR:1997:0319JUD001835791] para 41; *Scordino v Italy,* Case 36813/97 (ECtHR), Judgment 29 March 2006 [ECLI:CE:ECHR:2006:0329JUD003681397] para 196; *Association Entre Seine et Brotonne et autre [Action en démolition d'un ouvrage édifié conformément à un permis de construire],* Case 2017-672 QPC (Constitutional Council, France), Decision 10 November 2017, para 6; *Loi de programmation 2018-2022 et de réforme pour la justice*, 2019-778 DC (Constitutional Council, France), Decision 21 March 2019, para 82; French report p. 19; Spanish report p. 13.

separation of powers enshrined in Article 16 of the Declaration of human and civic rights.[96] In Spain, the Constitutional Court has also recognized the right to enforcement of judicial decisions as a component of the right to effective judicial protection, while making it clear that it will only interfere in cases of serious infringements.[97]

65 There are factual limits to enforcement because only the debtor's assets are subject to enforcement, which means that a judgment cannot be enforced if the debtor is bankrupt. It also seems to be a universal feature of today's enforcement laws that certain assets are exempt from enforcement in order to protect the debtor's livelihood and dignity – and, to some degree, the public purse. Furthermore, at least the exercise of physical force by state organs is only permissible on the state's own territory. This raises the question, to be addressed further below, of whether there is a right to cross-border enforcement, and if yes, what it entails.

1.5.5 Horizontal Dimension

1.5.5.1 Positive Obligations

66 Of the classical liberal fundamental rights, the right of access to a court is amongst the more heavily geared towards positive obligations of the state. The first issue that usually comes to mind in this context is legal aid and representation, which will be addressed in more detail further below. But positive obligations extend far beyond that. To ensure access to a court, the state must create courts and provide sufficient resources for them, and it must enact adequate procedural rules.

67 While such positive obligations mainly concern the relationship between the party seeking justice and the state, there is also the question of whether and to what extent the constitutional or fundamental right of access to a court entails a positive obligation to protect a party from obstruction by the opponent, or even to provide for an obligation to cooperate, eg, to disclose facts or to supply evidence to the other party.

1.5.5.2 Parties' Duty to Cooperate

68 Approaches towards the parties' duty to cooperate and to disclose evidence vary. While common law jurisdictions tend to provide for such obligations,[98] although to varying degrees, the German-speaking jurisdictions traditionally adhere to the principle '*nemo tenetur edere contra se*' (nobody is obliged to make a disclosure against themselves).[99] In these jurisdictions, a duty of disclosure, according to the traditionally prevailing view,

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[96] *Loi d'orientation relative à la lutte contre les exclusions,* Case 98-403 (Constitutional Council, France), Decision 29 July 1998; *Loi de programmation* (n 95) para 82; French report, 19.
[97] Spanish report, 9.
[98] See eg, JH Friedenthal, MK Kane, AR Miller and AN Steinman, *Civil Procedure,* (6th edn West Academic 2021) 381 ff; NH Andrews, *Andrews on Civil Procedure,* (2nd edn Intersentia 2019) 245 ff.
[99] Rosenberg, Schwab and Gottwald (n 9) § 110 para 9.

requires a basis in substantive law. Some scholars have argued, however, that for the right of access to a court to be effective, a (procedural) duty to cooperate and to disclose evidence is necessary at least in certain circumstances.[100]

1.5.5.3 Prevention of Undue Obstruction

69 As regards the state's potential obligation to prevent undue obstruction of access to justice by acts of private parties, there seems to be little debate so far. Yet new technologies enable some powerful parties to implement heavy 'sanctions' that could well act as deterrents against legitimate lawsuits. For example, news reports have described the practice of a large US company group to ban lawyers working in firms engaged in litigation against that company from their premises, and to implement the practice using facial recognition techniques. This resulted in the ban of a lawyer working in such a firm from attending an entertainment show with her daughter and a girl scout group. The lawyer was not involved in the relevant litigation herself, and the establishment where the show took place was run by a different subsidiary company than the one targeted by the lawsuit.[101] Such practices, if left unchecked, could seriously disrupt daily lives of plaintiffs suing large companies, and even more of lawyers representing such plaintiffs. The need could arise to address them to ensure that the right of access to a court is not undermined.

1.5.5.4 Burden of Participation in the Proceedings

70 Another aspect of the horizontal impact of the right of access to a court is the burden for the defendant that is almost necessarily implied in that right. The right to a fair trial, or due process, is generally the only safeguard for the defendant against unjustified lawsuits. In many jurisdictions, the successful defendant has a right to get their costs reimbursed, but that is not universal. Under the 'American rule', each party bears their own costs. Even where the loser pays rule applies, there is normally a recoverability gap. Only in rare circumstances, the defendant can claim additional damages based on tort.

71 In some jurisdictions, additional measures were implemented to rein in so-called 'strategic litigation against public participation' (SLAPP).[102] While anti-SLAPP rules initially gained a foothold mainly in common law jurisdictions, an anti-SLAPP directive

[100] On the debates around these issues in Germany, see Rosenberg, Schwab and P Gottwald (n 9) § 110.
[101] https://www.nbcnewyork.com/investigations/face-recognition-tech-gets-girl-scout-mom-booted-from-rockettes-show-due-to-her-employer/4004677/;https://arstechnica.com/tech-policy/2022/12/facial-recognition-flags-girl-scout-mom-as-security-risk-at-rockettes-show/; with regard to the company's practice to use facial recognition technology to identify unwanted visitors, see also https://www.nytimes.com/2018/03/13/sports/facial-recognition-madison-square-garden.html.
[102] The foundational text on 'SLAPPs' and on combatting them is Pring and Canan (n 38).

was also recently adopted in the EU.[103] Yet such instruments only catch a subset of baseless lawsuits and carry their own challenges.[104]

72 Usually, therefore, the defendant has little choice but to engage even in baseless lawsuits unless they are willing to risk a default judgment against them. There generally is no positive duty to participate, and the defendant's mere passivity normally does not amount to contempt of court. Yet in some jurisdictions, the sanction for non-participation is that the court may or shall assume the truth of the plaintiff's factual allegations, which means that a default judgment against the defendant is given unless the claim is legally untenable. In some jurisdictions, there are special remedies against such default judgments, but that is not the case everywhere. Even where the court has the authority to take evidence with respect to undisputed facts, it is risky to assume that it will do so, or that it will uncover the relevant evidence without the defendant's assistance.

73 So far, there seems to have been little reflection on the constitutional or fundamental rights implications of this burden on the defendant, apart from the debate on jurisdiction and its limits. The general assumption apparently is that if the court has jurisdiction and the lawsuit is admissible, the defendant has a sort of civic responsibility to engage in litigation as a reflex of the plaintiff's right of access to a court, and that there is generally no right to be fully compensated, either by the unsuccessful plaintiff or by the state, for the burdens and costs incurred by defending against unjustified claims.

74 It remains to be seen whether the 'anti-SLAPP' movement that has gained traction globally in recent years will trigger a broader debate around this. So far, however, the 'anti-SLAPP' debate evolves around cases where the defendant's actions that are targeted by the lawsuits can be framed as the exercise of the defendant's substantive fundamental rights, and the lawsuit can therefore be presented as an attack on those rights. It is not a general debate on the proper balance of the plaintiff's and the defendant's procedural positions.

1.6 Access to a Court and Alternative Dispute Resolution (ADR)

1.6.1 Concept of 'Alternative' Dispute Resolution (ADR)

75 The Cornell Legal Information Institute's website contains the following definition of ADR: 'Alternative dispute resolution ('ADR') refers to any method of resolving disputes without litigation. ADR regroups all processes and techniques of conflict resolution that occur outside of any governmental authority. The most famous ADR methods are the

[103] Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ('Strategic lawsuits against public participation').
[104] See T Domej, The proposed EU anti-SLAPP directive: a square peg in a round hole, (2022) 30 Zeitschrift für Europäisches Privatrecht 754, 763 ff.

following: mediation, arbitration, conciliation, negotiation, and transaction.' [105] Similarly, the New York State Unified Court System defines ADR as follows: 'Alternative dispute resolution (ADR) refers to the different ways people can resolve disputes without a trial. Common ADR processes include mediation, arbitration, and neutral evaluation. These processes are generally confidential, less formal, and less stressful than traditional court proceedings.[106]

76 The first of these definitions focuses on the lack of governmental intervention; the second places more emphasis on the methods used to resolve disputes. In its broadest sense, 'ADR' is an umbrella term that can cover all types of dispute resolution apart from litigation in court. For dispute resolution to be 'alternative', it must be carried out by a different institution than a court, or the process must be different from a 'traditional' trial, or both. While ADR usually takes place outside a court, sometimes ADR methods are integrated into court proceedings or offered by courts to litigants, such as in court-annexed mediation.

1.6.2 Relationship between Adjudication and Amicable Settlement

77 The debate about the relationship between authoritative adjudication and amicable settlement goes back a long way.[107] Yet since the emergence of civil procedure as an object of legislation and as an academic subject, the primary task of courts has been understood to be rendering judgments based on adversarial proceedings and according to the law. From a constitutional and fundamental rights perspective, this is still the hard core of the right of access to justice. If parties settle or choose alternative dispute resolution (ADR), this is traditionally conceived of as a waiver of this right. Where legislation or a judicial order directs the parties to use such mechanisms, this is considered to be a limitation of the right.

78 Such an approach is in line with the perception of ADR as a filtering mechanism that helps to keep cases that can be resolved in another way away from the courts, and thus to ensure that precious judicial resources are allocated where they are needed the most.

79 The ECtHR takes the view that a 'tribunal' within the meaning of Article 6(1) ECHR must have the power to issue binding decisions, and not just advisory opinions.[108] Much less can access to a body that only facilitates settlement negotiations and does not even issue advice satisfy the requirements of Article 6(1) ECHR.

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[105] Legal Information Institute, 'Alternative Dispute Resolution' (Cornell Law School) https://www.law.cornell.edu/wex/alternative_dispute_resolution.

[106] 'What is ADR' https://ww2.nycourts.gov/ip/adr/What_Is_ADR.shtml.

[107] See eg, M Schmoeckel, *Die Jugend der Justitia* (Mohr Siebeck 2013) 51, 79 on the relationship between adjudication and (intra-community) amicable settlement in the procedural thinking of Church Fathers.

[108] *Benthem v The Netherlands,* Case 8848/80 (ECtHR), Judgment 23 October 1985, para 40.

80 Against this background, a limitation of the right of access to a court is not only present if the parties are expected to conduct settlement negotiations among themselves, or if they are compelled to submit to ADR before a person or authority that does not qualify as a tribunal under Article 6(1) ECHR. Considering that adjudicative power is a defining characteristic of a 'tribunal', it is also a limitation of access if the entity orchestrating the ADR procedure is a court in the institutional sense. The fundamental right to access to a court does not only guarantee access to a certain type of institution but also to a certain type of procedure, ie, one that is designed to ascertain the relevant facts and to reach an authoritative decision on the disputed right based on facts and law.

81 A different perspective sees ADR as a better way than court proceedings to resolve at least some disputes in a just manner. The so-called third wave of the access to justice movement[109] did not invent ADR, but it reinvented it as a mode of delivering justice. The underlying narrative is that with the strict focus on the law that is characteristic for litigation, the parties' interests are not comprehensively addressed and that they will get a better outcome in a process not focusing on legal positions but on 'interests', implying that the two are frequently not aligned. Advocates of such an approach argue that by developing 'practical solutions' in fast and informal proceedings, the parties will be better served. Often the parties are referred to as 'users' of a 'service' in this context, signalling a commodified view of civil justice that prioritizes efficient 'delivery' over constitutional considerations and concerns.

1.6.3 Attitudes of Civil Procedure Legislation and Scholarship

82 Traditional civil procedure scholarship has paid little attention to the processes leading up to a settlement. Only since the 1970s, alternative dispute resolution (ADR) scholarship has emerged on a larger scale and established itself as part of the field.[110] Before that, mainly arbitration, a dispute resolute mechanism that is largely similar to litigation as regards the methods employed by the tribunal, attracted the interest of legal scholars.

83 *Wolfgang Brehm* summarizes the prevailing position of German-speaking civil procedure scholarship towards amicable dispute resolution as follows: 'Termination by settlement is not a purpose of civil procedure. Rather, settlement is an alternative to creating legal security through a judgment.' [111] From this perspective, it is within the parties' own

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[109] See M Cappelletti, B Garth and N Trocker, 'Access to Justice, Variations and Continuity of a World-Wide Movement' (1982) 46(4) Rabels Zeitschrift für ausländisches und internationales Privatrecht 664, 686 ff.

[110] The 1976 Pound Conference on the Causes of Public Dissatisfaction with the Administration of Justice, the outcomes of which were published in AL Levin and RR Wheeler (ed), *The Pound Conference: Perspectives on Justice in the Future* (West Publishing 1979), is often considered as a catalytic event for broader scholarly engagement with ADR, even though it is generally acknowledged that the practice of what is now considered as 'alternative' dispute resolution goes back to pre-historic times and is indeed much older than the practice of litigation.

[111] Brehm in Stein/Jonas (n 3) introduction to § 1 ZPO, para 16.

remit and responsibility not only to determine the content of a settlement but also to organize the settlement process, and the procedural scholar has little to contribute to or to learn from the way this is handled.

84 Newer textbooks often place more emphasis on amicable conflict resolution. Nonetheless, they still rarely focus on the processes leading up to such a resolution, although most cases that are not resolved by a default judgment are settled even in jurisdictions that are not commonly considered as particularly 'settlement-friendly'. Thus, a significant portion of what actually happens in litigation largely flies under the radar of legal doctrinal scholarship, and particularly of academic courses on civil procedure. And while some authors do point out that promoting amicable dispute resolution is (increasingly) a function of courts and point to elements of civil procedure that are meant to further it, the very framing as 'alternative dispute resolution' demonstrates that other fora are considered as generally better suited for this task.

85 The legislature's attitude towards settlement, and particularly towards the court's involvement in settlement negotiations, has varied over time and still varies across jurisdictions. While the promotion of amicable settlement is mostly considered to be desirable, there are also examples of legislation focused on the prevention of undue settlement pressure.

86 A striking historical example of the latter kind of legislation is the Austrian *Allgemeine Gerichtsordnung* (AGO) of 1781. It contained rules that primarily aimed at preventing any obstruction of the course of justice by settlement offers. Under Section 268, every party was free to offer a settlement, but the proceedings could only be suspended, even temporarily, based on a written statement by the opposing party. Section 269 said that the judge was free to 'work towards a settlement with decency and modesty', but that any undue pressure or meddling should be avoided, and the course of the proceedings should not be inhibited by settlement attempts.

87 In contrast to such an approach, there has been an increasing global trend for several decades towards authorizing the court to direct the parties to conduct settlement negotiations, or to refer them to ADR. Rule 1.4 of the English Civil Procedure Rules states that, as part of its duty to actively manage cases to further the overriding objective of dealing with cases 'justly and at proportionate cost' (UKCPR r. 1.1), the court must encourage the parties to use an ADR procedure if it considers that appropriate and facilitate the use of such procedure (UKCPR r. 1.4(2)(e)). Furthermore, such active case management includes 'helping the parties to settle the whole or part of the case' (UKCPR r. 1.4(2)(f)). The UKCPR do not stop at this general endorsement and promotion of settlement negotiations and ADR. Turning down a settlement offer can lead to adverse cost consequences (UKCPR r. 36.29, r. 44(2)(4)(c)). A rule to this effect was also

contained in Article 99 of the 2003 preliminary draft Swiss code of civil procedure,[112] but was dropped after coming under heavy criticism in the public consultation, and the explanatory report accompanying the Federal Council's 2006 draft explicitly states that '*Vergleichszwängerei'* (settlement coercion) should be avoided.[113]

88 In France, a strong tendency to develop ADR and sometimes to interlock ADR approaches with judicial proceedings is also being observed in legislation (FCCP, Articles 21, 127-131-15, 1528-1571) and increasingly covered in general treatises on civil procedure.[114]

1.6.4 Mandatory ADR

1.6.4.1 Introduction

89 In some varieties of ADR, voluntary participation in the process has traditionally been considered to be very important. This is particularly the case with mediation, where the voluntary nature, both with respect to the initiation and the continuation of the process, is often regarded as essential to the concept. In many jurisdictions, the legislature has also been reluctant to press or even oblige parties to engage in extrajudicial dispute resolution mechanisms. Yet the experience that conciliation attempts are often successful even if parties were initially reluctant or even unwilling to participate has made lawmakers more open to mandatory conciliation, or at least to enable courts to direct parties to engage in ADR.

90 There are several possible types of mandatory ADR, both with respect to the stage of the proceedings in which disputes are referred to ADR, the procedure of referring them to ADR (including whether there is judicial discretion in the selection of suitable cases), the type of ADR the parties are directed to, and the sanctions for non-compliance.

91 Where pre-trial conciliation is obligatory by statute, the sanction for non-compliance usually is inadmissibility of a lawsuit brought without first making the required conciliation attempt. This is, eg, the case in Germany (§ 15a of the Introductory Act to the Code of Civil Procedure [*Gesetz betreffend die Einführung der Zivilprozessordnung*]) and in Switzerland.[115] In France, Article 750-1 provided for a similar solution, but the provision was partially annulled by the Constitutional Council because one of the

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[112] 'What is ADR' https://www.bj.admin.ch/dam/bj/de/data/staat/gesetzgebung/archiv/zivilprozessrecht/entw-zpo-d.pdf.

[113] BBl [Bundesblatt, Federal Gazette] 2006 7221, 7298, https://www.fedlex.admin.ch/eli/fga/2006/914/de.

[114] See eg, the textbook by C Chainais, F Ferrand, L Mayer and S Guinchard (n 92) para 2386 ff. It now contains a specific subtitle dealing with ADR (60 pages), which discusses the question of reconfiguring the civil proceedings model.

[115] T Domej in P Oberhammer, T Domej and U Haas (ed), *Kurzkommentar Schweizerische Zivilprozessordnung,* (3rd edn Helbing Lichtenhahn 2021) Article 59 para 29 f.

exceptions provided for in the rule was not defined in a sufficiently precise manner.[116] Yet the French Constitutional Council has held that in principle, it is compatible with the French Constitution to require a prior attempt at amicable settlement as a prerequisite for the admissibility of a lawsuit.[117] A new rule on mandatory pre-trial ADR has recently been drafted in France (Article 750-1, mod. Décret n° 2023-357, 11 May 2023).

92 Another possibility to deal with cases where a required conciliation procedure was not observed is to stay the proceedings until the requirement is met.[118]

93 Even if a conciliation agreement is not considered to have procedural effects, ie, if it does not stand in the way of the inadmissibility of a lawsuit brought in breach of the agreement, it may have effects under substantive law, such as preventing the claim falling due. An obligation to pay damages for breach of the agreement is also possible.

94 Where ADR is mandatory, this normally means that the parties, or sometimes only the plaintiff, are under an obligation to engage in the process. But usually, lawmakers and courts are hesitant as regards sanctioning the parties for not being constructive enough in trying to come to an agreement. Furthermore, outcomes of ADR (other than arbitral awards) must normally be accepted by the parties to become binding upon them. Under Article 6(1) ECHR, this is a fundamental rights requirement. This is because mandatory ADR, to be compatible with this provision, must not block the parties from bringing the case to adjudication.

95 Under the EU ADR directive, the default rule also is that a solution imposed by an ADR entity (as opposed to a solution negotiated by the parties) is only binding on the parties if they were informed of this in advance and specifically accepted it. However, Article 10(2) of the EU ADR Directive allows Member States to provide that outcomes of ADR procedures can be made binding on traders without specific acceptance by the trader. This may be compatible with Article 6(1) ECHR if at least a general acceptance by the trader is required. Otherwise, it would appear difficult to justify depriving traders of the right of access to a court with respect to civil claims.

96 Smart contracts[119] are self-executing programmes that make automatic enforcement of certain obligations possible. Under a smart contract, a payment or other action is automatically triggered by certain pre-defined events. There have been suggestions that

[116] Case 436939 (Council of State, France), Decision 22 September 2022 [ECLI:FR:CECHR:2022:436939.20220922].
[117] Case 2019-778 DC (n 95).
[118] See eg, Domej (n 115) Article 59 para 29b.
[119] The concept of 'smart contracts' (which, as some like to point out, are neither smart nor contracts) was introduced by N Szabo in the early 1990s and laid out in the article 'Smart Contracts. Building Blocks for Digital Free Markets' 16 Extropy: Journal of Transhumanist Thought 50 (1996), available at https://ia601806.us.archive.org/24/items/extropy-16/Extropy-16_text.pdf. While the author seems to be a rather obscure figure and the journal in which the article was published is even more obscure, the concept of smart contracts is now firmly established in mainstream legal thought.

the use of smart contracts could be prescribed to ensure automatic enforcement of certain consumer claims that are easy to ascertain, such as delay or cancellation compensation. In particular, this idea has been put forward in coalition agreements of successive German federal governments.[120] The expectation is that smart contracts would remove the necessity for litigation and enforcement in most cases covered by them. However, to be compliant with Article 6(1) ECHR and Article 47 CFR, such a scheme would have to reserve the possibility to challenge any transaction executed by a smart contract before a court. The main effect of automatic enforcement from the perspective of access to a court would be that the parties' roles would be reversed, and the alleged debtor would have to sue for repayment of payments made in accordance with the smart contract, but not owed to the creditor under the applicable law.[121]

1.6.4.2 Mandatory Pre-Trial Conciliation

97 It is widely recognized that a requirement to attempt to settle the dispute before taking it to the court is not *per se* incompatible with the right of access to a court.

98 From the perspective of Article 6(1) ECHR; such a requirement is a limitation of the right of access to a court.[122] As such, it must have a legitimate aim, and there must be 'a reasonable relationship of proportionality between the means employed and the aim sought to be achieved'.[123] In any case, the parties must not be deprived of the very essence of the right of access to a court.[124] The final say on the dispute must be with a body that complies with the institutional and procedural guarantees of Article 6(1) ECHR and that has the authority to issue a final, binding, and enforceable decision on the basis of a full assessment of the facts and the law.

99 The ECHtR has considered it legitimate to require a claimant to negotiate with the state attorney's office for a friendly settlement regarding a claim against the state. It ruled that, in the case at hand, the pre-trial negotiation requirement pursued the legitimate aim of judicial economy and put no undue burden on the claimant, as it remained open to them to bring proceedings before the court if the negotiations failed.[125]

100 In Germany, the Federal Constitutional Court has taken the position that obligatory conciliation is compatible with the German constitution and that there is no constitutional requirement to dispense with the obligation where there is no reasonable

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[120] See M Fries, 'Smart consumer contracts – The end of civil procedure?' https://blogs.law.ox.ac.uk/business-law-blog/blog/2018/03/smart-consumer-contracts-end-civil-procedure.
[121] G Wagner, 'Algorithmisierte Rechtsdurchsetzung' (2022) 222 Archiv für die civilistische Praxis 56, 76 ff.
[122] *Momčilović v Croatia,* Case 11239/11 (ECtHR), Judgment 26 March 2015 [ECLI:CE:ECHR:2015:0326JUD001123911] para 45.
[123] Ibid para 43.
[124] Ibid para 45.
[125] Ibid para 45 ff.

chance of successful conciliation. It has stated that if the parties retain the right of access to a court after the completion of the required pre-trial procedure, the legislature may 'create incentives for amicable dispute resolution, for example to speed up conflict resolution, to promote legal peace or to reduce the burden on the state courts'.[126]

101 In some jurisdictions, obligatory pre-trial conciliation has long been an established element of the dispute resolution system. In France, *juges de paix* (justices of the peace) who were responsible for pre-trial conciliation, and in some cases also for adjudication, were established in 1790 and existed until the mid-twentieth century.[127] In the aftermath of the Napoleonic wars, this institution was exported to several other parts of Europe.

102 In Switzerland, a firm tradition of conciliation as an obligatory prerequisite for bringing a lawsuit exists. In a range of cantons, it is traced back to the introduction of French-style justices of the peace after the enactment of the 1803 Napoleonic *Mediationsakte* (Mediation Act). When Swiss civil procedure was unified at the federal level in 2011, obligatory pre-trial conciliation for most cases was expanded to the whole of Switzerland. Most cases brought before the conciliation authorities are finally settled at the conciliation stage and never reach the courts. While in some cantons, the conciliation procedure is still handled by justices of the peace, in others there are specialized administrative authorities entrusted with this task, and in some pre-trial conciliation is handled by the courts. The parties can agree to submit their dispute to mediation instead of a public conciliation authority. A settlement concluded in the course of pre-trial conciliation is enforceable in the same way as a court judgment, and it also has a *ne bis in idem* effect like a court judgment.[128] If the conciliation attempt is unsuccessful, the conciliation authority issues a leave to sue (*Klagebewilligung*), which must be filed with the court as a prerequisite for the admissibility of the lawsuit in cases where conciliation is obligatory. In small-value cases, conciliation authorities can also issue judgments and/or make so-called judgment proposals that become binding if neither party objects.

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[126] Case 1 BvR 1351/01 (Federal Constitutional Court, Germany), Order 14 February 2007 [ECLI:DE:BVerfG:2007:rk20070214.1bvr135101]. Meanwhile, the Baden-Württemberg 'justices of the peace' that were declared unconstitutional by the German Federal Constitutional Court (Case 1 BvR 88/56, 59/57, 212/59; Order 17 November 1959, BVerfGE 10, 200) were not just conciliation bodies but had the power to adjudicate in certain minor civil and criminal cases. As these 'justices of the peace' were administrative officials, the Federal Constitutional Court held that the law on which their adjudicative power was based violated the principle of separation of powers and was therefore unconstitutional. Because of this, judgments given by the justices of the peace also violated the parties' right to a lawful judge.

[127] They were abolished in 1958 (Ordinance no 58-1273 of 22 December 1958 and Decree no 58-1286 of 22 December 1958); see F Banat-Berger, 'La réforme de 1958. La suppression des justices de paix' in J-G Petit (ed), *Une justice de proximité, la justice de paix (1790-1958)* (PUF ed 2003), 225 ff.

[128] If the parties chose mediation, this effect of the settlement requires confirmation by the public conciliation authority.

103 In contrast to the Swiss experience, German and Austrian attempts to establish pre-trial conciliation have been patchy and largely unsuccessful so far.[129] The latest attempt in Germany is § 15a of the Introductory Act to the Code of Civil Procedure. It authorizes the *Länder* (federal states) to provide for an obligatory conciliation procedure (*Güteverfahren*) as a prerequisite for the admissibility of lawsuits for certain types of disputes (small claims up to EUR 750, certain neighbourhood disputes, defamation outside the media, discrimination). Several *Länder* have indeed implemented obligatory conciliation. Assessments of the practical success of such schemes, including their potential to save resources, have been mixed.[130]

104 In some jurisdictions, pre-trial conciliation is not obligatory for all cases falling in certain categories, but instead, cases are screened at the initiation of proceedings and channelled into ADR, where considered appropriate. This corresponds to the 'multi-door courthouse' concept in its purest form. Common law jurisdictions tend to follow this model and leave it to the courts to screen cases for their suitability to be referred to mediation, early neutral evaluation, or other types of ADR.

105 Such an approach was also implemented, eg, in the High Court of Lagos State, Nigeria, in 2012. The ADR Track Unit attached to the court registry conducts the intake screening and then refers the cases to the appropriate track.[131] Cases can be referred to the Lagos Multi-Door Courthouse, a court-connected ADR centre,[132] or to external institutions or practitioners.

106 Common law jurisdictions also often require the parties to follow pre-action protocols. These include giving the defendant notice of the claims, but typically also require the parties at least to consider negotiating a settlement either among themselves or with the assistance of ADR. In England and Wales, eg, a whole range of such protocols for different types of claims exists, accompanied by a practice direction.[133] Non-compliance with a pre-action protocol can lead to costs sanctions.[134] Nigeria, also a common law jurisdiction, goes a step further. Here, depending on the rules applicable before the

[129] In detail, see PG Mayr, *Rechtsschutzalternativen in der österreichischen Rechtsentwicklung* (Manz 1995).
[130] UP Gruber in *Münchener Kommentar zur Zivilprozessordnung,* vol 3, (6th edn C.H. Beck 2022), § 15a EGZPO para 3.
[131] https://lagosmultidoor.org/adr-track/.
[132] On the centre and its history, see M Obi-Farinde, 'The Growth of Mediation in Nigeria' (blog post, dated 12 August 2021), https://www.mediate.com/the-growth-of-mediation-in-nigeria/.
[133] Practice Direction on Pre-Action Conduct and Protocols https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct.
[134] Practice Direction on Pre-Action Conduct and Protocols, para 16.

specific court, the lawsuit may even be dismissed without prejudice for non-compliance with a pre-action protocol.[135]

107 The German-speaking jurisdictions do not provide for such formalized pre-action protocols, but in these jurisdictions as well, the plaintiff would normally be expected to notify the defendant in advance of the intent to initiate a lawsuit, or potentially face adverse costs consequences if the defendant immediately recognizes the claim (see eg, § 93 of the German Code of Civil Procedure).

1.6.4.3 Referral to ADR during the Proceedings

108 Attitudes towards directing parties to ADR without their consent during the proceedings have generally been more reserved than those towards pre-trial conciliation. Usually, the court may suggest to the parties to enter into settlement negotiations, or even make settlement proposals. While such measures can raise concerns regarding the court's perceived impartiality, they do not directly affect the right to access to a court, at least if the court does not right out refuse to adjudicate the case if the parties do not settle. But directing the parties to ADR before a different body is another matter, and only in recent decades a trend has emerged to expand the court's powers to do so.

109 Common law jurisdictions have been trendsetters in this regard. In the US, the 1998 Alternative Dispute Resolution Act gave federal courts the authority to refer parties to mediation or neutral evaluation at any stage of the proceedings. A referral to arbitration is also possible, but only with the parties' consent.[136] While judicial attitudes towards referrals to ADR vary, the general impression does seem to be that it has contributed to an increased use of ADR, particularly mediation, in federal courts.[137] Australian courts also typically have the power to refer parties to mediation, either at the beginning of the proceedings or at the later stage, regardless of their consent.[138]

110 In England and Wales, there used to be more scepticism towards mandatory ADR in the course of the proceedings. The development of case law there can serve as an example for shifting attitudes in this area.

111 In *Halsey v Milton Keynes General NHS Trust,* the Court of Appeal stated in 2004 that

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[135] F Fawehinmi and S Akande, *Litigation and Enforcement in Nigeria: Overview, Country Q & A* (Thomson Reuters 2022), answer to question 8. For a very critical perspective, questioning the compatibility of this regime with the right of access to a court, see Kehinde (n 43).

[136] 28 US Code §§ 651 ff. For a comprehensive analysis, see C Harris Crowne, 'The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice' (2001) 76 NYU Law Review 1768 ff.

[137] DL Swanson, 'ADR Act of 1998: A Reflection on Its Effectiveness and Shortfalls' https://mediatbankry.com/2020/05/19/adr-act-of-1998-a-reflection-of-its-effectiveness-and-shortfalls/.

[138] A Limbury, 'Compulsory Mediation – The Australian Experience' http://mediationblog.kluwerarbitration.com/2018/10/22/compulsory-mediation-australian-experience/.

> [i]t is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court.[139]

Dyson LJ, delivering the judgment of the court, referred to the ECtHR's case law with regard to waiver of the right to a court, particularly to the *Deweer* case, which concerned the acceptance of a fine without trial by a criminal defendant to avoid the immediate closure of the business.[140]

112 Despite some criticism,[141] the position taken by the Court of Appeal in *Halsey v Milton Keynes General NHS Trust* remained the established one until recently. In 2019, in *Lomax v Lomax,* the Court of Appeal distinguished *Halsey* and held that the court did have the power to direct unwilling parties to Early Neutral Evaluation (ENE). In delivering the judgment, *Moylan LJ* contended that this was a 'very different situation' than compelling the parties to mediate and that therefore overruling *Halsey* was not required to arrive at this result.[142] But at the same time, the Court of Appeal also signalled its willingness to consider a future departure from *Halsey* with respect to compulsory mediation, noting that 'the court's engagement with mediation has progressed significantly since *Halsey* was decided'.[143]

113 In July 2021, the Civil Justice Council published a report on compulsory ADR in which it concluded that 'introducing further compulsory elements of ADR will be both legal and potentially an extremely positive development', [144] but also acknowledged that acceptance of compulsory mediation (in contrast to some other forms of ADR) might require better regulation and 'shorter, cheaper formats'.[145]

114 In 2023, in the *Churchill* case, the Court of Appeal made reference, *inter alia,* to the Civil Justice Council's report and held that courts do have the power to stay proceedings for, or order the parties to engage in a non-court-based dispute resolution process, even

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[139] *Halsey v Milton Keynes General NHS Trust,* Court of Appeal (England and Wales), Judgment 11 May 2004, [2004] EWCA Civ 576 para 9.

[140] See the reference in [2004] EWCA Civ 576 [9] to *Deweer v Belgium,* Case 6903/75 (ECtHR), Judgment 27 February 1980 [ECLI:CE:ECHR:1980:0227JUD000690375] para 49.

[141] See the Civil Justice Council's report on compulsory alternative dispute resolution published in July 2021, https://www.judiciary.uk/wp-content/uploads/2022/07/Civil-Justice-Council-Compulsory-ADR-report-1.pdf, para 27 ff; A Marriott, 'Mandatory ADR and Access to Justice' (2005) 71(5) Arbitration 307 ff.

[142] *Lomax v Lomax,* (Court of Appeal, England and Wales), Judgment 6 August 2019, [2019] EWCA Civ 1467 para 25.

[143] Ibid para 27.

[144] Civil Justice Council, 'Compulsory ADR' https://www.judiciary.uk/wp-content/uploads/2022/07/Civil-Justice-Council-Compulsory-ADR-report-1. pdf, para 118.

[145] Civil Justice Council, 'Compulsory ADR' https://www.judiciary.uk/wp-content/uploads/2022/07/Civil-Justice-Council-Compulsory-ADR-report-1.pdf, para 118.

without an explicit statutory basis.[146] The Court of Appeal also laid down the factors that courts should consider when exercising their discretion as to whether they should make such an order.[147]

115 In Nigeria, another common law jurisdiction, there has also been a push for the expansion of ADR in recent years, including allowing court referrals to ADR not only at the outset of the proceedings[148] but also during their further course. For example, Order 27(2)(c) of the High Court of Lagos State Rules 2019 authorizes the judge to issue a Case Management Conference Note for the purpose of promoting amicable settlement or adoption of ADR.

116 A study commissioned by the European Parliament to assess why mediation is only used in a very small proportion of disputes (less than 1 %) and how to increase the number of mediations also proposed to introduce a 'mitigated' form of mandatory mediation (compulsory attendance at information sessions or an opt-out system) to reap 'the many societal benefits a greater use of mediation can bring'.[149] Subsequently, however, no legislative action was taken at the EU level in this regard.

117 From a constitutional and human rights perspective, there seems to be little difference between mandatory pre-trial ADR and mandatory referrals to ADR in the course of litigation. Perhaps one might argue that allowing a referral to ADR during the proceedings could be problematic from the perspective of the right to a lawful judge. But if each party retains the right to ask for adjudication by the referring judge if the case is not settled, such a concern could not be upheld. Furthermore, embedding ADR in the proceedings instead of attempting to settle the case as early as possible can help to reach a better-quality settlement, as the negotiations can be informed by evidence gathered during the proceedings and by the parties' submissions. At least in some cases, this may be preferable to single-minded efforts to bring about a settlement as early as possible. But if there was already an unsuccessful compulsory attempt at ADR at the outset of the proceedings, another referral to compulsory ADR may be a disproportionate limitation of the right of access to a court.

118 Another explanation for the lesser practical relevance of litigation-embedded ADR could be that in many jurisdictions, trial judges themselves engage in negotiations to facilitate settlement, sometimes to the point of making specific settlement proposals themselves. Yet in doing so, judges must tread carefully, as concerns regarding impartiality can arise

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[146] *James Churchill v Merthyr Tydfil County Borough Council* (Court of Appeal, England and Wales), Judgment 29 November 2023, [2023] EWCA Civ 1416 para 50 ff.
[147] Ibid para 59 ff.
[148] See above 1.6.4.2.
[149] G De Palo, L D'Urso, M Trevor, B Branon, R Canessa, B Cawyer and L Reagan Florence, *"Rebooting" the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU,* Study commissioned by the European Parliament (PE 493.042), 2014, 6 ff, 162 ff.

if they get too involved. Outsourcing settlement negotiations either to a judicial mediator or to an external ADR practitioner may contribute to more flexibility on the parties' side in the negotiations. From a constitutional and fundamental rights perspective, it can help to avoid a problematic mixing of roles between judge and mediator, and thus help to obviate impartiality concerns.

1.6.4.4 Mandatory ADR as a Substitute for Court Proceedings

119 While more and more jurisdictions embrace the concept of compulsory ADR at least in some circumstances, either for entire categories of cases or subject to judicial discretion, there still seems to be a widespread consensus that it would be incompatible with the right of access to a court to deprive a party of the right to ask for adjudication if dissatisfied with the outcome of an ADR process. The only form of ADR where that is not the case is arbitration, but there the arbitral tribunal itself must make an authoritative decision based on facts and law if the parties do not settle. Therefore, while the parties may be deprived of access to a court if the dispute is subject to arbitration, they still get an authoritative resolution of the dispute. Furthermore, courts do retain a residual authority to scrutinize arbitral awards, either in a procedure for setting aside or in a procedure for recognition and enforcement. Finally, and probably most importantly, arbitration generally is not compulsory. Even in cases where a party de facto has little choice but to enter into an arbitration agreement, such an agreement is usually still required. It is therefore systematically more appropriate to discuss 'mandatory' arbitration in the context of the requirements for an effective waiver of the right of access to a court.

120 Particularly for sports arbitration, however, there have been calls to abandon the 'dogma of consent', and to 'simply admit that arbitration without consent exists'.[150] In Portugal, even an openly mandatory sports arbitration system has been set up.[151] In France, Articles L7112-4 of the *Code du travail* (Labour Code) provides for mandatory arbitration if a journalist is dismissed after more than 15 years of service; an arbitration commission, whose members are appointed by employers' and employees' professional organizations, but presided by a neutral professional, makes a binding determination of the amount to be paid to the journalist in such cases. Meanwhile, the former Russian (and before that, Soviet) 'arbitrazh' courts were (state) commercial courts rather than arbitral tribunals or institutions, and thus the 'arbitrazh' system cannot be characterized as mandatory arbitration.

121 In recent years, some scholars have been floating the idea that arbitration should be the 'default' method of dispute resolution for commercial disputes based on the idea,

[150] G Kaufmann-Kohler and H Peter, 'Formula 1 racing and arbitration: the FIA tailor-made system for fast-track dispute resolution' (2001) 17(2) Arbitration International 173, 186.
[151] A Flamínio da Silva and D Mirante, 'Mandatory arbitration as a possible future for sports arbitration: the Portuguese example' (2020) 20 The International Sports Law Journal 180 ff.

familiar from the sports arbitration debate, that it is the most suitable method for them.[152] In Austria, such a system already exists for disputes arising out of certain stock exchange contracts (Articles XIII ff of the Act introducing the Code of civil procedure [*Einführungsgesetz zur Zivilprozessordnung*]). Under this approach, commercial disputes can only be brought before state courts if both parties agree. A less radical model would be to establish a presumption in favour of arbitration or to generously assume arbitration agreements based on trade or business usage.

122 For mandatory, but probably also for default arbitration to be compatible with Article 6(1) ECHR, the arbitral tribunal and the arbitral process must comply with the requirements of that article. But this requires removing at least some of the features of arbitration that are usually perceived as advantages by its proponents, particularly the confidentiality of the arbitral proceedings. Another obstacle for implementing mandatory arbitration is that the New York Convention on the recognition and enforcement of arbitral awards only covers awards based on an agreement made in writing (Article II of the New York Convention). The cross-border circulation of arbitral awards made by tribunals whose jurisdiction was not agreed upon by the parties would not be guaranteed, and thus another major advantage of arbitration in international trading relationship could be lost.

123 While mandatory arbitration, with some 'tweaks', could be reconciled with the right of access to a court, this would be more difficult for other forms of ADR as replacement for litigation. As mentioned, arbitral tribunals issue binding awards by applying the law to facts established in the arbitral proceedings. ADR mechanisms where these essential elements required by Article 6(1) ECHR are not present are more problematic in this respect. Where such a mechanism is mandatory, the parties must have the possibility of recourse to adjudication if they are dissatisfied with the outcome. Article 10(2) of the EU ADR directive[153], however, allows the Member States to dispense with the necessity of 'specific' acceptance by the trader of an imposed ADR solution. The compatibility of this rule with the right of access to a court seems questionable.

124 It remains to be seen whether the increasing trend to promote ADR as a way of 'giving justice' in its own right will change perceptions regarding the compatibility of ADR-only mechanisms with the right of access to a court. Yet from today's perspective, an ADR mechanism is not a substitute for access to a court, and a state cannot exonerate itself from a violation of the right of access to a court by only offering an ADR mechanism as

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[152] G Cuniberti, 'Beyond Contract – The Case for Default Arbitration in International Commercial Disputes' (2008) 32 Fordham International Law Journal 417 ff; F Núñez del Prado, 'Privatizing Commercial Justice. The Inevitability of Default Arbitration' (2020) 30(1) Berkeley La Raza Law Journal 84; F Núñez del Prado, 'The Fallacy of Consent: Should Arbitration Be a Creature of Contract?' (2021) 35(2) Emory International Law Review 219.

[153] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

a substitute. This also holds true if the ADR mechanism is not *de iure,* but *de facto* the only way of obtaining a timely and affordable resolution of a dispute.

1.6.5 Constitutional/Fundamental Right to ADR

125 As mentioned above, a requirement to use an ADR procedure before initiating a lawsuit is a limitation of the right of access to a court. But this does not necessarily preclude the idea that in some cases, the right of access to justice may encompass access to ADR.

126 Amicable settlement of disputes traditionally is primarily addressed as a matter of the parties' private autonomy. In Germany, for example, private autonomy is considered to be constitutionally guaranteed by Article 2 of the Basic Law and, with respect to specific legal relationships, by other constitutional provisions.[154] The constitutional protection of private autonomy also protects the parties' right to submit their dispute to ADR, but only within certain limits, as the German Federal Constitutional Court held in the *Pechstein* case with respect to sports arbitration.[155]

127 From a constitutional and fundamental rights perspective, the right to settle a dispute or to choose ADR thus seems to be primarily conceived of as an issue of the 'defence dimension' of fundamental and constitutional rights. Meanwhile, it is unclear to what extent there could be a positive obligation of the state to ensure effective access to ADR, particularly as regards the funding of the – potentially costly – involvement of a third party to facilitate the search for an amicable solution.

128 In the EU, ADR mechanisms have been promoted particularly as a measure to ensure a 'high level of consumer protection'. In 2013, a directive on alternative dispute resolution for consumer disputes (ADR directive) and a regulation on online dispute resolution for consumer disputes (ODR regulation) [156] were enacted. Both aim at facilitating consumers' 'access to simple, efficient, fast and low-cost ways of resolving disputes', as stated in recital 4 of the ADR directive and recital 2 of the ODR regulation. Already much earlier, in a green paper presented in 1993, the European Commission discussed a variety of out-of-court dispute resolution mechanisms in the context of access to justice.[157] Since then, the EU has actively engaged in ADR policymaking.

129 Against this background, the EU's perspective on access to justice has been described as a holistic one, encompassing both court proceedings and ADR.[158] Yet it is not completely

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[154] U Di Fabio in G Dürig, R Herzog and R Scholz (ed), *Grundgesetz-Kommentar* (C.H. Beck 2024) Article 2(1) GG para 101 ff.

[155] Case 1 BvR 2103/16 (Federal Constitutional Court, Germany), Order 3 June 2022 [ECLI:DE: BVerfG:2022:rk20220603.1bvr210316].

[156] Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR).

[157] COM (1993) 576.

[158] B Hess, *Europäisches Zivilprozessrecht,* (2nd edn, De Gruyter 2021) para 12.3.

clear how this relates to the fundamental right of access to justice laid down in Article 47 CFR. The recitals of both the ADR directive and the ODR regulation do make clear that ADR and ODR are not intended to replace court proceedings or to deprive the parties of their right to take the dispute to the courts (recital 45 of the ADR directive and recital 26 of the ODR regulation). But there does seem to be an implicit assumption that access to ADR can, to some degree, be a remedy for a lack of effective access to court – a problematic idea, as highlighted above. It would be premature, however, to speak of an EU fundamental right to ADR for consumers, or even more generally. The right of access to ADR, for the time being, remains at the level of secondary legislation, and its fundamental rights implications only concern the potential compensation for deficiencies in access to a court. Furthermore, by proposing the repeal of the ODR Regulation,[159] the EU Commission seems to have accepted that at least one of the building blocks of the European ADR architecture has turned out to be irreparably dysfunctional.

1.6.6 Broader Constitutional and Fundamental Rights Implications

1.6.6.1 Implications for Parties' Rights

130 Making ADR compulsory, even if the parties retain the right to bring their case to the court if dissatisfied with the outcome, raises the necessity of regulating ADR. On the one hand, there must be an appropriate legal framework for ADR bodies and practitioners, particularly regarding qualification requirements, independence, and impartiality. On the other hand, rules on the ADR process and the aspects ADR practitioners may or must consider when proposing a solution on the parties, or even imposing it upon them, are also needed. If the parties are mandated to use and often pay for, a mechanism that is supposed to develop appropriate solutions for their dispute that can later be enforced, it would be hard to justify leaving that mechanism unregulated. Furthermore, where ADR is compulsory, it may be necessary to expand legal aid to ADR settings.

131 There can also be tensions with substantive constitutional or fundamental rights, the enforcement of which can be rendered more difficult by mandatory ADR. If a debtor knows that the creditor will have to make a settlement offer before being able to bring a case before the court, this can create a disincentive for prompt and full discharge of debts, particularly if the costs and risks involved in using such tactics are low. This could not only compromise the integrity of the mechanism but even lead to additional burdens for an already overloaded system. Mandatory ADR mechanisms should be carefully designed to avoid such problematic incentives.

[159] Proposal for a Regulation of the European Parliament and of the Council repealing Regulation (EU) No 524/2013 and amending Regulations (EU) 2017/2394 and (EU) 2018/1724 with regards to the discontinuation of the European ODR Platform, COM (2023) 647 final.

132 At least to some degree, the necessity of an appropriate legal framework already arises if ADR is not mandatory, but nonetheless treated as an integral part of the 'multi-door courthouse'. If ADR is not just tolerated by the state as a dispute resolution structure existing alongside the one provided by the state but is endorsed and actively promoted, then, arguably, parties may legitimately expect that there will be a legal framework to ensure that the dispute resolution bodies will be fit for purpose, and that the process will be fair. That is even more the case if such mechanisms are promoted because of problems with the de facto accessibility of courts.

133 The acknowledgement that access to the courts does not work as well as it should in many Member States, along with the realization that the EU's influence on the functioning of Member States' judicial systems is limited, appears to have been an important driver behind the EU's legislative efforts in the field of ADR. Besides promoting ADR in general, these efforts have focused on the quality and integrity of ADR mechanisms. The EU Commission, already in its 1993 green paper on consumers' access to justice, highlighted that

> there is also the question as to the extent to which the guarantees of independence (or at least impartiality), which in rule-of-law states are invested in the judiciary, can be assured by the new 'judges' who are increasingly being called on to settle disputes outside the framework of the courts proper.[160]

In its legislative acts in the field of ADR, the EU has been trying to address this issue. Nonetheless, it is questionable whether the standards established for ADR entities, let alone the procedures applying before such entities and their (limited) powers to issue binding decisions, are sufficient to compensate for a lack of effective access to a proper court.

1.6.6.2 Implications for the Rule of Law

134 Making ADR mandatory implies deprioritising the parties' legal positions, and thus also their subjective rights. 'Entrenched legal position-taking' is presented as problematic, and a system's 'capacity to get around' such position-taking is hailed as beneficial.[161] One Australian court even went so far as to talk about rights in inverted commas in chiding a party for strongly opposing the mediation they were mandated by the court to participate in,[162] an approach described as 'compelling' by a mediation blogger.[163]

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[160] COM (1993) 576, 58.

[161] See *Yoseph v Mammo & Ors* (Supreme Court, New South Wales (Australia)), Judgment 25 June 2002, [2002] NSWSC 585 para 10, http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2002/585.html; A Limbury (n 138).

[162] *Waterhouse v Perkins and Ors* (Supreme Court, New South Wales (Australia)), Judgment 21 January 2001, [2001] NSWSC 13 para 92.

[163] A Limbury (n 138).

135 There is clearly a tension between the suggestion that it is somehow querulent to insist on a legal position and the principle of the rule of law. The tension is exacerbated where not only insistence on (perhaps unjustified) legal positions, but also the solutions that the court would have to impose under the law are presented as typically insufficiently aligned with the parties' 'interests and needs'. Such rhetoric, along with the promise of savings for the public purse through purportedly cheaper and more efficient dispute resolution systems, can present a serious challenge to liberal and democratic constitutional principles, especially in a climate where courts and lawyers already are frequently under political attack.

136 At the same time, however, there can also be upsides from the perspective of the rule of law if ADR mechanisms are increasingly recognized as a part of the dispute resolution structure. Negotiated solutions of legal disputes have always played an important role in practice. Bringing them from the 'shadow of the law'[164] into the limelight can help to make the process fairer, and particularly to protect weaker parties from being shortchanged.

137 Another issue with trying to resolve as many disputes as possible through ADR, and one also recognized by proponents of ADR as a potential problem,[165] is that the courts' public function to develop the law, which is tied to giving judgments (as opposed to facilitating settlements) and publishing them, could be compromised. While, arguably, such a function could also be assumed by arbitral tribunals in certain contexts,[166] other ADR mechanisms are clearly not suitable for that. It is also questionable how well such mechanisms could work without a solid background of court precedent as to how the dispute at hand should be appropriately resolved.

138 From the perspective of the rule of law, as well as of access to justice more generally, adjudication and ADR therefore should not be presented as competing models for the resolution of disputes, but as complementing each other and working in synergy. That said, upholding the rule of law requires recognizing the parties' right to insist on adjudication where they do not wish to sacrifice a legal position to reach a compromise with an opponent. It has rightly been pointed out that 'a *balance of power* is necessary for mediation to succeed, and to date, the threat of litigation has been a necessary element in establishing such a balance'.[167] That seems as true today as it was four decades ago.

[164] See n 80.
[165] See Cuniberti (n 152) 453 ff.
[166] See Ibid 458 ff.
[167] Cappelletti, Garth and Trocker (n 109) 701; emphasis in the original.

1.6.6.3 Implications for the Separation of Powers

139 The separation of powers between the legislature, the executive, and the judiciary is an essential element of liberal constitutions. Weakening one of these powers can disturb the delicate balance between them. Some might argue that this is more crucial with respect to public and criminal law than for the interpretation, enforcement, and development of seemingly less *political* private law, but that would be a misconception. Privatizing, outsourcing, and/or *delegalizing* the resolution of the bulk of private disputes is a political choice with serious implications for the status of courts within the constitutional power structure.

140 This issue cannot be resolved simply by reinventing the courts as institutions responsible for setting directions and developing the law. It is an essential characteristic of the judiciary that it is a bottom-up system, the functioning of which relies on a step-by-step, case-by-case development. Destabilizing the judicial system by radically reshaping the general approach to handling disputes also carries the risk of impacting public trust in the judicial system. This could be particularly harmful, considering that the courts so far seem to be less affected than, eg, the executive branch of government by the general trend of declining trust in public institutions.[168]

1.7 Waiver of Access to a Court

141 The most important type of waiver of access to a (state) court is an arbitration agreement.

142 Some jurisdictions restrict arbitrability for matters where there is a power imbalance between the parties, such as labour or consumer disputes.[169] Another possible approach is to put in place specific requirements for arbitration agreements covering such disputes. The list in the Annex of the EU Unfair contract terms directive[170] of terms that 'may be regarded as unfair' (Article 3(3) of the directive), under (q), lists terms 'excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions'. Under § 1031(5) of the GCCP, an arbitral agreement with a consumer must be contained in a self-standing signed (physical or electronic) document or in a notarial deed. Austrian law also requires a self-standing signed document and, additionally, only permits arbitration agreements between consumers and traders after

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[168] See OECD, *Building Trust to Reinforce Democracy: Main Findings from the 2021 OECD Survey on Drivers of Trust in Public Institutions* (OECD Publishing 2022), https://doi.org/10.1787/b407f99c-en, 36 f. On the challenges of measuring trust in institutions generally, and courts more specifically, see A Wallace and J Goodman-Delahunty, 'Measuring Trust and Confidence in Courts' (2021) 12(3) International Journal For Court Administration 3.

[169] See I Bantekas, 'The Foundations of Arbitrability in International Commercial Arbitration' (2008) 27 Australian Year Book of International Law 193, 198 ff, 216 ff.

[170] Council Directive 93/13/EEC on unfair terms in consumer contracts.

the dispute has arisen. The French Court of Cassation, in 2020, restricted the application of the principle of negative competence-competence in consumer disputes. It took the view that to ensure the rights guaranteed by the Unfair contract terms directive, the state court must be able, notwithstanding Article 1448 of the FCCP, to make a full examination of an arbitration agreement in a consumer contract.[171]

143 In the US, courts tend to enforce arbitration clauses contained in labour or consumer contracts. Such clauses are often used to avoid class actions. The US Supreme Court has facilitated this by deciding that state law cannot require that class wide arbitration procedures are available as a prerequisite for the enforceability of certain arbitration agreements.[172] The Biden administration has been trying to tackle 'forced arbitration' by the proposed 'FAIR Act' that was intended to prohibit binding arbitration clauses in employment, consumer, antitrust, or civil rights disputes. The act passed the House in March 2022, but it is considered improbable that it will pass the senate.[173] Meanwhile, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act had bipartisan support and was passed into law in 2022.[174]

144 Where there are no specific legal restrictions for arbitration agreements, such an agreement is not automatically unenforceable against a party who entered into it because of economic pressure.[175] There can be, however, stricter requirements regarding fair trial rights in the arbitral process in such cases. The ECtHR takes the view that where the parties agree to arbitration 'in a free, lawful and unequivocal manner', they may also waive certain other fair trial guarantees.[176] Yet even where a party is compelled to submit to arbitration due to the dominant position of the other party, an arbitration agreement can still be enforced against a party who did not enter into it 'freely and unequivocally' if referring the dispute to arbitration pursues a legitimate aim. With regard to sports arbitration, the ECtHR took the view that

> it is certainly of interest for the settlement of disputes arising in a professional sports context, especially those with an international dimension, to refer them to a specialised body which is able to give a ruling swiftly and inexpensively.

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[171] Case 18-19.241 (Court of Cassation, France), Judgment 30 September 2020 [ECLI:FR:CCASS:2020:C100556].

[172] *AT&T Mobility LLC v Concepcion* (Supreme Court, US) [563 US 333 (2011)].

[173] 'Alternative Dispute Resolution' https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2021/congress-continues-to-debate-the-proper-role-of-arbitration/.

[174] For a critical analysis, particularly of the loopholes of the act, see D Horton, 'The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act' The Yale Law Journal Forum 23 June 2022, https://www.yalelawjournal.org/forum/the-limits-of-the-ending-forced-arbitration-of-sexual-assault-and-sexual-harassment-act.

[175] See eg, U Haas, 'Zwangsschiedsgerichtsbarkeit im Sport und EMRK' (2014) 32(4) ASA Bulletin 707, 710 ff.

[176] *Mutu and Pechstein v Switzerland,* Cases 40575/10 and 67474/10 (ECtHR), Judgment 2 October 2018 [ECLI:CE:ECHR:2018:1002JUD004057510] para 96.

> High-level international sports events are held in various countries by organisations based in different States, and they are open to athletes from all over the world. Recourse to a single and specialised international arbitral tribunal facilitates a certain procedural uniformity and strengthens legal certainty; all the more so where the awards of that tribunal may be appealed against before the supreme court of a single country, in this case the Swiss Federal Court, whose ruling is final.[177]

However, where arbitration is not 'freely and unequivocally' chosen by a party, the arbitral tribunal 'must afford the safeguards' of Article 6(1) ECHR[178] as regards the lawful composition of the tribunal and its independence and impartiality, but also as regards the process, including the right to a public hearing.[179] Where these requirements are not met by the tribunal, there is a violation of Article 6(1) ECHR. Yet the ECtHR does not seem to take the view that therefore the arbitration agreement itself is rendered invalid or unenforceable. Meanwhile, the German Federal Constitutional Court seems to consider this as an issue of the validity of the arbitration agreement in light of § 19 of the German Competition Act (prohibited conduct of dominant undertakings).[180]

1.8 Cross-Border Cases

1.8.1 Introduction

145 Cases with cross-border elements can present particular challenges regarding the right of access to a court and its effectiveness. There is no universally recognized set of jurisdictional filters,[181] and states are reluctant to sacrifice their freedom to grant or decline jurisdiction as they see appropriate. This can be illustrated by the history of the 'Judgments Project' negotiated under the auspices of the Hague Conference on Private International Law (HCCH). After long and arduous negotiations that had commenced in 1992, the Choice of Court Convention was concluded in 2005, followed by the Judgments Convention of 2019. But it has proven to be very difficult to get even close to a consensus on a global convention on direct jurisdiction beyond exclusive choice of court agreements, and it remains to be seen whether the ongoing 'Jurisdiction Project' will indeed result in a convention on direct jurisdiction, or whether the resulting instrument will only deal with parallel proceedings, which is the 'initial focus' of the project.[182]

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[177] Ibid para 98.

[178] *Suda v Czech Republic,* Case 1643/06 (ECtHR), Judgment 28 October 2010 [ECLI:CE:ECHR:2010: 1028JUD000164306] para 49; *Mutu and Pechstein v Switzerland* (n 176) para 95.

[179] *Mutu and Pechstein v Switzerland* (n 176) para 169 ff.

[180] See the Federal Constitutional Court's decision in the *Pechstein* case, 1 BvR 2103/16, Order of 3 June 2022 [ECLI:DE:BVerfG:2022:rk20220603.1bvr210316] and the analysis by J Adolphsen, 'Sport, Spiel und Schiedszwang. Zum Pechstein-Urteil des Bundesverfassungsrechts' Verfassungsblog 15 July 2022, https://verfassungsblog.de/sport-spiel-und-schiedszwang/, DOI: 10.17176/20220715-233821-0.

[181] R Geimer, *Internationales Zivilprozessrecht* (9th edn, Otto Schmidt 2024) para 848.

[182] See https://www.hcch.net/de/projects/legislative-projects/jurisdiction-project.

146 There has, however, been regional harmonization of cross-border jurisdiction in Europe at least for some matters. In 1968, the member states of the European Economic Community, as it then was, concluded the Brussels Convention. It was the first 'double convention' that dealt with jurisdiction not only as a prerequisite for recognition and enforcement ('indirect jurisdiction') but also created uniform rules on jurisdiction for trial courts ('direct jurisdiction'). Today, the 'Brussels regime' has become part of EU law and, besides the Brussels I *bis* Regulation[183] that covers general civil and commercial matters, also includes a regulation on matrimonial matters and parental responsibility (Brussels II *ter* Regulation)[184]. Furthermore, there are now EU regulations governing, inter alia, jurisdiction for insolvency,[185] matrimonial property,[186] and succession[187] proceedings. In 1988, a parallel convention (the 'Lugano Convention') was concluded to enable third states to participate in the European judicial area for civil and commercial matters. It has been replaced by the Lugano Convention of 2007 to create parallelism with the Brussels I Regulation[188]. Further reform of the Lugano Convention to mirror the subsequent development in the EU is still outstanding.

147 Outside the scope of bi- or multilateral conventions, there are no universally accepted minimum standards regarding granting or denial of jurisdiction in cross-border contexts. But there are ongoing debates, both from the perspective of public international law in general, and from a fundamental rights perspective. Such debates concern both positive and negative obligations of states in the field of jurisdiction.

148 When discussing states' obligations regarding jurisdiction, a distinction needs to be made between obligations that can be enforced by individuals, for example by making a complaint before a national court or an international human rights body, and obligations that only operate between states. In the latter case, a typical sanction would be retaliation – which would hurt the nationals of the offending state who would then also have to put up with the offending treatment. It has rightly been pointed out in the

[183] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).
[184] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast).
[185] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).
[186] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.
[187] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.
[188] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

literature that retaliation is not an appropriate sanction for fundamental rights violations.[189]

1.8.2 Negative Obligations

149 There has been a longstanding debate on whether a 'genuine and effective link' is required between the dispute and the court to legitimize the exercise of jurisdiction from the perspective of public international law, and if yes, what constitutes such a link.[190] As most states provide for some sort of 'exorbitant' jurisdiction in their national law, it would be difficult to contend that such jurisdiction is contrary to customary international law.[191] Indeed, those who argue that there are limits under public international law for adjudicative jurisdiction generally find it difficult to find references supporting a state practice and *opinio iuris* to that effect.[192]

150 In 1927, the Permanent Court of International Justice made the following assessment in the *Lotus* case with regard to criminal jurisdiction:

> Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.[193]

Though often criticized, this still remains good law as regards limits on jurisdiction under public international law that can be derived from the principle of territoriality, also with respect to jurisdiction in civil cases.

151 Types of exorbitant jurisdiction are tag jurisdiction (jurisdiction based on service on a foreign defendant during a visit in the jurisdiction), jurisdiction based on doing business

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[189] Geimer (n 181) para 385.

[190] Perhaps the most famous academic proponent of such an approach was FA Mann, 'The Doctrine of Jurisdiction in International Law' (1964) Recueil de Cours I, 1, 73 ff, who claimed that '[t]he jurisdiction of the courts in civil matters is an aspect of the activity of States, which is more effectively determined and circumscribed by international rules of jurisdiction than many observers recognize or admit', though he recognized 'a tendency towards flexibility' as regards the 'strictly territorial character' of the jurisdiction to adjudicate in his second series of Hague lectures on the topic, see FA Mann, 'The Doctrine of International Jurisdiction Revisited After Twenty Years' (1984) Recueil des Cours III, 9 67.

[191] See eg, Restatement (Fourth) of Foreign Relations Law § 422 (2018), reporters' note 1: 'With the exception of various forms of immunity, however, modern customary international law generally does not impose limits on jurisdiction to adjudicate.'

[192] On this debate, see L Roorda and C Ryngaert, 'Public International Law Constraints on the Exercise of Adjudicatory Jurisdiction in Civil Matters' in S Forlati and P Franzina (ed), *Universal Civil Jurisdiction: Which Way Forward?* (Brill/Nijhoff 2020) 74 ff.

[193] *The Case of the S.S. Lotus* (PCIJ), Judgment of 7 September 1927, Publications of the Permanent Court of International Justice, Series A, No. 10 (A.W. Sijthoff 1927) 19.

(where the lawsuit is unrelated to that business), jurisdiction based on nationality, and jurisdiction based on the presence of assets.[194] Attempts at harmonizing cross-border jurisdiction and enforcement often aim to eliminate or restrict such bases for jurisdiction. In some cases, however, they can be important to prevent a denial of justice. That is the case if effective access to court is not possible in a state with a close connection to the dispute, or if a judgment from such a state cannot be recognized and enforced in the state where the exorbitant jurisdiction is exercised. In the latter case, however, one might consider an obligation to recognize and enforce judgments from states connected with the dispute to be a better approach from the perspective of the right of access to justice.[195]

152 Proposals to eliminate or restrict exorbitant grounds of jurisdiction usually aim to protect defendants from jurisdictional overreach. Yet there are also cases where the assumption of jurisdiction has been problematized from the perspective of respect for foreign sovereignty, or the principle of non-intervention. Typical examples are the jurisdiction over rights in rem in immovable property, or over the validity and registration of intellectual property rights. Yet in none of these matters is there a basis for assuming that the situs state's exclusive jurisdiction is guaranteed under customary public international law.[196]

153 Even those who assume that there is a public international law requirement of a 'genuine link' between the dispute and the forum must recognize that there is a range of acceptable 'links' and that therefore in cases with cross-border elements, there is often a range of acceptable fora. There is thus plenty of potential for positive conflicts of jurisdiction in cross-border cases, which, in the absence of a coordinated system for addressing such conflicts, can lead to unwelcome results for litigants.

154 Overall, therefore, attempts at solving the problems created by concurrent jurisdiction through the lens of territorial limits of state sovereignty have failed so far. To protect litigants from negative consequences of jurisdictional overreach, a focus on due process, and potentially on limits of jurisdiction derived from fundamental rights rather than from limits on territorial sovereignty, may be more promising. So far, however, a comprehensive and coherent doctrine of limits of adjudicative jurisdiction based on fundamental rights has not been developed.

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[194] For a comparative perspective, see KM Clermont and JRB Palmer, 'Exorbitant Jurisdiction' (2006) 58(2) Maine Law Review 474; A Nuyts, *Study on Residual Jurisdiction (Review of the Member States' Rules concerning the "Residual Jurisdiction" of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations),* final version dated 3 September 2007, para 74 ff (available at https://gavclaw.files.wordpress.com/2020/05/arnaud-nuyts-study_residual_jurisdiction_en.pdf).

[195] See 1.8.4 below.

[196] Geimer (n 181) para 394.

1.8.3 Positive Obligations

155 Some public international law scholars have called the prohibition of denial of justice, understood as a 'duty to the world at large to maintain an adequate system for the administration of justice'[197], 'one of the oldest principles of customary international law'.[198] Traditionally, this has been understood to be a principle of international aliens law, and thus as a protection for parties that are not nationals of the forum state. More recently, however, the fundamental rights aspect, and thus also the protection of the forum state's own citizens, has been discussed from this perspective as well.[199] The focus of the prohibition of denial of justice is not primarily on jurisdiction but rather on the 'adequacy' of the justice system, particularly on due process (or fair trial).

156 Classic treatises on the prohibition of denial of justice often focus on the protection of foreign investors from denial of justice, particularly with regard to expropriation without adequate compensation, in the host state. More recently, however, business and human rights disputes, or disputes concerning claims arising out of international crimes, have attracted increasing attention in this context. Here, denial of justice in a state closely connected to the dispute may lead to opening a forum elsewhere.

157 For a while, the US was the preferred forum for such cases, with the plaintiffs usually invoking the Alien Tort Statute (ATS). Since the 1980s, numerous cases concerning conduct abroad that were considered as being 'in violation of the law of nations or a treaty of the United States' were brought in US courts. In recent years, however, the US Supreme Court has progressively narrowed the scope of the ATS. In *Kiobel v Royal Dutch Petroleum* and *Jesner v Arab Bank* it finally shut the door to ATS claims against foreign corporations in US courts.[200] In *Nestlé USA v Doe,* the US Supreme Court decided that a domestic corporation cannot be sued under the ATS for conduct outside the US.[201]

158 Due to this development in US case law, business and human rights litigation has largely been transferred to European jurisdictions, particularly England and Wales and the Netherlands. In such litigation, jurisdiction is typically a crucial and contentious issue and access to justice considerations often play an important role.

159 English courts tend to consider whether the plaintiff could expect to obtain adequate access to justice abroad when deciding whether to allow service out of the jurisdiction, or whether to decline jurisdiction based on *forum non conveniens.* In *Cherney v Deripaska,* for example, the Court of Appeal allowed a case for which Russia would have been the 'natural forum' to go forward in England because of concerns whether the

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[197] J Paulsson, *Denial of Justice in International Law* (Cambridge University Press 2005) 1.
[198] A Newcombe, 'Jan Paulsson, Denial of Justice in International Law' (book review) (2006) 17 EJIL 692.
[199] Geimer (n 181) para 385.
[200] *Kiobel v Dutch Petroleum,* 569 US 108 (2013); *Jesner v Arab Bank,* 584 US ___ (2018).
[201] *Nestlé USA, Inc. v Doe,* 593 US ___ (2021).

plaintiff could expect to get a fair trial in Russia.[202] In *Lubbe v Cape Plc,* the UK House of Lords allowed a tort lawsuit for which it considered South Africa as the more appropriate forum to continue in England because of concerns about the availability of legal representation for the plaintiffs in South Africa.[203] Similarly, in *Vedanta,* the UK Supreme Court allowed a claim against a Zambian subsidiary of a UK company to go forward in England because it considered that substantial justice would be unavailable to the claimants in Zambia, as they would be unable to obtain adequate legal representation there.[204]

160 Article 9(1) of the third revised draft for a UN binding treaty on business and human rights[205] contained very broad grounds of jurisdiction for claims 'arising from acts or omissions that result or may result in human rights abuses'. This includes the forum of the victim's nationality or domicile. Article 9(3) of the draft excludes declining jurisdiction based on *forum non conveniens.* In 2022, Ecuador as the chair of the open-ended intergovernmental working group introduced new textual proposals[206] that were designed to garner more support from states for the initiative by watering down the obligations imposed by the treaty, including those on jurisdiction, while trying to retain the main gist.[207] The proposed changes to Article 9 were largely incorporated into the draft text of the treaty published in July 2023.[208] Nonetheless, one may assume that there will be considerable resistance to any binding jurisdictional rules in such a treaty.

161 Universal jurisdiction or *forum necessitatis* is also often discussed in the context of international crimes, such as genocide, torture and other crimes against humanity, and war crimes.[209] Universal criminal jurisdiction for such crimes is widely accepted. Many states also enable crime victims to raise civil claims before the court where the criminal proceedings take place. Yet often such claims are left for the civil courts to determine, which would then break the link established by universal criminal jurisdiction. The Ljubljana-The Hague Convention on International Cooperation in the Investigation and

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[202] *Michael Cherney v Oleg Deripaska* (Court of Appeal, England and Wales), Judgment 31 July 2009, [2009] EWCA Civ 849.
[203] *Lubbe v Cape Plc* (House of Lords, UK), Judgment 20th July 2000, [2000] UKHL 41.
[204] *Vedanta Resources Plc and Konkola Copper Mines Plc v Lungowe and Ors* (Supreme Court, UK), Judgment 10 April 2019, [2019] UKSC 20 para 88 ff.
[205] https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf.
[206] Human Rights Council, 'Suggested Chair proposals for select articles of the LBI (6 October 2022)' https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/wgtranscorp/session8/2022-10-06/igwg-8th-suggested-chair-proposals.pdf.
[207] See CM O'Brien and D Schönfelder, 'A Defining Moment for the UN Business and Human Rights Treaty Process', Verfassungsblog 26 October 2022, https://verfassungsblog.de/a-defining-moment-for-the-un-business-and-human-rights-treaty-process/, DOI: 10.17176/20221026-110229-0.
[208] https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf.
[209] See the definition in the resolution of the Institute of International Law on Universal civil jurisdiction with regard to reparation for international crimes, https://www.idi-iil.org/app/uploads/2017/06/01-Bucher-Competence_universel.pdf.

Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and other International Crimes that was adopted in 2023 aims at strengthening witnesses' rights to access to justice to obtain reparations (see Article 83 of the Convention), but it remains to be seen how broadly it will be implemented.

162 In 2018, the ECtHR took the view, after a very extensive analysis, that there is no obligation under the ECHR (or under international law more broadly) to provide for a *forum necessitatis* to enable a torture victim to whom the forum state had granted asylum to sue the perpetrator if there is no link between the dispute and the contracting state's territory. It stated that requiring a connection to the forum state beyond the current residence of the torture victim is a legitimate limitation of access to justice, despite stating that

> States are encouraged to give effect to [the torture victims' right to obtain appropriate and effective redress] by endowing their courts with jurisdiction to examine such claims for compensation, including where they are based on facts which occurred outside their geographical frontiers.[210]

The ECtHR also pointed to the 'possibility of development in the future', and invited the contracting states of the ECHR

> to take account in their legal orders of any developments facilitating effective implementation of the right to compensation for acts of torture, while assessing carefully any claim of this nature so as to identify, where appropriate, the elements which would oblige their courts to assume jurisdiction to examine it.[211]

163 These examples show that avoiding denial of justice may serve as a legitimate basis for jurisdiction in a forum to which the dispute is not, or only weakly, connected. Yet the ECtHR has shied back from assuming an obligation under the ECHR, or under international law more broadly, to accept universal civil jurisdiction even for very serious international crimes. It is thus prepared to accept, at least for the time being, that victims of international crimes are de facto deprived of effective access to justice with respect to their civil claims.

1.8.4 Cross-Border Recognition and Enforcement

164 The prevailing view today is that the right of access to justice does not comprise a right to have judgments recognized or enforced outside the state where they were given. If a state has not committed to recognizing and enforcing foreign judgments in an international treaty, and if it is not bound to do so by supranational law, it can freely

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[210] *Naït-Liman v Switzerland* (n 59) para 218.
[211] Ibid para 219.

decide whether and subject to what conditions it is prepared to do so. Many states insist on reciprocity or make other requirements that are not necessarily related to the quality of the judgment or the fairness of the proceedings. If a judgment cannot be recognized and enforced abroad, a party may have to introduce fresh proceedings to obtain effective access to justice. In such a situation, there is also a real possibility of conflicting judgments.

165 Where constitutional or fundamental rights are discussed in the context of recognition and enforcement, the focus is generally on grounds for the refusal of recognition and enforcement. Fundamental rights mainly come into play in the context of public policy and, more specifically, in the context of the refusal of recognition and enforcement based on improper service. In both respects, the focus in European jurisdictions has largely shifted towards the protection of constitutional or fundamental rights.

166 The ECtHR also considers the rules on the refusal of recognition and enforcement of judgments as an important safeguard for fair trial rights. With respect to judgments coming from states not bound by the ECHR, it insists that the courts of the receiving state must be satisfied that the proceedings in the state of origin were compatible with Article 6(1) ECHR.[212] As regards the relationship between contracting parties, and particularly between EU states, the ECtHR is less stringent. Nonetheless, it does not accept a system where 'mutual trust' is carried so far that there is no possibility at all for a party to object to recognition and enforcement of a judgment resulting from unfair proceedings. It takes the view that

> if a serious and substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, [member states' courts] cannot refrain from examining that complaint on the sole ground that they are applying EU law.[213]

167 Compliance with basic due process, or fair trial principles, is also an essential prerequisite for recognition and enforcement of foreign judgments elsewhere. In the US, courts require that the foreign proceedings were compatible with US due process standards. Lack of systemic due process, ie, a general lack of independent courts and due process of law in the state of origin, is a mandatory ground for non-recognition.[214]

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[212] *Pellegrini v Italy,* Case 30882/96 (ECtHR), Judgment 20 July 2001 [ECLI:CE:ECHR:2001:0720JUD003088296] para 40; *Dolenc v Slovenia,* Case 20256/20 (ECtHR), Judgment 20 October 2022 [ECLI:CE:ECHR:2022:1020JUD002025620].

[213] *Avotiņš v Latvia,* Case 17502/07 (ECtHR), Judgment 23 May 2016 [ECLI:CE:ECHR:2016:0523JUD001750207] para 116.

[214] RA Brand, 'Federal Judicial Center International Litigation Guide: Recognition and Enforcement of Foreign Judgments' (2013) 74 University of Pittsburgh Law Review 491, 510 ff.

Furthermore, several discretionary grounds for non-recognition concern due process violations in the individual case.[215]

1.9 Immunity from Jurisdiction

168 One of the most contentious issues in recent years as regards limitations affecting the very essence of the right of access to a court has been the relationship of this right with the immunity of states, international organizations, and diplomats.[216] Under public international law, states are, in principle, immune from the jurisdiction of other states. There is a widely recognized exception for commercial activities. Yet with respect to *acta iure imperii,* including acts of violence committed on foreign territory, the traditional view is that states are entitled to immunity before foreign courts unless they consent to the court's jurisdiction. Heads of state[217], diplomats, and consular officials are also immune from the jurisdiction of other states to a certain extent. Furthermore, Status of Forces Agreements (SOFAs) often contain rules exempting military personnel operating in a foreign country to some degree from that country's criminal and/or civil jurisdiction, or at least allowing the sending state to request that the host state waive its jurisdiction.[218]

169 State immunity is mainly governed by customary law. Attempts at harmonization through international treaties have had limited success so far. Under the auspices of the Council of Europe, the European Convention on State Immunity (Basle Convention) was concluded in 1972, but so far, it has been ratified only by eight states,[219] and there have been no recent new signatures or ratifications. The UN Convention on Jurisdictional Immunities of States and Their Property was adopted in 2004 but has not yet entered into force. While these conventions largely codify customary international law, they do provide for some exceptions from foreign-state immunity that are not generally accepted. The UN Convention contains a 'territorial tort exception' with respect to

> pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in

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[215] Ibid 518 ff.

[216] See eg, E Voyiakis, 'Access to Court v State Immunity' (2003) 53 International and Comparative Law Quarterly 297 ff; CA Whytock, 'Foreign State Immunity and the Right to Court Access' (2013) 93 Boston University Law Review 2033 ff; P Webb, 'The Immunity of States, Diplomats and International Organizations in Employment Disputes: The New Human Rights Dilemma?' (2016) 27(3) European Journal of International Law 745 ff; V Terzieva, 'State Immunity and Victims' Right to Access to Court, Reparation, and the Truth' (2022) 22 International Criminal Law Review 780 ff.

[217] See eg, Case 7 Ob316/00x (Supreme Court, Austria), Order 14 February 2001, dismissing a fatherhood claim against the reigning Prince of Liechtenstein.

[218] On the (then more than 100) SOFAs concluded by the US, see R Chuck Mason, 'Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized?' Congressional Research Service Report for Congress, 15 March 2012, 3 ff, posted at https://sgp.fas.org/crs/natsec/RL34531.pdf.

[219] Austria, Belgium, Cyprus, Germany, Luxembourg, Netherlands, Switzerland, and the United Kingdom. Portugal signed the convention in 1979 but has not ratified it.

the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission (Article 12 of the UN Convention).

Article 11 of the Basle Convention contains a similar exception. Some national courts and scholars have argued, more broadly, for a human rights/*ius cogens* exception with respect to grave violations of international human rights law, particularly crimes against humanity. Some courts have combined the requirements of the territorial tort exception and the *ius cogens* exception.

170 In 1997, a Greek court ordered the Federal Republic of Germany to pay EUR 37.5 million to descendants of victims of a massacre perpetrated by German SS in the Greek village of Distomo in 1944. The appeal lodged by Germany against the first-instance judgment was dismissed by the Greek Court of Cassation in 2000. The judgment could not be enforced as the Greek Minister of Justice refused the permission required under Greek law for enforcement against a foreign state.[220] A complaint brought to the ECtHR was declared inadmissible. The ECtHR took the view that refusal of enforcement 'did not upset the relevant balance that should be struck between the protection of the individual's right to peaceful enjoyment of his or her possessions and the requirements of the general interest' as the Greek government 'could not be required to override the principle of State immunity against their will'.[221]

171 The Distomo plaintiffs also tried to enforce the Greek judgment in Italy, where the Court of Cassation decided that enforcement was indeed possible. Famously, the Italian authorities seized the Villa Vigoni, a historic property situated on the shore of Lake Como and owned by the Federal Republic of Germany. In December 2008, Germany instituted proceedings against Italy before the International Court of Justice (ICJ), asking the court to declare that Italy had failed to respect Germany's immunity by seizing the property. In 2012, the ICJ ruled that Germany was indeed protected by state immunity under customary international law from legal action in foreign courts aimed at obtaining compensation for German war crimes committed during World War II.[222] Subsequently, the Italian Constitutional Court took the position that such legal action was nonetheless possible on the basis of the Italian constitution.[223] In April 2022, Germany therefore instituted fresh proceedings against Italy before the International Court of Justice, arguing that Italy consciously violates international law by continuing to give individuals

[220] The procedural history is laid out in *Kalogeropoulou and Others v Greece and Germany,* Case 59021/00 (ECtHR), Judgment 12 December 2002 [ECLI:CE:ECHR:2002:1212DEC005902100].
[221] Ibid.
[222] *Jurisdictional Immunities of the State, Germany v Italy: Greece intervening* (International Court of Justice), Judgment 3 February 2012, I.C.J. Reports 2012, 99.
[223] Case 238/2014 (n 39). On this judgment and its implications, see V Volpe, A Peters and S Battini (ed), *Remedies against Immunity? – Reconciling International and Domestic Law after the Italian Constitutional Court's Sentenza 238/2014* (Springer 2021).

access to its courts to bring lawsuits against Germany aimed at obtaining compensation for war crimes and crimes against humanity.[224]

172 After the Russian invasion of Ukraine in 2022, the Supreme Court of Ukraine, departing from its previous case law, allowed tort claims against the Russian Federation by victims of the armed conflict in Ukraine.[225] The court referred to the territorial tort exception contained in Article 12 of the UN Convention and Article 11 of the Basle Convention. It justified its departure from previous practice with the argument that the rationale for depriving victims of access to justice because of state immunity no longer applied after the beginning of full-blown war in 2022.[226] Subsequently, there have been press reports on 'a consortium of Ukrainian and international lawyers' preparing large-scale legal action against Russia in multiple jurisdictions, including the US and the United Kingdom.[227] If such lawsuits should be allowed to go forward against Russia, this would clearly make it more difficult to argue against allowing similar legal actions against other states as well.

173 The ECtHR generally allows contracting states of the ECHR to limit access to a court even to the point of making a lawsuit practically impossible based on immunity under international law.[228] The court recognises that promoting 'comity and good relations between States' is a legitimate aim that can justify limiting, or even denying, the access to a court if this is proportionate to the aim pursued,[229] and that this is a restriction inherent to the right of access to a court.[230] Even with respect to a civil claim arising out of torture, the ECtHR, 'while noting the growing recognition of the overriding

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[224] All materials concerning the case are available at https://www.icj-cij.org/en/case/183.

[225] Case No 308/9708/19 (Supreme Court, Commercial Cassation Court, Ukraine), Resolution 14 April 2022, press release in English: https://court.gov.ua/eng/supreme/pres-centr/news/1270647/; Case No 760/17232/20-ц (Supreme Court, Civil Cassation Court, Ukraine), Resolution 18 May 2022, press release in English: https://court.gov.ua/eng/supreme/pres-centr/news/1282788/.

[226] For a detailed analysis, see B Karnaukh, 'Territorial tort exception? The Ukrainian Supreme Court held that the Russian Federation could not plead immunity with regard to tort claims brought by the victims of the Russia-Ukraine war' (2022) 3(15) Access to Justice in Eastern Europe 165–177, https://doi.org/10.33327/AJEE-18-5.2-n000321; see also I Horodyskyy, 'Decisions Without Enforcement: Ukrainian Judiciary and Compensation for War Damages', https://www.justsecurity.org/92525/decisions-without-enforcement-ukrainian-judiciary-and-compensation-for-war-damages/.

[227] 'Mass civil legal action to seek compensation for Ukrainian war victims' The Guardian https://www.theguardian.com/world/2022/may/31/mass-civil-legal-action-to-seek-compensation-for-ukrainian-war-victims.

[228] For an overview of the ECtHR's case law on immunity from jurisdiction, see European Court of Human Rights (n 52), para 142 ff.

[229] *Fogarty v United Kingdom,* Case 37112/97 (ECtHR), Judgment 21 November 2001 [ECLI:CE:ECHR:2001:1121JUD003711297] (regarding alleged discrimination in the course of recruitment of embassy staff); *McElhinney v Ireland,* Case 31253/96 (ECtHR), Judgment 21 November 2001 [ECLI:CE:ECHR:2001:1121JUD003125396] (regarding damages for alleged misconduct of a foreign state's law enforcement officer); *J.C. and Others v Belgium,* Case 11625/17 (ECtHR), Judgment 12 October 2021 [ECLI:CE:ECHR:2021:1012JUD001162517] para 61 (regarding a lawsuit against the Holy See based on childhood sexual abuse by priests).

[230] *Cudak v Lithuania,* Case 15869/02 (ECtHR), Judgment 23 March 2010 [ECLI:CE:ECHR:2010:0323JUD001586902] para 57.

importance of the prohibition of torture', did not 'find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State', and that granting 'immunity to States in respect of personal injury claims unless the damage was caused within the [forum state], is not inconsistent with those limitations generally accepted by the community of nations as part of the doctrine of State immunity.'[231] The ECtHR also held that the dismissal on the basis of state immunity of a lawsuit initiated in Belgium against the Holy See by plaintiffs claiming that they had been sexually abused by priests as children was compatible with Article 6(1) ECtHR, even if it acknowledged that it would be 'at least desirable' for them to have some alternative means of recourse.[232] The ECtHR does not consider the availability of a reasonable alternative possibility to resolve the dispute as a prerequisite for dismissal of a lawsuit based on state immunity.[233] If the applicant's interest to bring the lawsuit is considered not to outweigh the aim pursued by the limitation, a bar on litigation is not regarded as impairing 'the very essence' of the right of access to a court.[234]

174 Yet states do not have an unlimited margin of appreciation when extending such immunities beyond what is required by international law. In the *Sabeh El Leil* case, the ECtHR ruled that France had violated Article 6(1) ECHR by not allowing a challenge to dismissal to be brought before its courts by a non-national employee of a foreign embassy. The ECtHR stated that

> by […] dismissing the applicant's claim without giving relevant and sufficient reasons, and notwithstanding the applicable provisions of international law, the French courts failed to preserve a reasonable relationship of proportionality. They thus impaired the very essence of the applicant's right of access to a court.[235]

The ECJ, in the *Mahamdia* case, also took the view that state immunity did not prevent an embassy driver from suing the foreign state in the host state's courts in a labour dispute, and it held that the Brussels I Regulation applied in such a case.[236] However,

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[231] *Al-Adsani v United Kingdom,* Case 35763/97 (ECtHR), Judgment 21 November 2001 [ECLI:CE:ECHR:2001:1121JUD003576397] para 66.

[232] *J.C. and Others v Belgium,* Case 11625/17 (ECtHR), Judgment 12 October 2021 [ECLI:CE:ECHR:2021:1012JUD001162517].

[233] *Ndayegamiye-Mporamazina v Switzerland,* Case 16874/12, Judgment 5 February 2019 [ECLI:CE:ECHR:2019:0205JUD001687412] para 48.

[234] *Prince Hans-Adam II of Liechtenstein v Germany,* Case 42527/98 (ECtHR), Judgment 12 July 2001 [ECLI:CE:ECHR:2001:0712JUD004252798] para 69.

[235] *Sabeh El Leil v France,* Case 34869/05 (ECtHR), Judgment 29 June 2011 [ECLI:CE:ECHR:2011:0629JUD003486905] para 67; see also *Wallishauser v Austria,* Case 156/04 (ECtHR), Judgment 17 July 2012 [ECLI:CE:ECHR:2012:0717JUD000015604] (violation of Article 6(1) by accepting refusal of service with respect to an embassy photographer's payment claim instead of allowing substitute service or issuing a default judgment).

[236] *Mahamdia v Algeria,* Case C-154/11 (ECJ), Judgment 19 July 2012 [ECLI:EU:C:2012:491].

these judgments concerned cases where the employee's tasks were not 'part of the exercise of public powers by the defendant State'.[237] Where the employee does exercise such powers, employment disputes might still be covered by state immunity.[238]

175 The immunity of diplomats and consular officials is governed by the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963. Diplomats are entitled to immunity from the civil jurisdiction of the host state with very limited exceptions, subject to waiver by the sending state. Consular officers and consular employees are entitled to immunity (only) in respect of acts performed in the exercise of consular functions. The compatibility of such immunity with the right to access to a court has been at issue in several cases concerning exploitation and maltreatment of personnel by diplomats. While diplomatic immunity does not preclude bringing a lawsuit in the diplomat's sending state, this is often unfeasible for victims of such treatment.[239]

2 RIGHT TO A COURT ESTABLISHED BY LAW

2.1 Introduction

176 The concept of the lawful judge plays an important role in a range of European constitutions.[240] It operates both as a fundamental right and as an institutional guarantee.[241] It is also recognised in Article 6(1) ECHR, which guarantees a hearing by a 'tribunal established by law'. A similar wording is contained in Article 47(2) CFR, according to which the tribunal must be 'previously established by law'. From the perspective of EU primary law, the concept of a lawful tribunal is also relevant for the ability to request a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union (TFEU) and to ensure 'effective legal protection in the fields covered by Union law' under Article 19(1)(2) TEU.[242] The first constitutional embodiment of this right was contained in Chapter V, Article 4 of the French

[237] See Ibid para 27.
[238] See Case 2 AZR 501/00 (Federal Labour Court, Germany), Judgment 25 October 2001.
[239] See in this context, eg, M Baldegger, *Das Spannungsverhältnis zwischen Staatenimmunität, diplomatischer Immunität und Menschenrechten* (Helbing Lichtenhahn 2015).
[240] European Commission for Democracy through Law (Venice Commission), *Comments on European standards as regards the independence of the judicial system: judges* (by A Nussberger), CDL-JD(2008)006, 2 ff. M Cappelletti, 'Fundamental Guarantees of the Parties in Civil Litigation: Comparative Constitutional, International and Social Trends' (1973) 25 Stanford Law Review 651, 652 classifies it as one of the rights that were 'a conquest, or an aspiration, of modern times'.
[241] M Jachmann-Michel in Dürig/Herzog/Scholz, *Grundgesetz* (102nd instalment, CH Beck 2023) GG Article 101 para 17 f.
[242] For an in-depth analysis, see M Leloup, 'The appointment of judges and the right to a tribunal established by law: The ECJ tightens its grip on issues of domestic judicial organization: *Review Simpson*' (2020) 57 Common Market Law Review 1139, 1148, 1155 ff.

Constitution of 1791, but its intellectual roots are often traced back much further in history.[243]

177 There are significant differences between the various European jurisdictions as to how the right to a lawful court is implemented and understood.[244] In national constitutions, the concept of the 'lawful' (or 'natural') judge mainly relates to the pre-determination of the court, and sometimes also the panel or individual judge, that will handle the case. At least that seems to have been the dominating perception in the twentieth century.[245] In the case law of the ECtHR, the focus used to be on the requirements regarding the legal basis for the establishment, jurisdiction, and composition of the tribunal. The ECtHR takes a very broad approach to the concept of lawfulness, which leads to significant overlap with the requirements of independence and impartiality.[246]

178 More recently, the ECtHR and the ECJ, largely in parallel, have developed another aspect of the 'lawfulness' of the tribunal, namely the existence of and compliance with appropriate requirements and procedures for the appointment of judges.[247] While this approach has been described as innovative,[248] the function of the right to a lawful court as a safeguard for the separation of powers and the rule of law, particularly against undue executive intervention, can be traced back to the historical origins of the right to a lawful court.[249]

179 The German approach to the right to a lawful judge, especially as regards the pre-determination of the competent court, is particularly strict. The right was included in the fundamental rights catalogue of the Bill of Rights of the German People of 1849. The original aim was to prevent the monarch, local princes, or landlords from influencing the judiciary by intervening in proceedings.[250] Subsequently, the influence of the executive branch on the composition of panels became a more pressing issue, which led to the implementation of judicial self-administration in the *Gerichtsverfassungsgesetz* (Courts Constitution Act) that was enacted in 1877.[251] In the German constitutions of the

[243] H Schulze-Fielitz in H Dreier (ed), *Grundgesetz-Kommentar* (3rd edn, Mohr Siebeck 2018) GG Article 101 para 1 ff; but see M Jachmann-Michel in Dürig/Herzog/Scholz, *Grundgesetz-Kommentar* (102nd instalment, CH Beck 2023) GG Article 101 para 7, who notes that the specific content associated with the right today is closely linked to nineteenth century constitutionalism.

[244] See *Guðmundur Andri Ástráðsson v Iceland,* Case 26374/18 (ECtHR), Judgment 1 December 2020 [ECLI:CE:ECHR:2020:1201JUD002637418] para 148 ff. on the results of a comparative survey on the meaning of the 'lawful court' requirement in the contracting states of the ECHR.

[245] From a comparative perspective, see M Cappelletti (n 240) 672 fn 116 and 119.

[246] *Guðmundur Andri Ástráðsson v Iceland* (n 244) para 212 and 231 ff.

[247] For an overview of the case law, see European Court of Human Rights (n 52) para 246 ff.

[248] M Leloup, 'The appointment of judges and the right to a tribunal established by law: The ECJ tightens its grip on issues of domestic judicial organization: *Review Simpson*' (2020) 57 Common Market Law Review 1139, 1150 f.

[249] U Müßig, *Recht und Justizhoheit* (2nd edn, Duncker & Humblot 2009) 331 ff.

[250] D Kuch, 'Recht auf den gesetzlichen Richter (Art. 101 Abs. 1 S. 2 GG)'(2020) Juristische Ausbildung 228.

[251] Müßig (n 249) 321; Kuch (n 250) 228.

twentieth century, the right to a lawful judge was no longer part of the fundamental rights catalogues. It was instead included in the constitutional rules on court organisation (see Article 105 of the *Weimarer Reichsverfassung* [*Weimar* Constitution] and, today, Article 101 of the Basic Law). Nonetheless, while the nomenclature varies, the general understanding is that the right to a lawful judge is an individual constitutional right. The German Federal Constitutional Court classifies it as a 'fundamental-rights equivalent right' (*grundrechtsgleiches Recht*), but that does not signify a different rank or level of constitutional protection compared to those constitutional rights that are contained in the catalogue of fundamental rights in the first section of the Basic Law.[252] The guarantee is considered as a core element of the principle of the rule of law that cannot be lawfully disbanded by an amendment to the German constitution.[253]

180 The US, at least at first glance, is at the opposite end of the spectrum. Mauro Cappelletti observed in his 1973 comparative study on 'Fundamental Guarantees of the Parties in Civil Litigation' that the US Constitution does not contain an obvious counterpart to the European 'lawful judge' guarantee.[254] The rigid German insistence on pre-determination of the judge that will handle each case certainly has no parallel in the US. Sometimes the plaintiff has significant influence on which court, and even which specific judge, will hear a case. Particularly in politically charged cases this has led to a problematic practice of judge-shopping.[255] A recent attempt to curb such judge-shopping in federal courts[256] seems to have been unsuccessful.[257]

181 Yet the separation of powers, one of the components of the concept of the lawful judge, is also an essential feature of the US Constitution, particularly at the federal level. Article III of the US Constitution establishes the judicial branch of government and gives Congress the power to establish courts. The rules on tenure ('during good behaviour') and salary contained in Article III(1) are considered as core safeguards of the federal 'package of judicial independence' .[258] The state judicial branches are established by the state constitutions, which provide for their own 'packages' of independence

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[252] E Schumann, 'Grundrechte sind Grundrechte – Überlegungen zur Terminologie des Bundesverfassungsgerichts bei den Prozessgrundrechten' (2020) 75(1) Juristenzeitung 30, 32; regarding the broad scope of the right ('all that the Basic Law says about and requires of the organs of the judicial power', see Case 2 BvR 780/16 (Federal Constitutional Court, Germany), Order 22 March 2018 [ECLI:DE:BVerfG:2018:rs20180322.2bvr078016] para 48.

[253] Jachmann-Michel (n 241) para 19.

[254] Cappelletti (n 240) 672.

[255] S Vladeck, 'The Growing Abuse of Single-Judge Divisions' https://stevevladeck.substack.com/p/18-shopping-for-judges.

[256] United States Courts, 'Conference Acts to Promote Random Case Assignment' https://www.uscourts.gov/news/2024/03/12/conference-acts-promote-random-case-assignment.

[257] N Raymond, 'Texas federal court will not adopt policy against "judge shopping"' https://www.reuters.com/legal/texas-federal-court-will-not-adopt-policy-against-judge-shopping-2024-03-30/.

[258] See VC Jackson, 'Packages of Judicial Independence: The Selection and Tenure of Article III Judges' (2007) 95 Georgetown Law Journal 965, 986 ff.

safeguards.[259] Furthermore, as also noted by Cappelletti in the said study, the jurisdictional component of the right to a 'lawful judge' is, at least to some degree, reflected in the due process prerequisites of jurisdiction,[260] and the trend to constitutionalise jurisdiction has not subsided in the US since then. The statutory determination of the court that will deal with the case, however, still is not a priority.[261]

182 In light of these divergences, instead of approaching the concept of the lawful court holistically, it seems preferable for comparative purposes to look at each of the (potential) individual components separately. These are (1) the establishment of courts, (2) the selection of judges, (3) the jurisdiction of the court, (4) the composition of the court or panel, and (5) the assignment of cases to panels or judges. In all cases, both the lack of an appropriate legal basis and non-compliance with appropriate rules can constitute a violation of the right to a lawful court.[262]

2.2 Establishment of Courts

183 To fulfil the requirements of Article 6 ECtHR, a tribunal must, in principle, be established by 'a law emanating from Parliament'. This is to prevent that judicial organisation is dependent on the discretion of the executive or of the judicial authorities.[263] Yet in the *Zand* case, the European Commission on Human Rights took the view that the requirement of an establishment by Parliamentary legislation 'does not mean that delegated legislation is as such unacceptable in matters concerning the judicial organisation', and it considered a rule of the Austrian Labour Courts Act leaving the establishment of individual labour courts to the Minister who was authorised to create such courts 'according to need' as compatible with the requirement of establishment by law.[264] The European Commission on Human Rights did indicate, however, that the discretion left to the executive in such matters must not be 'excessive'.[265] In the *Savino* case, the ECtHR reiterated that there is scope for delegated legislation regarding the

[259] Ibid.
[260] Cappelletti (n 240) 672 fn 120.
[261] For a comparative perspective, see H Koch, 'Rechtsvergleichende Fragen zum gesetzlichen Richter' in A Heldrich and T Uchida (edn), *Festschrift für Hideo Nakamura zum 70. Geburtstag am 2. März 1996* (De Gruyter 1996) 281, 290 ff.
[262] See Leloup (n 248) 1148 ff.
[263] *Coëme and Others v Belgium,* Cases 32492/96 and others (ECtHR), Judgment 22 June 2020 [ECLI:CE:ECHR:2000:0622JUD003249296] para 98; *Gurov v Moldova,* Case 36455/02 (ECtHR), Judgment 11 July 2006 [ECLI:CE:ECHR:2006:0711JUD003645502] para 34; *Fatullayev v Azerbaijan,* Case 40984/07 (ECtHR), Judgment 22 April 2010 [ECLI:CE:ECHR:2010:0422JUD004098407] para 144.
[264] *Zand v Austria,* Case 7360/76 (ECHR), Report 12 October 1978 [ECLI:CE:ECHR:1978:1012REP000736076] para 69 ff. This is often omitted in references to the *Zand* case in later case law, see eg, *Gurov v Moldova,* Case 36455/02 (ECtHR), Judgment 11 July 2006 [ECLI:CE:ECHR:2006:0711JUD003645502] para 32 ff.
[265] *Zand v Austria* (n 264) para 70.

establishment of judicial bodies, provided that such legislation is sufficiently accessible and foreseeable.[266]

184 Many constitutions, particularly of civil law states, explicitly prohibit courts of exception, ie, courts created ad hoc to deal with specific cases, regardless of whether they are established by executive decree or by legislation.[267] Such prohibitions are, eg, contained in the constitutions of Brazil (Article 5(XXXVI)), Germany (Article 101(1)), Italy (Article 102) Spain (Article 117(6), and Switzerland (Article 30(1)). The abolition of courts of exception was proposed in the report on the organisation of the judicial power presented by Nicolas Bergasse to the French Constituent National Assembly in 1789[268] but was not included the Declaration of human and civic rights. In several jurisdictions, it was enshrined in the constitutions or fundamental rights catalogues enacted after the 1848 revolution. This was, eg, the case in Germany (§ 42(2) of the Bill of Rights of the German People of 1849) or Switzerland (Article 53 of the Swiss Constitution of 1848).

185 The prohibition of courts of exception does not preclude setting up a specialised court, or branch of courts, for a specific category of cases that are designated in a general abstract fashion.[269] The ECtHR has also held it to be compatible with the lawfulness requirement of Article 6(1) ECHR if the court is 'set up to deal with a specific subject matter which can be appropriately administered outside the ordinary court system'.[270] Furthermore, to comply with Article 6(1) ECHR; the 'tribunal' does not necessarily have to be 'a court of law of the classic kind, integrated within the standard judiciary machinery of the country'.[271]

186 The lawfulness requirement concerns not only the establishment of courts but also their organisation. As already mentioned, the ECtHR has stated in a range of judgments that the purpose of this requirement is to prevent that court organisation is left at the

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[266] *Savino and Others v Italy,* Cases 17214/05, 42113/04, and 20329/05 (ECtHR), Judgment 28 April 2009 [ECLI:CE:ECHR:2009:0428JUD001721405] para 94 ff.

[267] Jachmann-Michel (n 243) para 91.

[268] Rapport par M Bergasse sur l'organisation du pouvoir judiciaire, lors de la séance du 17 aout 1789, (1875) 8 Archives Parlementaires de la Révolution Française 440, 446 f. (Title II Article 6 of the proposed Constitution of Judicial Power), available at https://www.persee.fr/doc/arcpa_0000-0000_1875_num_8_1_4859_t2_0440_0000_6.

[269] *Crociani and Others v Italy,* Cases 8603/79 and Others (ECHR), Decision 18 December 1980 [ECLI:CE:ECHR:1980:1218DEC000860379], (1981) 22 Decisions and Reports 147, 219 f. (concerning the Italian Constitutional Court's jurisdiction for the trial of Ministers and the President of the Republic for offences committed in office); Case 1 BvR 335/51 (Federal Constitutional Court, Germany), Judgment 17 December 1953, BVerfGE 3, 213 (concerning labour courts); Case 2 BvF 1/56 (Federal Constitutional Court, Germany), Order 10 June 1958, BVerfGE 8, 174 (concerning the German Federal Administrative Court).

[270] *Xhoxhaj v Albania,* Case 15227/19 (ECtHR), Judgment 9 February 2021 [ECLI:CE:ECHR:2021:0209JUD001522719] para 284 (regarding 'vetting bodies' set up to re-evaluate all Albanian judges in the course of a justice reform).

[271] *Campbell and Fell v UK,* Cases 7819/77 and 7878/77 (ECtHR), Judgment 28 June 1984 [ECLI:CE:ECHR:1984:0628JUD000781977] para 76.

discretion of the executive, or of judicial authorities themselves.[272] In that regard, however, the ECtHR makes an exception for common-law jurisdictions to accommodate their traditions of judicial self-government.[273]

187 Article III(1) of the US Constitution establishes the US Supreme Court, while inferior federal courts must be 'ordain[ed] and establish[ed]' by Congress. Besides the 'Article III courts', Congress has also created a range of other federal adjudicatory bodies, usually referred to as 'Article I courts' or 'legislative courts', where the 'independence package' of Article III(1) of the Constitution does not apply.[274] A variety of proposals have been put forward on how to reconcile 'Article I courts' with Article III of the Constitution, a literal reading of which would not permit investing bodies to which the protections of Article III of the Constitution do not apply with adjudicatory power.[275] In any case, all types of federal adjudicatory bodies must be established by Congress.[276]

2.3 Selection of Judges

188 There is a range of models for the selection of judges: (1) election (by the general electorate or by a legislative body, on a partisan or non-partisan basis); (2) appointment by an executive organ (eg, president or minister); (3) appointment (or selection) by an independent organ.

189 The requirement of lawful establishment of the court does not prescribe or exclude any of these methods. Appointment of judges by the executive or the legislature is not incompatible with the principle of separation of powers that lies at the heart of the lawfulness requirement, 'provided that appointees are free from influence or pressure when carrying out their adjudicatory role'.[277] The ECtHR recognises that a 'certain interaction' between the state powers in the selection of judges is not only permissible

[272] See the references in n 263.
[273] See *Coëme and Others v Belgium* (n 263) para 98; *Savino and Others v Italy* (n 266) para 94.
[274] RH Fallon, Jr., 'Of Legislative Courts, Administrative Agencies, and Article III' (1988) 101 Harvard Law Review 915, 916; J Dodge, 'Reconceptualizing Non-Article III Tribunals' (2015) 99(3) Minnesota Law Review 905, 912 ff; LK Donohue and J McCabe, 'Federal Courts: Article I, II, III, and IV Adjudication' (2022) 71(3) Catholic University Law Review 543, 545 f.
[275] See eg, the 'appellate review theory' elaborated by RH Fallon, Jr. (n 274) 933 ff; the 'inferior tribunals' approach proposed by JE Pfander, 'Article I Tribunals, Article III Courts, and the Judicial Power of the United States' (2004) 118 Harvard Law Review 643; 671 ff; and the 'sacrosanct core to the judicial power' approach favoured by J Dodge (n 274) 955 ff. According to W Baude, 'Adjudication outside Article III' (2020) 133(5) Harvard Law Review, 1511, 1557 ff, 'non-Article III tribunals' do not belong to the judicial but to the executive branch of government.
[276] A special regime applies to courts that exercise federal judicial functions based on an international treaty. The treaty-making power lies with the executive. Yet such a treaty would nonetheless have to be supported by Congressional statute; see Donohue and McCabe (n 274) 600 f.
[277] *Guðmundur Andri Ástráðsson v Iceland* (n 244) para 207 with further refereces.

but also necessary.[278] Yet the ECtHR seems increasingly reluctant to accept a decisive influence of the legislative or executive branch.

190 Meanwhile, in the US, federal, and often also state, judicial selection processes are clearly and openly political. Supreme Court justices, federal circuit judges and federal district court judges are nominated by the President and confirmed by the Senate. For state judges, there is a variety of selection mechanisms (appointment by the governor, various types of elections, legislative appointment, merit selection[279]). While the increasingly partisan nature of judicial selection processes is often criticised, the influence of the legislative and executive branches is seen by many as an important element of the system of checks and balances that is essential for the US approach to the separation of powers. Particularly with respect to the Supreme Court, there does not seem to be any appetite to get rid of executive and legislative involvement in the selection of judges. In 2021, the Presidential Commission on the Supreme Court of the United States submitted a report to US President Biden in which it discussed a range of potential reform measures, yet introducing a system where Supreme Court justices would be selected strictly based on 'merit' was not even considered as an option.[280]

191 The lawfulness of the appointment or removal of judges has recently been the focus of a number of high-profile cases before the ECtHR and the ECJ. Many, but not all of them related to justice reforms in Poland and Hungary that raised serious concerns about the rule of law in these states. The ECtHR and the ECJ revisited both the requirements regarding the appointment procedure and the consequences of breaches of the rules governing that procedure. There are different clusters of cases addressing this. One focuses on the right of judges who were removed from their posts (or not appointed) to obtain a review by a (lawful) court.[281] Another, which is of primary interest for this

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[278] Ibid para 215.

[279] On the spread of merit selection of state court judges in the US, see G Goelzhauser, *Judicial Merit Selection* (Temple University Press 2019) 5 ff.

[280] Presidential Commission on the Supreme Court of the United States, *Final Report December 2021,* 67 ff, https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf.

[281] *Baka v Hungary,* Case 20261/12 (ECtHR), Judgment 23 June 2016 [ECLI:CE:ECHR:2016:0623JUD002026112] para 120 ff; *Broda and Bojara v Poland,* Cases 26691/18 and 27367/18 (ECtHR), Judgment 29 June 2021 [ECLI:CE:ECHR:2021:0629JUD002669118]; *Dolińska-Ficek and Ozimek v Poland,* Cases 49868/19 and 57511/19, Judgment 8 November 2021 [ECLI:CE:ECHR:2021:1108JUD004986819]; *Grzęda v Poland* (n 59) (judicial member of National Council of the Judiciary). The ECtHR approaches such cases using the so-called Vilho Eskelinen test (first used in *Vilho Eskelinen and Others v Finland,* Case 63235/00 (ECtHR), Judgment 19 April 2007 [ECLI:CE:ECHR:2007:0419JUD006323500]) to determine whether Article 6(1) applies to a dispute concerning the conditions of the employment of civil servants. The first step of the two-step test is to determine whether domestic law excludes access to the court. If not, then Article 6(1) ECtHR applies. If not, as a second step, the ECtHR assesses whether the exclusion is justified, which requires that there are objective grounds in the state's interest to exclude the specific subject-matter and issue in dispute from judicial review. The test was modified in the *Grzęda* judgment to include an implicit exclusion of access to court in domestic law.

subchapter, deals with the right of parties to a dispute to complain against the unlawful composition of the court because of the participation of unlawfully appointed judges.[282]

192 In 2020, the ECtHR undertook an extensive analysis and restatement of the requirements for judicial appointments in the *Ástráðsson* case. It found a violation of the right to a tribunal established by law in a case where a judge involved in the decision-making had been appointed despite not having been included in the list drawn up by the committee of experts responsible for the selection of candidates. In its judgment, the ECtHR stated that 'it is inherent in the very notion of a 'tribunal' that it be composed of judges selected on the basis of merit – that is, judges who fulfil the requirements of technical competence and moral integrity to perform the judicial functions required of it in a State governed by the rule of law',[283] thus indicating qualitative criteria for the selection and appointment to judges as an element of the 'lawfulness' concept. In this context, the court referred to various international – mostly soft law – texts dealing with the appointment and promotion of judges [284] and 'emphasise[d] the paramount importance of a rigorous process for the appointment of ordinary judges to ensure that the most qualified candidates – in terms of both technical competence and moral integrity – are appointed to judicial posts'.[285] After setting out this rather stringent approach, the ECtHR stated that the right to a lawful tribunal 'should not be constructed in an overly expansive manner', and highlighted the need to strike a balance with the principles of legal certainty and irremovability of judges.[286] To this end, it developed a 'three-step test' to ensure that only sufficiently grave irregularities lead to a finding of violation of the right to a lawful court. The steps of the test are (1) a manifest breach of domestic law (the absence of which does not, however, necessarily rule out a violation), (2) assessment of the breach in the light of the object and purpose of the lawfulness requirement, and (3) 'the review conducted by national courts, if any, as to the legal consequences – in terms of an individual's Convention rights'. In this context, the passage of time can also be relevant.[287] Subsequently, applying the *Ástráðsson* test, the ECtHR held in several cases that panels of Polish courts that included members

[282] *Guðmundur Andri Ástráðsson v Iceland* (n 244) (defendant in a criminal case); *Xero Flor w Polsce v Poland,* Case 4907/18 (ECtHR), Judgment 7 May 2021 [ECLI:CE:ECHR:2021:0507JUD000490718] (party in civil proceedings regarding a claim for state liability); *Reczkowicz v Poland,* Case 43447/19 (ECtHR), Judgment 22 July 2021 [ECLI:CE:ECHR:2021:0722JUD004344719] (defendant in disciplinary proceedings); *Advance Pharma v Poland,* Case 1469/20 (ECtHR), Judgment 3 February 2022 [ECLI:CE:ECHR:2022:0203JUD000146920] (party in civil proceedings regarding a claim for state liability).

[283] *Guðmundur Andri Ástráðsson v Iceland* (n 244) para 220.

[284] Ibid para 117 ff.

[285] Ibid para 222. While the Court took pains to point out, in para 230, that it 'in no way seeks to impose uniformity in the judicial appointment practices', this does raise the question whether judicial elections such as those in Switzerland, where affiliation with a political party is usually a central factor, will in future be considered to be compliant with the requirement of a 'merit-based' appointment process, or whether the ECtHR might consider that Swiss courts lack the quality of a 'tribunal established by law' according to Article 6 ECHR. The Court did highlight, though, that the contracting states should retain 'a certain margin of appreciation' (para 243).

[286] Ibid para 237 ff.

[287] Ibid para 244 ff.

appointed under the judicial selection regime implemented by the *Prawo i Sprawiedliwość* (PiS) government did not meet the requirements of Article 6(1) ECHR for a tribunal established by law.[288]

193 Already before the ECtHR Grand Chamber's *Ástráðsson* judgment, the ECJ took a similar approach regarding the consequences of irregularities in the appointment of judges in the *Simpson* case. The ECJ held that a court must always check whether there is a serious doubt as to whether its composition complies with Article 47(2) CFR, including whether there was a serious irregularity in the appointment process of a judge participating in the case. It must do so on its own motion, this being a matter of public policy.[289] But the ECJ also pointed out that not every irregularity constitutes a violation of the right to a tribunal previously established by law. The irregularity must be

> of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned.[290]

This, according to the ECJ, 'is the case when what is at issue are fundamental rules forming an integral part of the establishment and functioning of that judicial system'.[291] As a potential example, the ECJ mentions appointing a judge for a shorter term than provided for by law (three years instead of six years).[292] Meanwhile, reusing a list of candidates from an earlier appointment procedure instead of issuing a new call of applications, while irregular, does not necessarily justify setting aside a judicial decision in which a judge appointed on this basis participated.[293] Indeed, legal certainty could be undermined if every irregularity in judicial appointment procedures could lead to the annulment of all judgments given by the irregularly appointed judge.[294]

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[288] *Xero Flor w Polsce v Poland* (n 282) (Constitutional Court); *Reczkowicz v Poland* (n 282) (Disciplinary Chamber of the Supreme Court); *Dolińska-Ficek and Ozimek v Poland* (n 281) (Chamber of Extraordinary Review of the Supreme Court); *Advance Pharma v Poland* (n 282) (Civil Chamber of the Supreme Court).
[289] *Erik Simpson v Council of the EU* and *HG v European Commission,* Cases C-542/18 RX-II and C-543/18 RX-II (ECJ), Judgment 26 March 2020 [ECLI:EU:C:2020:232] para 57; see also, particularly with respect to the right to an independent and impartial tribunal, *Chronopost and La Poste* v *UFEX and Others*, Cases C-341/06 P and C-342/06 P (ECJ), Judgment 26 March 2020 [ECLI:EU:C:2008:375] para 46, 48.
[290] *Erik Simpson v Council of the EU* and *HG v European Commission* (289) para 75.
[291] Ibid para 75.
[292] Ibid para 80.
[293] Ibid para 82.
[294] See the reference to legal certainty in Ibid para 50. Yet, while AG Sharpston in her opinion in the *Simpson* case ([ECLI:EU:C:2019:977] para 41 ff.) framed the issue as one of the 'balance between the right to a tribunal established by law and the principle of legal certainty', the ECJ only refers to legal certainty in passing and does not explicitly include it in the criteria for upholding or setting aside a decision made by an irregularly appointed judge.

194 During the controversies surrounding the Polish judicial reforms, several candidates made appeals to the Supreme Administrative Court challenging appointment decisions, and the Supreme Administrative Court ordered the stay of the implementation of several such decisions. These orders were, however, disregarded by the President, and legislation was enacted that declared the appeals to be discontinued. The ECJ ruled that these changes to Polish legislation, which were intended to prevent the Polish Supreme Administrative Court from asking the ECJ for a preliminary ruling on the compatibility the new judicial appointments procedure with EU law, were incompatible with Articles 267 TFEU,[295] Article 4(3) EU, and Article 19(1) TEU. The ECJ said that in the case of an infringement 'capable of giving rise to legitimate doubts […] as to the imperviousness of the judges appointed', the national court must disapply the amendment and continue to assume its previous jurisdiction.[296]

195 These developments raise the question whether judicial selection mechanisms in other European jurisdictions will also come under increasing scrutiny, as both the ECJ and the ECtHR seem to favour a system of independent nominating bodies. Yet in several European jurisdictions, judges are not selected in this way. In Austria and Germany, for example, the executive, and in some cases the legislature, plays a decisive role. In Switzerland, judges are mostly elected based on party-political affiliation. So far, the push to implement selection by independent bodies as a 'well-established European standard'[297] has not been universally successful. In Germany, eg, there has been significant criticism towards such a model.[298] In Switzerland, a referendum took place in 2021 on an initiative to introduce random selection of Federal Court judges from a pool of highly qualified candidates selected by an independent committee.[299] The Swiss Federal Council recommended the rejection of the initiative without making alternative

[295] The consequence could be that issues that could otherwise be resolved through a preliminary ruling would have to be addressed in infringement proceedings, as noted by M Leloup (n 248) 1158.

[296] *A.B. and Others v Krajowa Rada Sądownictwa,* Case C-824/18 (ECJ), Judgment 2 March 2021 [ECLI:EU:C:2021:153]; see also *A.K. v Krajowa Rada Sądownictwa and CP, DO v Sąd Najwyższy,* Joined Cases C-585/18, C-624/18 and C-625/18 (ECJ), Judgment 19 November2019 [ECLI:EU:C:2019:982]; *W.Ż.*, Case C-487/19 (ECJ), Judgment 6 October 2021 [ECLI:EU:C:2021:798].

[297] See European Commission, *The 2019 EU Justice Scoreboard,* 49 (https://commission.europa.eu/system/files/2019-05/justice_scoreboard_2019_en.pdf); Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities para 47 f (https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d).

[298] See F Wittreck, *Empfehlen sich Regelungen zur Sicherung der Unabhängigkeit der Justiz bei der Besetzung von Richterpositionen?, Gutachten G zum 73. Deutschen Juristentag* (CH Beck 2020) G 7 ff. who states (at G 10) that the concept of institutional independence underlying the European institutions' approach to the selection of justice 'rests on an absolutist understanding of the separation of powers that originates in political theology rather than in the *acquis* of common European constitutional law' (my translation). The delegates at the German Juristentag 2022 were equally hostile towards the idea of creating independent selection committees; see https://djt.de/wp-content/uploads/2022/09/Beschluesse.pdf 24 ff.

[299] The text of the initiative was published in Bundesblatt 2020 6847.

proposals, arguing that the existing system was working well. The initiative was rejected by a majority of 68 %.[300]

196 It remains to be seen how far the ECtHR will be willing to go as regards the implementation of autonomous requirements for judicial selection processes. So far, where it has held that a tribunal was not 'established by law' because of a flawed selection process, it has always based this on the finding of a manifest breach of domestic law.[301] Yet the statement that 'the very notion of a "tribunal"' requires a merit-based selection[302] does seem to signal a willingness to implement at least certain autonomous criteria for appropriate selection mechanisms.

197 The ECtHR has also ruled on the requirements of Article 6(1) ECHR regarding the reappointment of judges. It held that the 'tacit extension' of a judge's term of office after expiration of their term of office – without a statutory basis – is incompatible with the requirement of a 'tribunal established by law'.[303]

198 Meanwhile, it does not yet seem clear whether an unlawful removal of a judge from office could violate a party's right to a tribunal established by law if the result of the removal is that a different judge hears their case.[304]

2.4 Jurisdiction

199 The right to a tribunal established by law can also be relevant in the context of jurisdiction. As with respect to the selection of judges, there can be two different dimensions, ie, (1) constitutional prerequisites for jurisdictional rules, and (2) compliance with the applicable rules on jurisdiction in the individual case.

200 According to the case law of the ECtHR, a tribunal that lacks jurisdiction under the applicable (domestic) law is not 'established by law' as required by Article 6(1) ECHR.[305] Yet it is primarily for the national courts to interpret national law. The ECtHR only examines it was unreasonable for the national courts to assume that they had jurisdiction. In this context, the ECtHR also considers whether the assumption of

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[300] 'Bestimmung der Bundesrichterinnen und Bundesrichter im Losverfahren (Justiz-Initiative)' https://www.ejpd.admin.ch/ejpd/de/home/themen/abstimmungen/justiz-initiative.html.

[301] See the first step of the *Ástráðsson* test (para 192 above) and, regarding the Polish judicial reforms, *Advance Pharma v Poland* (n 282) para 306 ff. The Polish domestic courts took conflicting views on whether there was indeed a breach of domestic law. The Polish Constitutional Court issued several rulings declaring various ECtHR judgments incompatible with the Polish Constitution; see the extensive references in the ECtHR's *Advance Pharma* judgment para 110 ff.

[302] *Guðmundur Andri Ástráðsson v Iceland* (n 244) para 220.

[303] *Gurov v Moldova* (n 263) para 37; *Oleksandr Volkov v Ukraine,* Case 21722/11 (ECtHR), Judgment 9 January 2013 [ECLI:CE:ECHR:2013:0109JUD002172211] para 151.

[304] See Leloup (n 242) 1159 f.

[305] *Coëme and Others v Belgium* (n 263) para 105 ff. (regarding a joinder of criminal cases without a clear legal basis in the rules on connection).

jurisdiction is compatible with public international law, but it seems that also in this respect, only a reasonableness test is applied.[306]

201 It can also be a violation of the right to a tribunal established by law under Article 6(1) ECHR if an appellate court takes a type of decision that is not provided for in the applicable procedural rules. This was held by the ECtHR in the *Sokurenko* case, where the Supreme Court, acting as second cassation instance, quashed the decision of the first cassation instance and upheld the decision of the (first) appellate court. Under the applicable procedural rules, however, it only had the options to remit the case to the lower court for fresh consideration or to nullify the proceedings.[307] The ECtHR stated that while it was sometimes acceptable for the highest judicial body to take decisions 'not strictly provided by the law', this was only allowed in exceptional cases and based on clear and plausible reasons.[308]

202 Some national constitutions explicitly provide for the right to trial by a competent court – which entails the right not to be tried by a court that lacks jurisdiction. Examples are Article 5(LIII) of the Brazilian Constitution or Article 30(1) of the Swiss Constitution. In other jurisdictions, such as in Germany,[309] the right to be tried (only) by a competent court is not explicitly spelled out in the constitutional text but considered to be encompassed by the right to the lawful judge. As is the case under Article 6(1) ECHR, usually only a manifest violation of the applicable rules on jurisdiction amounts to a violation of such constitutional rights.[310]

203 Somewhat paradoxically, the right to a tribunal established by law can also require that a different court than the one that would nominally have jurisdiction under the applicable national law take up the case. In the context of the Polish PiS government's judicial reforms, the ECJ ruled that if there are 'legitimate doubts, in the minds of subjects of the law, as to the imperviousness of [a national] court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it', Article 47 CFR precludes the exclusive jurisdiction of such a court with regard to cases concerning the application of EU law, and that in such circumstances a court that would have jurisdiction in the relevant field in the absence of the exclusive jurisdiction rule may examine such cases.[311] Thus, the right to an independent and impartial court can require a departure from the

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[306] *Jorgic v Germany,* Case 74613/01 (ECtHR), Judgment 12 July 2007 [ECLI:CE:ECHR:2007:0712JUD007461301] para 67 ff. (regarding universal criminal jurisdiction for genocide).

[307] *Sokurenko and Strygun v Ukraine,* Cases 29458/04 and 29465/04 (ECtHR) [ECLI:CE:ECHR:2006:0720JUD002945804] para 26; see also *Aviakompaniya v Ukraine,* Case 1007/06 (ECtHR), Judgment 5 October 2017 [ECLI:CE:ECHR:2017:1005JUD000100607] para 44 with further references to similar cases.

[308] *Sokurenko and Strygun v Ukraine* (n 307) para 27.

[309] M Kment in Jarass/Pieroth, *Grundgesetz für die Bundesrepublik Deutschland* (18th edn, CH Beck 2024) GG Article 101 para 17.

[310] See eg, Jachmann-Michel (n 241) para 77 ff.

[311] *A.K. v Krajowa Rada Sądownictwa and CP, DO v Sąd Najwyższy* (n 296).

applicable rules on jurisdiction. While this approach reduces the risk that no court can legitimately handle the case, it does itself create a tension with the idea that there should be a clear basis in legislation for a court's jurisdiction.

204 In many jurisdictions, there are separate branches of courts for administrative law and civil or criminal matters. Sometimes the delineation of responsibilities between the branches can be difficult. The French Constitutional Council has explicitly addressed this issue and stated that the existence of such a division is not per se incompatible with the right to an effective judicial remedy [312] unless the relevant rules are excessively complex.[313]

205 In the US, the Supreme Court has original jurisdiction in a limited range of matters based directly on the US Constitution, ie, without the need for legislative action by Congress.[314] In all other cases, an act of Congress is required to confer jurisdiction on the federal courts.[315] Within the scope of their jurisdiction, courts are thought to have a range of 'inherent' ancillary powers which they can exercise without having to be authorised to do so by statute, such as procedural rule-making, case management, punishing contempt of court, or appointing certain court officers.[316]

206 Most constitutions do not contain explicit rules on personal and territorial jurisdiction. Switzerland is an exception in this regard. According to Article 30(2) of the Swiss Federal Constitution, '[u]nless otherwise provided by law, any person against whom civil proceedings have been raised has the right to have their case decided by a court within the jurisdiction in which they reside.'[317] This guarantee, originally limited to defendants domiciled in Switzerland, has a long tradition in Swiss constitutional law.[318] In recent years, it has been successively eroded, first for domestic disputes and then for cross-border cases. As regards the direct jurisdiction of Swiss courts, it has become largely meaningless. It still plays a significant role, however, with respect to the recognition and enforcement of foreign judgments. Outside the scope of the Lugano Convention, foreign

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[312] *M. Lamin J. [Compétence du juge administratif en cas de contestation de l'arrêté de maintien en rétention faisant suite à une demande d'asile formulée en rétention],* Case2019-807 QPC (Constitutional Council, France), Decision 4 October 2019 para 11: 'While the legislator may, in the interests of the proper administration of justice, unify the rules of jurisdiction within the courts' branch principally concerned, it is not required to do so' (translation: F Ferrand).

[313] *Loi de finances pour 2006,* Case 2005-530 DC (Constitutional Council, France), Decision 29 December 2005.

[314] This doctrine was established in *Chisholm v Georgia* (Supreme Court, US) [2 U.S. 419 (1793)] and further developed in *Kentucky v Dennison* (Supreme Court, US) [65 U.S. 66 (1861)].

[315] *The Mayor v Cooper* (Supreme Court, US) [73 U.S. 247 (1867)]; *Kline v Burke Construction Co* (Supreme Court, US) [260 U.S. 226, 234 (1922)].

[316] See eg, RJ Pushaw, Jr., 'The Inherent Powers of Federal Courts and the Structural Constitution' (2001) 86 Iowa Law Review 735; JJ Anclien, 'Broader is Better: The Inherent Powers of Federal Courts' (2008) 64(1) New York University Annual Survey of American Law 37.

[317] Unofficial English translation provided by the Swiss government, https://www.fedlex.admin.ch/eli/cc/1999/404/en.

[318] See Article 50 of the Swiss Constitution of 1848; Article 59(1).

judgments can only be recognised and enforced against Swiss-domiciled defendants in a very limited range of cases if the defendant has not submitted to a foreign court's jurisdiction.

207 In the US, constitutional prerequisites for personal jurisdiction also play an important role. While there is no explicit provision on jurisdiction in the US Constitution, it has been the Supreme Court's established case law since *Pennoyer v. Neff* that the due process clause of the Fourteenth Amendment sets the limits of the states' jurisdiction.[319] There have been some shifts as to how the limits should be drawn.[320] The basic premise, however, that there are such limits and that they are derived from the due process clause, remains intact. Yet this case law does not require states to enact detailed legislative rules on jurisdiction.

208 In civil law jurisdictions, meanwhile, the emphasis usually is on the predictability of jurisdiction. There is a range of detailed jurisdictional rules that are meant to clarify in advance which court has jurisdiction. This is seen as more important than ensuring that the court that has jurisdiction is best suited to deal with the case. The relevant connecting factors are determined in advance. These factors are meant to ensure that, in a typical case where they are present, there is a sufficient link between the parties or the dispute and the forum. In practice, however, the results of the application of such rules can be quite unpredictable.

209 In most jurisdictions, there are alternative fora for a range of cases. Some of them may be subsidiary, ie, only available in cases where another, primary, forum is not available. Yet often the plaintiff is given a choice between different fora within the same jurisdiction. There is generally a tacit assumption that the plaintiff will exercise this freedom appropriately and choose the court that is best suited for resolving the dispute. While it is recognised that such a choice can be exercised inappropriately in some cases, this is not considered as a problem that arises routinely. Unless the choice is downright abusive, courts in civil law jurisdictions generally do not second-guess the choice of forum made by the plaintiff. It is seen as legitimate to choose the forum that is most

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[319] *Pennoyer v Neff* (Supreme Court, US) [95 U.S. 714 (1878)]. For a detailed analysis of the Supreme Court's reasoning, in particular of the influence of Joseph Story, and indirectly, of continental European jurisprudence, on the *Pennoyer* opinion, see GC Hazard, 'A General Theory of State-Court Jurisdiction' (1965) Supreme Court Review 241, esp. 252 ff.

[320] Key cases are *International Shoe Co. v Washington* (Supreme Court, US) [326 U.S. 310 (1945)]; *Shaffer v Heitner* (Supreme Court, US) [433 U.S. 186 (1977)]; *World-Wide Volkswagen Corp. v Woodson* (Supreme Court, US) [444 U.S. 286 (1980)]; *Helicopteros Nacionales v Hall* (Supreme Court, US) [466 U.S. 408 (1984)]; *Burnham v Superior Court* (Supreme Court, US) [495 U.S. 604 (1990)]; *Goodyear Dunlop Tires Operations, S. A. v Brown* (Supreme Court, US) [564 U.S. 915 (2011)]; *Daimler AG v Bauman* (Supreme Court, US) [571 U.S. 117 (2014)]; *Bristol-Myers Squibb Co.* v *Superior Court of California, San Francisco Cty.* (Supreme Court, US) [582 U. S. ___ (2017)]; *Ford Motor Co. v Montana Eighth Judicial District Court* (Supreme Court, US) [592 U.S. ___ (2021)]; *Mallory v Norfolk Southern Railway Co.* (Supreme Court, US) [600 U.S. ___ (2023)].

advantageous for the plaintiff either procedurally or with regard to the expected substantive outcome.

210 Even in Germany, where the right to a lawful judge is generally interpreted very strictly, the possibility of 'forum shopping' is not considered as unconstitutional *per se*.[321] According to the case law of the German Federal Constitutional Court, in criminal matters the right to a lawful judge largely excludes giving the prosecution a discretionary choice between different courts.[322] Meanwhile, in civil cases, the rules on local jurisdiction often provide for concurrent fora. For such cases, § 35 of the German Code of Civil Procedure provides that the plaintiff can choose between all competent courts and thus explicitly authorises forum shopping. In the literature, the plaintiff's right to choose among concurrent fora is justified as being a compensation for the principle of *actor sequitur forum rei.*[323] While the freedom of choice must not be exercised in an abusive manner, it is broadly accepted that the plaintiff may choose the court where, based on previous case law, the prospects of success are the highest.[324] This used to be carried to the extreme in the field of unfair competition, where Article 14(2) of the German Unfair Competition Act gave the plaintiff the choice between all German courts in cases of ubiquitous torts. Since a reform in 2020, this choice has been restricted with respect to domestic defendants. A combination of a very rigid system of assignment of cases within the court with a very broad choice of fora can create problematic opportunities for manipulation.

211 Some jurisdictions provide for the possibility of transferring cases from one court to another. For example, in France, there used to be a rule allowing the *juge de proximité* to relinquish jurisdiction in favour of the court of first instance in cases that posed serious legal difficulties (former Article L231-5 of the French Judicial Organisation Code). The Constitutional Council considered this to be compatible with the right to a lawful judge emanating from the citizens' right to equality before the law and before justice.[325] According to the ECtHR's case law, however, discretionary reassignment of a case to

[321] See, however, Case 1 BvR 1389/97 (Federal Constitutional Court, Germany), Judgment 31 August 1999 [ECLI:DE:BVerfG:1999:rk19990831.1bvr138997], where the Federal Constitutional Court said that rules giving the plaintiff jurisdictional choices must not be interpreted in a way that would create an excessive potential for manipulation.

[322] See Case 1 BvR 295/58 (Federal Constitutional Court, Germany), Judgment 19 March 1959, BVerfGE 9, 223, 226 ff; G Morgenthaler in V Epping and C Hillgruber (ed), *BeckOK Grundgesetz* (57th edn, C.H. Beck 2024) Grundgesetz Article 101 para 18.

[323] R Patzina in *Münchener Kommentar zur ZPO* (6th edn, C.H. Beck 2020) ZPO § 35 para 1.

[324] H Roth in Stein/Jonas, *Kommentar zur Zivilprozessordnung,* vol. 1 (23rd edn, Mohr Siebeck 2014) § 35 ZPO (GCCP) para 5.

[325] *Loi d'orientation et de programmation pour la justice*, Case no 2002-461 DC (Constitutional Council, France), Decision 29 August 2002, para 21 ff; French report, 14.

another court is incompatible with the right to a tribunal established by law, at least if there are 'neither ascertainable reasons nor criteria' for the reassignment.[326]

212 While courts in civil law jurisdictions generally do not interfere with the plaintiff's choice among several competent fora, common law courts use the *forum non conveniens* doctrine to dismiss cases for which another court would be a more appropriate forum.[327] This doctrine is often perceived as a counterweight to very broad jurisdictional bases. As it focuses on the circumstances of the individual case and leaves broad discretion to the judge, it would be difficult to reconcile with a constitutional requirement of clear-cut and predictable rules on jurisdiction. So far, the ECtHR has not ruled on whether *forum non conveniens* is compatible with the right to a tribunal established by law. The ECJ did, however, rule that it was incompatible with the Brussels Convention, as it would be 'liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention […], and consequently to undermine the principle of legal certainty, which is the basis of the Convention'.[328]

213 In Germany, the *forum non conveniens* doctrine is widely considered to be incompatible with the constitutional right to a lawful judge, and scholars mostly oppose its reception, as its results are considered to be arbitrary and unpredictable.[329] In some other civil law jurisdictions, however, it has been gaining ground in recent decades. In China, it has been accepted in judicial practice for a number of years, at least to a limited degree.[330] An amendment of the Chinese Code of Civil Procedure that was enacted in 2023 has created a statutory basis for dismissal on *forum non conveniens* grounds.[331] In the Republic of Korea, an amendment of the rules on international litigation in the Korean Private International Law Act that came into force in 2022 also introduced *forum non conveniens* into Korean law.

214 The *forum non conveniens* doctrine has even been incorporated into the Brussels regime, though only for specific constellations. It made its first appearance in Article 15

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[326] *Miracle Europe Kft v Hungary,* Case 57774/13 (ECtHR), Judgment 12 January 2016 [ECLI:CE:ECHR:2016:0112JUD005777413] para 63 (concerning the discretionary power of the President of the National Judicial Council to transfer cases from one court to another, eg, to achieve a more balanced workload distribution); but see *Biagioli v San Marino,* Case 8162/13 (ECtHR), Judgment 8 July 2014 [ECLI:CE:ECHR:2014:0708DEC000816213] para 70 ff. (reassignment of a criminal case to a civil judge by the Chief Justice of a small jurisdiction after all criminal judges had recused themselves).

[327] See A Arzandeh, *Forum (Non) Conveniens in England* (Hart 2021).

[328] *Owusu v Jackson,* Case C-281/02 (ECJ), Judgment 1 March 2005 [ECLI:EU:C:2005:120] para 41.

[329] H Roth (n 324) Introduction to § 12 para 52.

[330] G Tu, '*Forum Non Conveniens* in the People's Republic of China' (2012) 11(2) Chinese Journal of International Law 342; ZS Tang, 'Declining Jurisdiction by Forum *Non Conveniens* in Chinese Courts' (2015) 45 Hong Kong Law Journal 351, 353 ff.

[331] S Tang, 'A Major Amendment to Provisions on Foreign-Related Civil Procedures Is Planned in China', https://conflictoflaws.net/2023/a-major-amendment-to-provisions-on-foreign-related-civil-procedures-is-planned-in-china/; S Tang, 'Overview of the 2023 Amendments to Chinese Civil Procedure Law', https://conflictoflaws.net/2023/overview-of-the-2023-amendments-to-chinese-civil-procedure-law/.

of the Brussels II *bis* Regulation[332] that allowed 'transfer to a court better placed to hear the case' in exceptional circumstances in parental responsibility cases. The rules on such transfer are now contained in Articles 12 and 13 of the Brussels II *ter* Regulation[333]. The Brussels I *bis* Regulation also refers to elements of *forum non conveniens* in its rules on *lis pendens* and related proceedings in the relationship with third-state courts (Articles 33 and 34 Brussels I *bis* Regulation). These rules, however, require that proceedings are already pending before the third-state court. Meanwhile, there is no such requirement under the *forum non conveniens* doctrine as applied by common law courts.

215 The mandate of the HCCH Working Group on Jurisdiction highlights the primary role of both jurisdiction rules and the *forum non conveniens* doctrine in a possible future global instrument on concurrent proceedings.[334] One may expect, therefore, that such a future instrument will not give strict priority to the predictability of jurisdiction.

216 On the whole, therefore, one can perceive a global trend towards more flexibility for courts in applying jurisdictional rules. The relationship of such discretion with the predictability of jurisdiction, but also with the right of access to justice, is not straightforward. For jurisdictions such as Germany with a strict understanding of the right to a lawful judge, its introduction would mean a deconstitutionalization and a loss of predictability. Yet *forum non conveniens* does not necessarily reduce predictability in all circumstances. After all, it was conceived as an instrument to curb excessive forum shopping in a common law environment, where there is a lack of clear-cut rules on jurisdiction, and the potential for unwelcome surprises (from the debtor's perspective) might be greater without it. Where there are clear-cut jurisdictional rules, though, it is much more difficult to justify giving the courts discretion in applying them.

2.5 Composition of the Court

217 As already indicated in the context of the selection of judges, the phrase 'established by law' in Article 6(1) ECHR covers 'not only the legal basis for the very existence of a 'tribunal' but also the composition of the bench in each case'.[335] As with the other components of the right to a tribunal established by law, only manifest breaches of the domestic rules on the composition of tribunals constitute a violation of Article 6(1)

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[332] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

[333] Council Regulation (EU) 2019/1111 (n 184).

[334] Conclusions and Decisions adopted by the Council on General Affairs and Policy of the HCCH of March 2021, para 9(b).

[335] *Posokhov v Russia,* Case 63486 (ECtHR), Judgment 4 March 2003 [ECLI:CE:ECHR:2003: 0304JUD006348600] para 39; *Gurov v Moldova* (n 263) para 35; *Fatullayev v Azerbaijan* (n 263) para 144; *Ezgeta v Croatia,* Case 40562/12 (ECtHR), Judgment 7 September 2017, para 38 ff; see also the summary of the ECtHR's case law on the lawful composition of the court in *Guðmundur Andri Ástráðsson v* Iceland (n 244) para 217.

ECHR.[336] Furthermore, there can be a violation if there is reasonable doubt as to whether the composition of the panel is in compliance with the applicable law and the concerns are not addressed by the domestic courts.[337]

218 The ECtHR has found a violation of the right to a tribunal established by law, eg, where there were fewer judges on a panel than legally required;[338] where a member of a judicial panel had been replaced during the proceedings without a sufficient legal basis,[339] and where a court administrator had conducted proceedings that should have been conducted by a judge.[340]

219 The criteria for the lawful composition of panels tend to be less stringent than those for the establishment of the court as such. While executive interference would be incompatible with Article 6(1) ECHR and the composition also cannot be left entirely to the discretion of judicial authorities, the ECtHR does tolerate 'some latitude' for judicial authorities, such as court presidents, with regard to organising the workload and forming panels, as long as objective criteria are used.[341]

220 According to the case law of the German Federal Constitutional Court, the right to a lawful judge can also be violated if there is a systemic lack of appropriate court personnel. Judges who are not fully personally independent according to Article 97(2) of the Basic Law, ie, who have not (yet) been appointed to their judicial post for life, may only be used if there is a compelling reason, and only to the extent absolutely necessary for purposes such as training of junior judges or assessment of suitability for senior judicial positions.[342] Temporary secondment of judges to other courts (eg, of first-instance judges to an appellate court), or the appointment of temporary judges, is also constitutionally acceptable if there is a temporary workload surge.[343] Yet if there is a permanent understaffing, additional permanent judicial posts must be created. If seconded judges are used instead in such a situation, this violates the parties' right to a

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[336] For a case where the ECtHR held that there was such a flagrant breach, see *Lavents v Latvia,* Case 58442/00 (ECtHR), Judgment 28 November 2002 [ECLI:CE:ECHR:2002:1128JUD005844200] para 114 ff.

[337] *Richert v Poland,* Case 54809/07 (ECtHR), Judgment 25 October 2011 [ECLI:CE:ECHR:2011:1025JUD005480907] para 51 ff.

[338] *Momčilović v Serbia,* Case 23103/07 (ECtHR), Judgment 2 April 2013 [ECLI:CE:ECHR:2013:0402JUD002310307] para 32; *Jenița Mocanu v Romania,* Case 11770/08 (ECtHR), Judgment 17 December 2013 [ECLI:CE:ECHR:2013:1217JUD001177008] para 41.

[339] *Kontalexis v Greece*, Case 59000/08 (ECtHR), Judgment 31 May 2011 [ECLI:CE:ECHR:2011:0531JUD005900008] para 43 f. (replacement of a panel member for being 'unable to attend' a hearing without giving any reasons for such inability).

[340] *Ezgeta v Croatia* (n 335) para 38 ff.

[341] *Pasquini v San Marino,* Case 50956/16 (ECtHR), Judgment 2 May 2019 [ECLI:CE:ECHR:2019:0502JUD005095616] para 110 ff. (determination of the number of judges sitting on a panel based on the complexity of the case).

[342] Cases 1 BvL 13/52, 1 BvL 21/52 (Federal Constitutional Court, Germany), Order 9 November 1955, BVerfGE 4, 331; Case 2 BvR 957/05 (Federal Constitutional Court, Germany), Order 22 June 2006 [ECLI:DE:BVerfG:2006:rk20060622.2bvr095705] para 7.

[343] Case 1 BvR 1623/17 (Federal Constitutional Court, Germany), Order 10 November 2022 [ECLI:DE:BVerfG:2022:rk20221110.1bvr162317] para 12.

lawful judge.[344] Where the applicable rules allow a departure from the normal composition of the court (eg, decision by the chair of the panel as single judge in urgent cases) in exceptional circumstances, the decision must clearly set out why the case at hand was exceptional.[345] Thus, the German Constitutional Court does not tolerate attempts to save on judicial budgets by using rules that were designed to deal with temporary and exceptional problems to address permanent workforce shortages.

221 In many jurisdictions, courts are divided into different departments or senates, usually to allow for a certain degree of specialisation. Such subdivisions of courts usually consist of more judges than needed for the panel in each individual case, so a selection must be made to form each individual panel. The 'lawfulness' issues arising in this context are essentially the same as where panels for individual cases are drawn from the plenary of the court and will be addressed below.[346]

2.6 Assignment of Cases to Panels/Judges within the Court

222 Courts usually consist of more than one judge, and mostly they do not decide in plenary session. Even where they do, there are specific tasks, such as acting as judge rapporteur or as opinion writer, that must be allocated to individual judges. In jurisdictions that subscribe to the idea of judicial independence and impartiality, there seems to be universal agreement that the process of panel formation and assignment of judicial responsibilities should ensure the independence and impartiality of the selected judge or panel, and that the assignment process must not be used to manipulate the outcome of individual cases.[347] Nonetheless, there are considerable differences among jurisdictions, and even among individual courts, as to how the process is handled, and how much flexibility exists in individual cases.

223 There are two models at opposite sides of a spectrum that could be said to ensure the neutrality of the chosen judge or panel equally well: complete pre-determination and entirely random assignment. Different benefits and drawbacks are associated with each of them. Strict pre-determination makes it easier to enable judges to specialise on a certain type of cases – which can, however, also have its own downsides[348]. Random assignment might be more conductive to an even distribution of the workload, though

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[344] Ibid para 15; see also Case 2 BvR 780/16 (n 252) para 67 ff. (repeated temporary judicial appointments).

[345] Case 1 BvR 1510/17 (Federal Constitutional Court, Germany), Order 28 September 2017 [ECLI:DE:BVerfG:2017:rk20170928.1bvr151017] para 19 ff.

[346] See 2.6.

[347] See eg, P Butler, 'The Assignment of Cases to Judges' (2003) 1 NZJPIL 83, 84: '[W]hile litigants can be expected to accept the 'luck of the draw', they should not be expected to tolerate a 'stacking of the deck'.'

[348] Regarding the potential downsides of specialisation, see pt IV ch 3.

this is not guaranteed.[349] It might also prevent overspecialisation and 'highjacking' of a particular type of case by individual judges.[350] Furthermore, it can help to avoid manoeuvring by the plaintiff that can occur where a combination of rigid assignment rules and a variety of jurisdictional choices makes it possible to 'shop' for individual judges – a practice facilitated by predictive software.[351] Both models must accommodate events that might make it necessary to depart from the original assignment, such as recusal, illness, scheduling conflicts, or other reasons for inability to participate in the case. From an efficiency perspective, neither of the models promises the optimal outcome. A discretionary system would, at least theoretically, create the possibility to allocate each case to the judge or panel best suited to deal with it – based on their qualification, prior experience, and spare resources. It is therefore appealing to those who favour a 'managerial' approach to justice. Yet another approach is to acknowledge the influence of factors such as 'race', gender, or political affiliation on judicial decisions,[352] and to try to build balanced panels where a diversity of viewpoints and backgrounds is represented.[353]

224 In the US, there are no established constitutional rules on judicial assignments. The Supreme Court allows a large measure of discretion, as long as the right to 'a fair trial in a fair tribunal' is not violated[354] – which will not, however, be lightly assumed merely

[349] See JL Entin, 'The Sign of "The Four": Judicial Assignment and the Rule of Law' (1998) 68 Mississippi Law Journal 369, 378; see also S Willett Bird, 'The Assignment of Cases to Federal District Court Judges' (1975) 27(2) Stanford Law Review 475, 476 ff, who argues that random case assignment has particular drawbacks if newly appointed, inexperienced judges are part of the judicial pool.

[350] One famous controversy around this in the US concerned the composition of panels in civil rights and desegregation cases in the US Court of Appeals for the Fifth Circuit. The Chief Judge of that court at the time was accused of 'panel rigging' by packing panels with judges sympathetic to the civil rights movement. For a detailed analysis, see Entin (n 349) 369 ff; JR Brown Jr and A Herren Lee, 'Neutral Assignment of Judges in the Court of Appeals' (2000) 78(5) Texas Law Review 1037, 1044 ff. See also CW Tobias, 'A Note on the Neutral Assignment of Federal Appellate Judges' (2002) 39 San Diego Law Journal, 151 ff.

[351] 'Einsatz von KI und algorithmischen Systemen in der Justiz. Grundlagenpapier zur 74. Jahrestagung der Präsidentinnen und Präsidenten der Oberlandesgerichte, des Kammergerichts, des Bayerischen Obersten Landesgerichts und des Bundesgerichtshofs vom 23. bis 25. Mai 2022 in Rostock' https://www.justiz.bayern.de/media/images/behoerden-und-gerichte/oberlandesgerichte/nuernberg/einsatz_von_ki_und_algorithmischen_systemen_in_der_justiz.pdf, 36 f; see also V Römermann, 'Vom Glück personalisierter Urteilsanalyse', Legal Tribune Online 2 January 2020, https://www.lto.de/recht/legal-tech/l/urteilsanalyse-predictive-analytics-legal-tech-software-algorithmen-justiz-profil-richter-datenschutz-gerichtsoeffentlichkeit/. In France, the analysis of individual judges' behaviour was outlawed in 2019; see M Langford and M Rask Madsen, 'France Criminalises Research on Judges', Verfassungsblog 22 June 2019, https://verfassungsblog.de/france-criminalises-research-on-judges/, DOI: 10.17176/20190622-232658-0. K Kuchenbauer, 'Der gläserne Richter' (2021) Juristenzeitung 647 ff advocates for a similar approach in Germany.

[352] Numerous studies have been conducted particularly (though not only) in the US about the influence of such factors on judicial decisions. For a recent overview of such studies, see D Thorley, 'Randomness *Pre*-Considered: Recognizing and Accounting for "De-Randomizing" Events When Utilizing Random Judicial Assignments' (2020) 17(2) Journal of Empirical Legal Studies 342, 348 ff.

[353] With respect to the US Supreme Court, see the analysis of various proposals in *Final Report December 2021* (n 280) 84 ff.

[354] *Bracy v* Gramley (Supreme Court, US) [520 U.S. 899 (1997)] 904 f.

based on how the case was assigned. Lower federal courts have also been reluctant to assume a due process right to random assignment, or to any other specific assignment method, and have rejected the proposition that it is unconstitutional to allow a discretionary departure from random assignment in individual cases, taking the view that regulations on case allocation 'are promulgated […] primarily to promote efficiency of the court and the court has a large measure of discretion in applying them'.[355] In practice, whether explicitly prescribed in rules or laid down as policy or not, federal US circuit and district courts tend (or 'purport')[356] to assign cases on a (more or less) random basis,[357] but exceptions for efficiency purposes are often permitted,[358] and even after the initial assignment, changes can be made, often without informing the parties.[359] It is generally difficult to challenge the assignment or reassignment of cases, even if there was a breach of an assignment plan.[360] While random assignment of cases tends to make 'judge shopping' more difficult, it still can occur, particularly in single-judge districts.[361]

225 From the perspective of Article 6 ECHR, the ECtHR also allows a significant margin of appreciation for the domestic authorities, provided that the requirements of independence and impartiality are respected. A process where a judicial authority (such as a court president) is allowed significant discretion in the assignment of cases is not, per se, incompatible with the ECHR.[362] Nonetheless, the ECtHR points out that court organisation cannot be left entirely to the discretion of the judicial authorities.[363] Stricter criteria apply, and reasons may need to be given, if a case is reassigned to another judge or panel in the course of the proceedings.[364] Reassignments are only permissible on objective grounds, and any administrative discretion must be exercised 'within transparent parameters'.[365]

226 The German Federal Constitutional Court derives stricter criteria than those imposed by the ECtHR from Article 101(1) of the Basic Law. It takes the view that the panel (including its composition) or judge deciding each individual case must be determined in advance

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[355] See *United States v Keane* (District Court for the Northern District of Illinois, US) [375 F. Supp. 1201, 1204 f. (N.D. Ill. 1974)].

[356] Brown Jr and Herren Lee (n 350) 1041. Regarding the challenges arising from not truly random assignment for empirical legal research, see Thorley (n 352).

[357] In 2024, the Judicial Conference of the United States even proposed random assignment across federal districts to curb the practice of 'judge shopping'; see https://www.uscourts.gov/news/2024/03/12/conference-acts-promote-random-case-assignment; in this context, see also para 180 above.

[358] Entin (n 349) 379 f.

[359] Brown Jr and Herren Lee (n 350) 1043, 1069 ff.

[360] Entin (n 349) 380 ff; JBrown Jr and Herren Lee (n 350) 1041 ff.

[361] See para 180 above.

[362] *Pasquini v San Marino* (n 341) para 103 ff.

[363] Ibid para 110.

[364] Ibid para 107.

[365] *DMD Group, a.s. v Slovakia,* Case 19334/03 (ECtHR), Judgment 5 October 2010 [ECLI:CE:ECHR:2010:1005JUD001933403] para 70.

as clearly as possible.[366] The Federal Constitutional Court considers this to be necessary to prevent any influence on the outcome of the case through manipulation of the selection of the judges responsible for deciding the case.[367] While some flexibility is accepted to enable reacting to a judge's absence, illness or overburdening, each court's allocation plan must determine as clearly as possible which judge(s) will decide in such situations.[368] If a division of a court has more judges than needed to constitute a panel, the right to the lawful judge requires that abstract criteria are laid down to determine the composition of the panel in each individual case.[369] The rigidity of these rules can create challenges particularly for the handling of mass disputes. Some courts have meanwhile modified their case allocation plans to avoid overburdening individual judges with such disputes, particularly by implementing assignment by rotation for certain matters.[370]

227 In Austria, the situation is similar to the one in Germany. Article 87(3) of the Austrian Constitution even explicitly provides for the requirement of a case distribution plan. It also states that a case may only be reassigned to a different judge than the one designated in the case allocation plan by order of the competent chamber, which may only be made if the judge is unavailable or cannot handle the case within a reasonable time because of overburdening. Austrian courts have also faced challenges with the handling of mass disputes, and some of them have reacted by adapting their case allocation practices, replacing assignment based on the defendant's name by assignment by rotation.[371] The Austrian Constitutional Court has regarded a case allocation plan based on the rotation principle as compatible with Article 87(3) of the Constitution.[372] Some scholars, however, take the view that Article 87(3) of the

[366] Cases 2 BvR 42/63, 2 BvR 83/63, 2 BvR 89/63 (Federal Constitutional Court, Germany), Order 24 March 1964, BVerfGE 17, 294, 298 f.

[367] Ibid 299. The focus of this approach is clearly on preventing manoeuvring on the side of the authorities responsible for case allocation. Meanwhile, as indicated (para 223), a combination of rigid assignment rules and forum shopping opportunities can allow the plaintiff to manipulate the outcome of the case.

[368] Ibid 299 f.

[369] Case 1 PBvU 1/95 (Federal Constitutional Court, Germany) Plenary Order 8 April 1997, BVerfGE 95, 322.

[370] On the compatibility of assignment by rotation with the right to a lawful judge, see Cases StB 25 and 26/21 (Federal Court of Justice, Germany), Order 16 June 2021, (2021) Neue Zeitschrift für Strafrecht 762.

[371] The Commercial Court of Vienna even did this pre-emptively after it had been forewarned of the advent of aggregated claims, see P Oberhammer, 'Kollektiver Rechtsschutz bei Anlegerklagen', in Österreichischer Juristentag (ed.), *Verhandlungen des 19. Österreichischen Juristentages Wien 2015 vol. II/1* (Manz 2015) 73, 94 f.

[372] Case U5/08 (Constitutional Court, Austria), Judgment 8 October 2008 [ECLI:AT:VFGH:2008:U5. 2008]; see also C Piska in K Korinek et al. (ed), *Österreichisches Bundesverfassungsrecht* (14th instalment, Verlag Österreich 2018) B-VG Article 87 para 27.

Constitution requires that the case allocation plan must enable the parties to identify in advance the specific judge(s) who will handle their case.[373]

228 The Swiss approach is much more flexible and rather similar to the one in the US. Often there are no clear rules on judicial assignments, and the distribution of the workload is largely left to the discretion of the president of the court or court division, or even of court administrators. There is often a lack of transparency regarding the mechanisms for case assignment. Not all courts have explicit rules on judicial assignments, and where rules exist, they can be quite vague. Article 40 of the Standing Orders of the Swiss Federal Court[374], eg, authorises the president of the competent division to form panels based on a variety of factors such as judges' workloads and schedules, language, gender, specialisation, and previous participation in similar cases. These criteria are so vague that it would be difficult to pin down a breach in a specific case.[375] Yet even where purportedly random processes are used, there can be significant tampering. The Swiss Federal Administrative Court, a first-instance federal court, has used a random assignment software, nicknamed 'Bandlimat' after the court's first president Christoph Bandli, from its creation in 2007.[376] While this process was promoted as ensuring the strict neutrality of assignments, a study published in 2021 uncovered that in 45 % of cases, the software-based assignment had been overruled, sometimes by non-judicial court personnel, and 40 % of the changes were unexplained.[377] An evaluation of the federal courts' case assignment processes commissioned by the Swiss Parliament[378] also uncovered a range of weaknesses, prompting the Parliamentary Business Review Committees to make recommendations for improvements regarding objectivity and transparency.[379] Case assignment processes at cantonal courts can also be quite intransparent and give those responsible for distributing the workload a lot of discretion.

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[373] HW Fasching, 'Verfassungsmäßige Gerichtsorganisation' in Österreichischer Juristentag (ed), *Verhandlungen des 10. Österreichischen Juristentages Wien 1988* (Manz 1988) 1, 70 f.; Rechberger and Simotta (n 2) para 55; see also G Kodek in Fasching/Konecny, *Zivilprozessgesetze*, vol. III/1, (2nd edn, Manz 2017) ZPO § 260 para 54 f.

[374] Reglement über das Bundesgericht, SR 173.110.131.

[375] The Federal Court itself has held that the rules on judicial assignments contained in its Standing Orders are compatible with the requirement of a tribunal established by law, see Case 6B_1356/2016 (Federal Court, Switzerland), Judgment 5 January 2018, BGE 144 I 37.

[376] The Swiss Federal Court also uses random software-based assignment in its case allocation, but only for the selection of the panel members who do not preside or act as rapporteur. Yet presumably the assignment would have to be changed if the resulting panel does not comply with the criteria laid down in the Standing Orders.

[377] K Büchel, R Kiener, A Lienhard and M Roller, 'Automatisierte Spruchkörperbildung an Gerichten. Grundlagen und empirische Erkenntnisse am Beispiel des Bundesverwaltungsgerichts', 2021/4 Justice – Justiz – Giustizia.

[378] Geschäftsverteilung bei den eidgenössischen Gerichten. Bericht der Parlamentarischen Verwaltungskontrolle zuhanden der Geschäftsprüfungskommissionen des Nationalrates und des Ständerates vom 5. November 2020, Bundesblatt 2021 2436.

[379] Geschäftsverteilung bei den eidgenössischen Gerichten. Bericht der Geschäftsprüfungskommissionen des Ständerates und des Nationalrates vom 22. Juni 2021, Bundesblatt 2021 2437.

229 In a case-law system where the authority of precedent traditionally plays a much bigger role than in the civil-law world, it can also be very important which judge is selected to write the majority opinion.[380] In the US Supreme Court, the Chief Justice decides which justice writes the majority opinion. If the Chief Justice is in the minority in the conference vote, the senior Associate Justice who voted with the majority assigns the opinion.[381] Due to the import of Supreme Court judgments, including the specific arguments on which the majority opinion relies, for the development of the law, this is an important prerogative power,[382] even if somewhat mediated by the right of every Supreme Court justice to write a concurring or dissenting opinion. In some US state supreme courts, meanwhile, opinion-writing is assigned at random or by rotation.[383]

230 In civil law courts, a judge often is selected as the 'rapporteur' responsible to prepare the court's decision and to write it up, regardless of whether the rapporteur's proposal for the outcome of the case is accepted. The assignment of the rapporteur position can be decisive for the outcome, as their proposal will often go unchallenged, partly due to the high case load of senior civil law courts. Yet even in Germany it is disputed whether the panel member serving as rapporteur must be predetermined in the same manner as a single judge or panel members.[384]

3 COLLECTIVE LITIGATION

3.1 Introduction

231 Typically, there are no constitutional rules explicitly dealing with the existence or design of collective redress schemes in the field of private law.[385] There is also a relative paucity of literature seriously engaging with constitutional implications of such schemes, particularly from the perspective of the right to access to a court. Constitutional arguments nonetheless are put forward in this context, both by proponents and by

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[380] For a theoretical analysis, see eg, JR Nash, 'Expertise and Opinion Assignment on the Courts of Appeals: A Preliminary Investigation' (2014) 66(4) Florida Law Review 1599; S Farhang, JP Kastellec, and GJ Wawro, 'The Politics of Opinion Assignment and Authorship on the US Court of Appeals: Evidence from Sexual Harrassment Cases' (2015) 44 Journal of Legal Studies Supplement 1, 59.

[381] It has been suggested that this has led to tactical votes by Chief Justices to ensure that they were in the majority and could assign the opinion, see RJ Lazarus, 'The Opinion Assignment Power, Justice Scalia's Un-Becoming, and UARG's Unanticipated Cloud over the Clean Air Act' (2015) 39 Harvard Environmental Law Review 37, 40 fn 31 with further references.

[382] PJ Wahlbeck, 'Strategy and Constraints on Supreme Court opinion Assignment' (2006) 154 University of Pennsylvania Law Review 1729.

[383] See M Gann Hall, 'Opinion assignment procedures and conference practices in state supreme courts' (1990) 73(4) Judicature 209, 210; DA Huges, T Wilhelm, and RL Vining Jr., 'Deliberation Rules and Opinion Assignment Procedures in State Supreme Courts: A Replication' (2015) 36(4) Justice System Journal 395, 402 f.

[384] See Jachmann-Michel (n 241) para 36 ff.

[385] An exception in this regard is the Brazilian Constitution; see C Lima Marques, 'Enforcing Consumer and Capital Markets Law in Brazil' in B Gsell and TMJ Möllers (ed), *Enforcing Consumer and Capital Markets Law. The Diesel Emissions Scandal* (Intersentia 2020) 291, 295.

opponents. In Germany in particular, resistance to collective redress instruments is often constitutionally framed.

232 Some international and supranational instruments create obligations for states to enable collective access to justice. In the EU, the Injunctions Directive obliged member states to give qualified entities standing to sue for injunctive relief for the protection of consumers' collective interests.[386] In 2022, it was replaced by the Representative Actions Directive,[387] which added an obligation to allow representative actions for redress measures. Article 9(2) of the Aarhus Convention provides for a right of access to justice in environmental matters for environmental NGOs; such NGOs may also have standing under Article 9(3) of the Aarhus Convention.[388] Several EU legislative acts aiming at the implementation of the Aarhus Convention in the EU and its Member States also contain rules on access to justice in environmental matters.[389] Proceedings concerning the environment have been an important playfield for the representation of collective interests by NGOs and interested individuals. Another area where collective redress has increasingly attracted the attention of international lawmakers is business and human rights litigation. In the official commentary on UN Guiding Principle 26 on Business and Human Rights, 'class actions and other collective action procedures' are mentioned among the 'state-based judicial mechanisms' to ensure 'access to remedy' for business-related human rights abuses.[390] Article 4.2(d) of the draft legally binding instrument on business and human rights provides that

> [victims of human rights abuses in the context of business activities] [shall] be guaranteed the right to submit claims, including by a representative or through class action in appropriate cases, to courts and non-judicial grievance mechanisms of the States Parties.[391]

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[386] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version), replacing Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests.

[387] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

[388] For a detailed analysis, see A Danthinne, M Eliantonio, and M Peeters, 'Justifying a presumed standing for environmental NGOs: A legal assessment of Article 9(3) of the Aarhus Convention' (2022) 31 Review of European, Comparative and International Environmental Law (RECIEL) 411.

[389] For an overview, see https://environment.ec.europa.eu/law-and-governance/aarhus_en.

[390] United Nations Human Rights Office of the High Commissioner, 'Guiding Principles on Business and Human Rights - Implementing the United Nations "Protect,Respect and Remedy" Framework' https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

[391] Updated draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf.

233 The rise of collective litigation has been styled as the 'second wave' of the access to justice movement.[392] Yet the impact on individuals' access to justice largely depends on the type of instrument. The (positive) right of access to a court and a party's negative autonomy, ie, the freedom not to enforce a right, can both be affected by such schemes. In this context, the many, and sometimes contradictory, facets of 'access to justice' become apparent.

3.2 Collective Litigation as a Tool to Promote Access to Justice

234 While collective litigation instruments can limit the rightsholders' own access to court, this is usually not their purpose or the focus of the debate around them. Quite to the contrary, they are mainly discussed as tools to improve access to justice. Several different – potentially overlapping – aspects can be relevant in this context: (1) more effective enforcement of individual claims; (2) enforcement of objective law, and (3) representation of 'diffuse' interests.

3.2.1 More Effective Enforcement of Individual Claims

235 In some cases, simply bundling similar claims in one lawsuit can significantly improve the chances of successfully enforcing them, as it enables individuals who each have 'a small stake in a large controversy' to join forces and confront a stronger, more experienced defendant on a more equal footing.[393]

236 In such 'David v Goliath' situations, collective litigation can also be an important driver for the emergence of a 'plaintiff bar' with the ability and resources to represent certain types of plaintiffs effectively. Where that does not exist, it can be difficult for consumers, employees, and similar groups to find effective legal representation against corporate defendants. High-profile law firms in such jurisdictions tend to specialise in representing corporations, and they can be unwilling to represent clients coming from the 'other side', even where such clients are able and willing to pay. Another indirect way in which the enforcement of individual claims can be promoted by collective redress instruments is to free up resources by making the processing of related claims more efficient.

237 Some scholars have juxtaposed collective litigation and ADR, noting that ADR can serve to exclude disadvantaged groups' grievances from the legal sphere and thus further exacerbate discrimination and power imbalances.[394] In contrast to that, collective litigation could be seen as a means of empowering such groups to assert their rights. Yet such a picture can be misleading, as settlement is by far the most common outcome of

[392] B Garth and M Cappelletti, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 Buffalo Law Review 181, 209 ff.
[393] See the classic article by H Kalven, Jr. and M Rosenfield, 'The Contemporary Function of the Class Suit' (1941) 8(4) University of Chicago Law Review 684.
[394] See eg, MA Noone, 'ADR, Public Interest Law and Access to Justice: The Need for Vigilance' (2011) 37(1) Monash University Law Review 57, 67 ff.

collective litigation, and indeed often seems almost inevitable once the collective lawsuit is declared admissible or certified. Individual group members generally have little influence on the settlement negotiations. Often, they have the right to opt out of the collective settlement, but to obtain any compensation, they then have to initiate individual proceedings. They may also be allowed to participate in settlement approval proceedings and raise objections. In the US in particular, objectors have become important players in class action proceedings.[395] Yet most individuals represented in a collective lawsuit are not personally involved in the litigation. They usually do not have more, and indeed in most cases they have less personal agency in collective litigation than they do in (individual) ADR proceedings – and the outcome they get is still in most cases a negotiated settlement and not a judgment affirming their legal rights. Thus, the line between the second and third waves is blurry, and from the perspective of the empowerment of disenfranchised groups or individuals, none is clearly superior.

238 In cases where the claims are so small that it is impractical to distribute the proceeds of a collective lawsuit, the enforcement of objective law becomes more relevant than that of individual claims.[396] Yet it depends on the circumstances of the case whether individual compensation is indeed wholly impracticable. There are cases where distribution can be automated – eg, where a bank is ordered pay back small amounts to overcharged individual account holders. While this is not practically feasible on an opt-in basis, an opt-out procedure can deal with such cases effectively, and most individuals will not consider an automatic compensation as an unwelcome intrusion into their autonomy. Even where automation is not possible, and individual claims are so negligible that the rightsholders' 'rational apathy' will keep them from actively claiming an adjudicated or agreed compensation, arguably each of them still has an individual interest in deterring market participants from exploiting such apathy by causing minimal individual harms to a large number of people and profiting from such behaviour. Where individual rights were infringed, the typical rightholder will usually favour addressing the infringement over allowing the wrongdoer to profit from it. Therefore, individual interests of rightsholders are always affected in collective litigation over civil claims, even in situations where 'rational apathy' is most pronounced.

3.2.2 Private Enforcement of Objective Law

239 Conversely, even where the focus is on individual claims, collective interests play a crucial role in legislative and doctrinal debates on collective redress. Such interests are generally invoked to justify the representative plaintiff's standing to sue for claims that are not their own.

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[395] See eg, R Klonoff, 'Class Action Objectors: The Good, the Bad, and the Ugly' (2020) 89(2) Fordham Law Review 475.

[396] This will be addressed in 3.2.2.

240 The idea behind 'private enforcement', a concept originating in law and economics, is that private individuals should be incentivised to bring claims in the public interest – either because this is perceived as more efficient than public enforcement (ie, enforcement by public authorities), or to ensure that unlawful behaviour can be addressed regardless of whether government agencies are willing to prosecute it. This concept is particularly often invoked in cases where the individual claims are so small that there is a lack of interest in bringing a lawsuit, or where the cost-benefit ratio of an individual lawsuit is negative.

241 In the US, economic approaches to the enforcement of law have been particularly influential. Law and economics scholars have put forward treatises dealing not only with the societal benefits of enabling individuals to enforce their private rights, but also arguing in favour of the privatisation of law enforcement altogether, including criminal prosecution.[397] The rising engagement of law and economics scholars in the debate on the enforcement of law was intertwined with the increasing popularity of the concept of the 'private attorney general' who brings private lawsuits, particularly class actions, for the public benefit.[398] This has resulted in a perception of collective redress that focuses on the enforcement of law in the public interest.[399]

242 Subsequently, the idea of private enforcement of regulatory laws also gained foothold in Europe, especially in the context of competition and consumer law. Proponents of this approach argue that it is more important to strip wrongful gains from lawbreakers than to ensure that individuals' damages are compensated. They focus on behavioural incentives rather than on the compensation of damage that has already been inflicted, and advocate for the use of private law for general preventive purposes.

243 Some rules enabling private parties to bring skimming-off claims against perpetrators have been introduced in Europe. Examples are § 10 of the *Gesetz gegen den unlauteren Wettbewerb* (German Unfair Competition Act) and § 34a of the *Gesetz gegen Wettbewerbsbeschränkungen* (German Act against Restraints of Competition). They enable business and consumer associations to sue for disgorgement of profits from infringements of unfair competition or anti-trust law. Yet the disgorgement claims are subsidiary to claims by injured individuals, and the proceeds of the lawsuit go into the federal budget. As a result, disgorgement lawsuits are unattractive.[400] This was further exacerbated by a judgment of the German Federal Court of Justice stating that it is an

[397] See GS Becker and GJ Stigler, 'Law Enforcement, Malfeasance, and Compensation of Enforcers' (1974) 3 Journal of Legal Studies 1, 13 ff; W M Landes and R A Posner, 'The Private Enforcement of Law' (1975) 4 Journal of Legal Studies 1 ff.

[398] On this concept, see eg, JA Rabkin, 'The Secret Life of the Private Attorney General' (1998) 61(1) Law and Contemporary Problems 179 ff; WS Rubenstein, 'On What A "Private Attorney General" Is--And Why It Matters' (2004) 57 Vanderbilt Law Review 2129 ff.

[399] See eg, Garth and Cappelletti (n 392) 209 f. and their example of 'all those interested in clean air in a region' as a potential plaintiff group.

[400] For a critical assessment, see R Harnos, 'Drittfinanzierte Gewinnabschöpfungsklagen' (2020) GRUR 1034 ff.

abuse of process if a disgorgement lawsuit is funded by a third-party who takes on the litigation risk in exchange for a share of the proceeds, even if the state endorses the funding agreement.[401] In 2023, however, § 10 of the Unfair Competition Act was amended and now permits third-party funding of such lawsuits if authorised by the Federal Office of Justice.

244 Legislative and judicial resistance against effective private enforcement may be motivated by the traditional European scepticism towards using tort law for purposes other than the reparation of harm actually suffered. This scepticism affects both the claims that go beyond the reparation of actual damage, and procedural instruments that do not require harmed individuals themselves to come forward. The importance of the link between the actual harm suffered by the claimant and the amount of damages due to them also comes to bear in the traditional hostility of European jurisdictions towards punitive damages. Many jurisdictions consider punitive damages as incompatible with their public policy. Presumably this is not only because of the sometimes ruinous amounts of such damages but also because of the reluctance to endorse a role of private law and civil procedure beyond restoring the proper economic balance between the parties to the dispute.

245 Nonetheless, some jurisdictions, including in continental Europe, do recognise at least scattered cases of *actiones populares* where the law permits individuals to sue regardless of whether they assert a subjective right towards the defendant.[402] Nineteenth century German scholars discussed the Roman *actio popularis,* comparing the function of private citizens bringing such lawsuits to that of an attorney general – an early, usually unacknowledged, precursor to the modern 'private attorney general' doctrine.[403]

3.2.3 Representation of Diffuse Interests

246 Some scholars highlight the potential of collective litigation with respect to representing 'diffuse' interests that have not (yet?) crystallised into subjective rights.[404] From this perspective, collective litigation is not just a tool to promote access to justice in cases where, at least theoretically, the group members could also successfully bring individual

[401] Case I ZR 26/17 (Federal Court of Justice, Germany), Judgment 13 September 2018; Case I ZR 205/17 (Federal Court of Justice, Germany), Judgment 9 May 2019.
[402] See eg, A Halfmeier, *Popularklagen im Privatrecht* (Mohr Siebeck 2006) on German examples; H Sousa Antunes, 'Enforcing Consumer and Capital Markets Law in Portugal' in B Gsell and TMJ Möllers (ed), *Enforcing Consumer and Capital Markets Law. The Diesel Emissions Scandal* (Intersentia 2020) 221, 227 ff. on the Portuguese popular action.
[403] See Halfmeier (n 402) 43 ff with references, particularly with respect to nineteenth century German scholarship where the *actio popularis* was regarded by some as incompatible with the modern distinction between citizens and the State.
[404] Garth and Cappelletti (n 392).

lawsuits, but also, or even mainly, an instrument for collective advocacy – a tool to petition the courts to develop the law, or at least to exercise discretion in a certain way.

247 It is not always easy to draw a clear dividing line between substance and procedure, as phenomena like procedural elements of substantive fundamental rights or substantive due process demonstrate. But an understanding of collective redress that is entirely decoupled from the enforcement of existing rights, or at least of objective law, does not seem compatible with the way private law is traditionally perceived to operate. Therefore, most jurisdictions do not – or at least not explicitly[405] – recognise this sort of representation of diffuse interests by a plaintiff in civil proceedings. Doing so would blur the distinction between adjudication and legislature to a degree that would be unacceptable for most jurisdictions that consider the separation of these powers as a core constitutional principle. Where the plaintiff does not assert a subjective right, a collective civil lawsuit will be as unsuccessful as an individual one. The main playfield for this type of representation of diffuse interests is public law litigation, particularly with respect to planning or building permissions for projects that impact the environment. It is therefore largely outside the scope of this chapter.[406]

3.3 Right of Individual Access to a Court and Collective Litigation

248 Collective redress normally operates either on an opt-in or on an opt-out basis. To be included in the group bound by the outcome of the proceedings, potential members must either actively express their willingness to become part of the represented group, or refrain from opting out until a designated time. If they do not opt in, or if they opt out, they usually retain the right to pursue their claims in individual proceedings.

249 Opt-in instruments that exist as an alternative to individual litigation do not seem to be problematic from the perspective of the group members' right of access to a court, or of a constitutionally framed principle of party disposition.

250 Opt-out proceedings raise more serious concerns, as rightsholders can be deprived of their right to pursue their claim individually through mere passivity. Yet there are typically no explicit constitutional rules guaranteeing that civil rights and obligations can only become subject to litigation if the rightholder actively requests it. It would also be difficult to argue that there is an unwritten guarantee to this effect rooted in tradition. Requiring a party to be vigilant and active to preserve a procedural position is a regular feature of civil procedure. The defendant has no freedom to choose whether a disputed right should become subject to litigation, and the defendant's passivity normally results

[405] This is not to say that the emergence of subjective rights cannot be a process that takes place in the courts. Yet it seems that to be broadly acceptable, it must be framed as uncovering existing rights rather than as creating new ones – particularly where one person's right is another's obligation, or loss of a right – as is generally the case in private law.

[406] See also para 232 above regarding the Aarhus Convention.

in a default judgment.[407] If that is constitutionally acceptable, it is not easy to see why involvement in litigation on the plaintiff side should always require explicit consent as a matter of constitutional law. Furthermore, many jurisdictions allow actions for negative declaration in certain circumstances, meaning that the alleged rightholder is not always free to decide whether and when litigation should take place. Against this background, it is difficult to make a case for an implicit constitutional or fundamental rights bar on opt-out collective redress mechanisms.

251 There are also collective litigation mechanisms that are not based on voluntary participation. Examples are the *Kapitalanleger-Musterverfahren* (German capital markets model case procedure), the English and Welsh Group Litigation Order (GLO) (UKCPR r. 19.10 ff.), or US multidistrict litigation (28 USC § 1407). While these mechanisms require that individual lawsuits have been brought, and thus do not interfere with the principle of party disposition, they can seriously impact individual plaintiffs' opportunities to have their own day in court.[408]

252 In the absence of explicit constitutional provisions to this effect, it is difficult to contend that an arrangement where the participation in collective proceedings is the only option for pursuing a claim is inadmissible in all circumstances. Most, if not all, jurisdictions have a long tradition of compulsory collective proceedings for certain matters, including matters that have implications for civil rights and obligations. Typical examples are insolvency or planning proceedings.[409] Such mechanisms already existed when modern constitutions were created, and they have been generally considered to be perfectly constitutional if the fair trial rights of the participants to the proceedings are respected. This raises the question why using similar instruments to deal with new problems, such as those presenting in the context of mass claims, should be constitutionally problematic. Traditional acceptance alone cannot insulate laws from constitutional scrutiny. Yet such scrutiny would have to apply to all instruments of similar quality equally, unless there is a specific savings clause for the older instrument.[410]

253 Nonetheless, arguably it is a limitation of the right of access to court if participation in a collective scheme is the only available or the default option. It must therefore satisfy the requirements of the relevant constitutional or fundamental rights tests for such limitations. Within the realm of Article 6(1) ECHR, any limitation must pursue a legitimate aim, and there must be a reasonable relationship of proportionality between

[407] T Domej, 'Einheitlicher kollektiver Rechtsschutz in Europa?' (2012) 125(4) Zeitschrift für Zivilprozess 421, 439.

[408] With respect to US multidistrict litigation, see the scathing critique by MH Redish and JM Karaba, 'One Size Doesn't Fit all: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism' (2015) 95 Boston University Law Review 109, 113 ff, 139 ff, who conclude (at 154) that 'due process cannot tolerate such a system'.

[409] Domej (n 407) 438 f.

[410] On constitutional savings clauses, see R Weill, 'Evolution vs Revolution: A Theory of Constitutional Savings Clauses', Verfassungsblog 13 September 2022, https://verfassungsblog.de/evolution-vs-revolution/, DOI: 10.17176/20220913-230534-0.

that aim and the means employed to achieve it.[411] Acceptable aims could be, eg, the enforcement of objective law in the public interest, or the promotion of procedural economy.

254 In the *Lithgow* case, the ECtHR was very generous in permitting a curtailing of individual access to justice in mass disputes. The case concerned the nationalisation of certain companies by the UK Labour government in the 1970s. The ECtHR took the view that it was compatible with Article 6(1) ECHR if only a stockholder representative, and not stockholders themselves, had access to the Arbitration Tribunal established to resolve disputes over the quantum of compensation. The Court said that avoiding 'a multiplicity of claims and proceedings brought by individual shareholders' in the aftermath of nationalisation was a legitimate aim, and that there was a 'reasonable relationship of proportionality' between reserving access to the tribunal to a stockholder representative and this am. It considered that the stockholders' (collective) right to appoint the representative, to give them instructions or 'express their views' to them, and to remove them, was sufficient to ensure that 'the interests of each individual shareholder were safeguarded, albeit indirectly'.

255 A 'softer' method to pressure plaintiffs into participating in a collective scheme would be to withhold legal aid for individual lawsuits if the applicant could instead join collective proceedings. Arguably, there is a margin of appreciation in this respect. Such a system would, however, create a two-tier system of justice where the wealthy would get to have their own day in court while the poor would be limited to having their interests represented through intermediaries. From the perspective of equality before justice, this approach would be inferior to making collective proceedings obligatory where there are compelling reasons of procedural economy for that, or to ensuring that collective proceedings are attractive enough that plaintiffs choose them voluntarily.

3.4 Negative Autonomy

256 The potential plaintiff's negative autonomy, ie, the right not to bring a claim, seems particularly understudied. Yet in German-speaking procedural scholarship, it is the primary basis for concerns raised against collective redress instruments operating on an opt-out basis. Such instruments are often presented as incompatible with the principle of party disposition.[412] Similar concerns also exist in France. The French Constitutional Council has taken the view that for actions brought by trade unions for the defence of individual interests of employees, 'the person concerned must have been in a position to give his or her assent with full knowledge of the facts and that he or she must be free to defend his or her interests personally and to put an end to this action'.[413] According

[411] See para 98 above.
[412] See eg, S Lange, *Das begrenzte Gruppenverfahren* (Mohr Siebeck 2011) 131 ff.
[413] Case 89-257 DC (Constitutional Council, France), Decision 25 July 1989, para 24.

to the French national report, this would also make an opt-out mechanism for collective redress actions problematic under French law.[414]

257 As far as negative autonomy is discussed in more depth from a constitutional or fundamental rights perspective, it is not primarily perceived as an element of the right of access to court, but rather as a matter of substantive constitutional or fundamental rights, such as the right to property, the right to private life, etc.[415]

258 There is a case to be made for such an understanding. In the realm of Article 6 ECHR and comparable constitutional and fundamental rights, there are generally two parties, the plaintiff and the defendant. The defendant does not get a choice when it comes to becoming a party to a lawsuit. Their 'negative autonomy' only enables them to submit to the claim at the earliest possible opportunity, and even then, they cannot entirely avoid involvement in the proceedings. If they remain passive, they normally risk a default judgment against them. Thus, a procedural negative autonomy would have to be one-sided, ie, limited to the plaintiff, or else the right of access to a court would be negated. But the idea of a procedural fundamental right applying only to one side in a civil dispute seems inherently problematic.

259 It could be argued, though, that considering negative autonomy as a matter of substantive fundamental rights can also create problems. Carried to the extreme, the consequence could be that it would be up to the alleged creditor whether the alleged debtor is entitled to bring an action for negative declaration. Yet substantive rights also have limitations. Moreover, there are generally specific requirements for the admissibility of negative declaratory actions. Such specific requirements could be understood as arising from the alleged rightholder's negative autonomy. One could even argue that an action for negative declaration does not interfere with negative autonomy at all if such autonomy is conceived as an aspect of a substantive right. After all, the outcome of an action for negative declaration can never be the enforcement of the substantive right against the rightholder's will.[416]

260 In any case, the constitutional status of the principle of party disposition is unclear,[417] as are the potential implications for collective redress instruments based on the opt-out principle.[418] It is a universal feature of civil procedure that proceedings are only initiated if a lawsuit is brought by a party. Generally, that party must be someone claiming a

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[414] French national report, 10.

[415] R Stürner, 'Verfahrensgrundsätze des Zivilprozesses und Verfassung' in W Grunsky, R Stürner, G Walter and M Wolf (ed), *Festschrift für Fritz Baur* (Mohr Siebeck 1981) 647, 651.

[416] That also holds true if the action for negative declaration is dismissed. While such an outcome means, at least from the perspective of German-speaking jurisdictions, that the disputed right is bindingly affirmed, this can only happen if the defendant does not admit the claim, ie, accept that the right in dispute does not exist.

[417] From the German perspective, see Stürner (n 415) 650 ff.

[418] On this debate, see Lange (n 412); Domej (n 407) 438 ff.

personal interest in the subject matter of the proceedings. Otherwise, the lawsuit is normally inadmissible for lack of standing. In most jurisdictions, there is nonetheless a range of cases where a party can litigate over a claim of which they are not the alleged creditor or debtor, and the consent of that alleged creditor or debtor is not necessarily required. In the absence of explicit constitutional rules, it would be difficult to argue that such an arrangement is *per se* unconstitutional.

261 One should also keep in mind that it is often unrealistic to assume that potential plaintiffs remain passive because they do not want their claim to be satisfied. Where individual claims are small, potential plaintiffs often do not wish to invest the necessary time and resources to carry through a lawsuit. Nonetheless, they will usually be perfectly happy to receive the proceeds. Sometimes, not suing can be a rational choice even if the chances of success are good, as the expected value can still be negative if the costs and effort associated with the proceedings are out of proportion with the claim. But refraining from bringing a lawsuit can also simply result from common human inertia. Whatever the reason for the passivity, it is arguably enough from the perspective of rightsholders' negative autonomy if they have the option to refuse receiving their share of the proceeds. If there is this freedom, it is debatable whether collective redress interferes with negative autonomy at all.

3.5 Constitutional/Fundamental Right to Collective Litigation?

262 There is an emerging debate in some jurisdictions not only on constitutional limits and restraints for collective litigation, but also on the existence, prerequisites, and content of a positive right to collective litigation even in the absence of explicit provisions addressing it.[419] Such a right could, in principle, be individual or group-based. With respect to civil rights and obligations, the conceptualization as an individual right seems better aligned with the traditional constitutional and fundamental rights doctrine in many jurisdictions, particularly if the right is framed as a component of access to justice.[420]

263 Another potential basis could be a substantive right or constitutional objective. Many constitutions today explicitly endorse collective interests such as, eg, the protection of

[419] See M Peter, *Zivilprozessuale Gruppenvergleichsverfahren* (Mohr Siebeck 2018) 138 ff.

[420] Things might be different in the field of public law. Here, the Swiss Federal Court, eg, has long recognized a right of associations to bring a so-called 'egoistic association complaint' where an association acts in the interests of all or the majority of its members, the protection of those interests is a statutory purpose of the association, and the affected members would themselves have standing to bring a complaint. See *Verband schweizerischer Motorlastwagenbesitzer and others v Grosser Rat des Kantons Bern* (Federal Court, Switzerland), Judgment 8 June 1928, BGE 53 I 143, 146; *Union technique suisse v Vaud, Grand Conseil* (Federal Court, Switzerland), Judgment 31 January 1986, BGE 112 Ia 30, 33; *Touring Club Schweiz v Einwohnergemeinde Münsingen and others,* Case 1C_17/2010 (Federal Court, Switzerland), Judgment 8 September 2010, BGE 136 II 539, 542, and many others. While the right to an 'egoistic association complaint' is treated as an individual right of the association, it is rooted in group interests that could be understood as collective rights.

consumers or of the environment. While such professions often are not considered as establishing justiciable rights, this perception may evolve over time. This could result in the recognition of a constitutional mandate to create appropriate mechanisms for asserting constitutionally endorsed collective interests before the courts.

264 It has been suggested in the German literature that in some circumstances, *Justizgewährungsanspruch* (the right of access to justice) can give rise to an individual right to effective collective redress mechanisms. Even among authors supporting this idea, however, there is no unanimity as to which types of deficits in the enforcement of individual rights should give rise to a right to collective litigation. Some authors have suggested that such a right exists with respect to mass damage claims that cannot be effectively handled by the courts in individual proceedings,[421] particularly if actual equality of arms between the parties cannot be achieved in individual litigation.[422] Others also include situations of scattered damages where individual lawsuits are unattractive because of the low value of the individual claims.[423]

265 If one approaches the issue from the perspective of the prevailing case law and doctrine on the right to access to a court, it seems difficult to postulate a constitutional or fundamental right to collective litigation. The state's obligation is to ensure practical and effective access to a court, but it is generally up to the legislature how to achieve this.[424] Yet that does not totally exclude a constitutional mandate to provide for collective litigation mechanisms. Where such a mechanism is the only conceivable way to ensure practical and effective access to a court, there must be, in effect, a constitutional or fundamental right to have access to it. Yet where effective individual access would also be possible, but would require more public resources, it might be more appropriate to perceive the introduction of collective litigation mechanisms instead of investing the necessary resources to ensure effective individual access as a limitation of the right of access to court – and not to use resource-depletion of the justice system as a basis for positing a constitutional right to collective redress.

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[421] See eg, C Meller-Hannich, *Sammelklagen, Gruppenklagen, Verbandsklagen – Bedarf es neuer Instrumente des kollektiven Rechtsschutzes im Zivilprozess?,* Gutachten A zum 72. Deutschen Juristentag (C.H. Beck 2018) A 39 f.; M Heese, 'Die Musterfeststellungsklage und der Dieselskandal' (2019) Juristenzeitung 429, 430 f.; from a Swiss perspective, see Peter (n 419) 150; *contra:* A Bruns, 'Instrumentalisierung des Zivilprozesses im Kollektivinteresse durch Gruppenklagen?' (2018) Neue Juristische Wochenschrift 2753, 2756.

[422] Lange (n 412) 103 ff.

[423] Heese (n 421) 431; *contra:* Meller-Hannich (n 421) A 38 f.

[424] This is also highlighted in the German report.

4 LEGAL AID/LEGAL ADVICE AND REPRESENTATION

4.1 Introduction

266 The famous quote, mainly ascribed to the Irish judge Sir James Mathew, that '[i]n England justice is open to all – like the Ritz hotel' [425] is a light-hearted acknowledgment of the fact that effective access to justice only exists where sufficient funds are available. It is widely recognised that the financial viability of bringing and defending a lawsuit is an essential component of access to justice. Yet, as is generally the case with positive obligations derived from constitutional and fundamental rights, the prevailing view is that states have a significant margin of appreciation when determining whether and how much to charge for access to justice, and how to support indigent litigants.

267 The costs of litigation can be roughly divided into (1) court costs such as filing fees and costs for specific court activities, and (2) parties' costs, particularly costs of legal representation. Levels of such costs, rules on payment and reimbursement, as well as rules on litigation funding and legal aid can differ dramatically from jurisdiction to jurisdiction.

268 Supporting poorer litigants with free legal aid is often referred to as the 'first wave' of the access to justice movement [426] Most jurisdictions today recognise that effective access to justice requires addressing financial and other factual barriers. Nonetheless, significant inequities remain, and indeed have been exacerbated in recent years in some jurisdictions due to gradual erosion, and in some cases even aggressive dismantling, of legal aid systems and of structures such as law centres that were introduced during the height of the 'first wave', particularly in the 1960s and 1970s. [427] Yet while in many jurisdictions of the Global North the development of state-funded legal aid mechanisms has been stalled or reversed, there still seems to be an upward trajectory in other regions of the world. [428]

4.2 Court Fees

269 Most jurisdictions require the parties to pay court fees – some only nominal, others very substantial ones, often as a proportion of the value in dispute. Besides lump-sum filing

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[425] S Ratcliffe (ed), *Oxford Essential Quotations* (4th edn, Oxford University Press 2016), keyword 'Justice'.

[426] It was characterised in this way by Cappelletti and Garth (n 392) 196 f.

[427] For an overview of the developments up to the 1970s, see Cappelletti and Garth (n 392) 198 ff.

[428] For global perspectives, see G Knaul, *Report of the Special Rapporteur on the independence of judges and lawyers* (A/HRC/23/43), submitted 15 March 2013, para 20 ff; United Nations Office on Drugs and Crime (UNODC), *Global Study on Legal Aid. Global Report* (2016), https://www.undp.org/publications/global-study-legal-aid. A recent comparative study covering seven (mainly common law) jurisdictions was commissioned by the UK government; see Open Innovation Team, *Review of Civil Legal Aid in England and Wales. Comparative Analysis of Legal Aid Systems,* March 2024, https://assets.publishing.service.gov.uk/media/66015ca6a6c0f7bb15ef9166/rocla-comparative-analysis-legal-aid-systems.pdf.

fees, parties are usually required to cover costs of specific procedural actions, such as taking of evidence by the court.[429]

270 The ECtHR allows states a significant margin of appreciation in this area. It recognises that a requirement to pay court fees[430] or to post a security[431] is a limitation of the right of access to a court that must pursue a legitimate aim and be proportionate. This also applies if the fee is only imposed as a penalty for bringing an unsuccessful claim, and thus its payment is not a prerequisite for the admissibility of the lawsuit.[432] While court fees may be linked to the amount in dispute, it must be possible for parties to obtain a full or partial exemption if they are unable to pay the full fee.[433] The ECtHR accepts that the interests of the fair administration of justice can justify imposing financial restrictions such as having to post a security for adverse costs.[434] The lack of a possibility to be granted an exemption from such restrictions does not automatically imply a violation of Article 6(1) ECHR, particularly at the appellate stage.[435] Stricter scrutiny applies, however, where a litigant has not yet had the opportunity to make their case in a fair trial, and more generally, where the financial barrier is unrelated to the prospects of success.[436]

271 When discussing financial barriers for court access, affordability for the individual litigant in question is usually an important element of the ECtHR's analysis.[437] Yet the Court does

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[429] For a comparative analysis, see C Hodges, S Vogenauer, and M Tulibacka, 'National Approaches to Costs and Funding of Civil Litigation' in C Hodges, S Vogenauer, and M Tulibacka (ed), *The Costs and Funding of Civil Litigation. A Comparative Perspective* (Hart 2010) 11 ff.

[430] *García Manibardo v Spain,* Case 38695/97 (ECtHR), Judgment 15 February 2000 [ECLI:CE:ECHR:2000:0215JUD003869597] para 36 ff.

[431] *Aït-Mouhoub v France,* Case 22924/93 (ECtHR), Judgment 20 October 1998 [ECLI:CE:ECHR:1998:1028JUD002292493] para 57.

[432] *Stankov v Bulgaria,* Case 68490/01 (ECtHR), Judgment 12 July 2007 [ECLI:CE:ECHR:2007:0712JUD006849001] para 53 f.; *Sace Elektrik Ticaret ve Sanayi A.Ş. v Turkey,* Case 20577/05 (ECtHR), Judgment 22 October 2013 [ECLI:CE:ECHR:2013:1022JUD002057705] para 27. See however, *Liga Portuguesa de Futebol Profissional v Portugal*, Case 4687/11 (ECtHR), Judgment 17 May 2016 [ECLI:CE:ECHR:2016:0517JUD000468711] para 81, where the ECtHR appears to negate that a fee that is only imposed at the end of the proceedings is an access barrier.

[433] *Nalbant and Others v Turkey,* Case 59914/16 (ECtHR), Judgment 3 May 2022 [ECLI:CE:ECHR:2022:0503JUD005991416] para 40.

[434] *Tolstoy Miloslavsky v UK,* Case 18139/91 (ECtHR), Judgment 13 July 1995 [ECLI:CE:ECHR:1995:0713JUD001813991] para 59 ff.

[435] Ibid para 59 ff.

[436] *Nalbant and Others v Turkey* (n 433) para 35.

[437] See *Kreuz v Poland,* Case 28249/95 (ECtHR), Judgment 19 June 2001 [ECLI:CE:ECHR:2001:0619JUD002824995] para 60 ff; *Podbielski and PPU Polpure v Poland,* Case 39199/98 (ECtHR), Judgment 26 July 2005 [ECLI:CE:ECHR:2005:0726JUD003919998] para 64 ff; *Hoare v UK,* Case 16261/08 (ECtHR), Judgment 12 April 2011 [ECLI:CE:ECHR:2011:0412DEC001626108] para 64; *Georgel and Georgeta Stoicescu v Romania,* Case 9718/03 (ECtHR), Judgment 26 July 2011 [ECLI:CE:ECHR:2011:0726JUD000971803] para 69 f.; on the procedural requirements regarding the assessment of the applicant's circumstances, see *Laçi v Albania,* Case 28142/17 (ECtHR), Judgment 19 October 2021 [ECLI:CE:ECHR:2021:1019JUD002814217] para 55 ff. These principles also apply to legal persons, see *Nalbant*

seem to tend towards the view that prohibitive costs of the proceedings that would deter rational litigants from suing even if their case is viable violate Article 6(1) ECHR regardless of whether the litigant has the funds to cover them.[438] The ECtHR considers it as particularly problematic if a party is partially successful with a claim, but the costs that they have to bear are so high that they consume the entire award or a large part of it.[439] Excessive court fees can also violate the right to property (Article 1 of Protocol 1 of the ECHR).[440]

272 In German-speaking jurisdictions, court fees can reach very sizeable amounts depending on the type of dispute and on the value of the claim. The requirement to pay such fees is, in principle, regarded as compatible with the right of access to justice.[441] Court fees must be in line with the constitutional principles governing the determination of fees for public services.[442] While there is a broad margin of appreciation when determining fees, there must be a reasonable relationship between the amount of the fee and the actual costs of the public service.[443] Even fees that comply with this requirement can be an excessive limitation of the right of access to justice if they are out of proportion with the value of the claim.[444] Requiring the losing party (and, in some situations, even the winning party) to bear external costs that are necessary for the adjudication of the dispute, such as fees for court-appointed experts, is not considered as an undue limitation of access to justice, even if such costs by far exceed the amount of the claim.[445] In the determination of the amount of court fees, the parties' financial situation may be taken into account.[446] Legal aid beneficiaries are exempt from having to pay court fees. The situation is similar in the Republic of Korea, where parties are also required to pay a

and Others v Turkey (n 433) para 39. Regarding the burden of diligence on the applicant to provide the necessary information and evidence, see *Elcomp sp. z o.o. v Poland,* Case 37492/05 (ECtHR), Judgment 19 April 2011 [ECLI:CE:ECHR:2011:0419JUD003749205] para 41 ff.

[438] See *Weissman and Others v Romania,* Case 63945/00 (ECtHR), Judgment 24 May 2006 [ECLI:CE:ECHR:2006:0524JUD006394500] para 32 ff, where the Court discussed a stamp duty of more than 300 000 EUR from the perspective of 'any ordinary litigant' and found a violation Article 6(1) ECHR without entering into the details of whether the particular litigants had the necessary funds to pay the duty. But see *Urbanek v Austria,* Case 35123/05 (ECtHR), Judgment 9 December 2010 [ECLI:CE:ECHR:2010:1209JUD003512305] para 52 ff, where the Court accepted the full amount of the claim as the basis for the fee calculation for a lawsuit aiming at the registration of the claim in insolvency proceedings.

[439] *Čolić v Croatia,* Case 49083/18 (ECtHR). Judgment 18 November 2021 [ECLI:CE:ECHR:2021:1118JUD004908318] para 46, 49 ff. See also the case law on the loser pays principle discussed in para 284 below.

[440] *Perdigão v Portugal,* Case 24768/06 (ECtHR), Judgment 16 November 2010 [ECLI:CE:ECHR:2010:1116JUD002476806] Para 67 ff.

[441] Rosenberg, Schwab and Gottwald (n 9) § 4 para 2.

[442] Case 1 BvR 2096/09 (Federal Constitutional Court, Germany), Order 23 May 2012 [ECLI:DE:BVerfG:2012:rk20120523.1bvr209609] para 16.

[443] Case 2 BvL 5/76 (Federal Constitutional Court, Germany), Order 6 February 1979, BVerfGE 50, 217, 227.

[444] Case 1 BvR 2096/09 (n 442) para 18.

[445] Ibid para 17.

[446] Case 1 BvL 35/86 (Federal Constitutional Court, Germany), Order 9 May 1989, BVerfGE 80, 103, 106 ff.

stamp tax, the amount of which is determined as a percentage of the value in dispute.[447] The Korean Constitutional Court considers this system to be compatible with the right to a trial based on the argument that the legal aid system provides the necessary support to litigants who cannot afford the stamp duty. This was criticised in the literature on the grounds that the lack of an upper limit to the stamp tax unfairly prevents poorer plaintiffs' access to justice.[448]

273 The US, eg, has a very different approach. The filing fee for a civil action in a federal district court is USD 350 (28 USC § 1914(a)), the fee for docketing a proceeding in a US Court of Appeals is USD 500 (Court of Appeals Miscellaneous Fee Schedule, para 1), and in the US Supreme Court, the docketing fee is USD 300 (r. 38(a) of the Rules of the Supreme Court of the United States). The need to exempt litigants from the obligation to pay the filing fee thus arises less often than in the German-speaking jurisdictions, but that does not mean that it is never an issue, particularly considering the massive economic inequalities in the US. Furthermore, it should be noted that the gathering of evidence is largely the parties' responsibility in the US, and that the costs generated in this context can be very substantial.

274 In US federal law, explicit statutory rules for civil proceedings 'in forma pauperis' only exist for prisoners bringing civil action (28 USC § 1915). This does not absolutely exclude fee exemptions for other indigent litigants. As mentioned above, the US Supreme Court has recognised, based on the due process and equal protection clauses, a right for plaintiffs lacking the necessary funds to be exempt from the obligation to pay a filing fee where 'the judicial proceeding becomes the only effective means of resolving the dispute at hand', such as in a divorce cases.[449] Furthermore, in *M.L.B. v S.L.J.,* a case concerning permanent termination of parental rights, the US Supreme Court recognised a right of an indigent appellant to get free access to a transcript required for an appeal, mainly based on the Fourteenth Amendment's equal protection clause.[450] On the whole, however, the US Supreme Court has been extremely reticent to recognise a right to exemptions from court fees for indigent litigants in civil cases, based on the idea that 'government need not provide funds so that people can exercise even fundamental rights'.[451] This is in line with the US Supreme Court's profound scepticism towards the idea of positive obligations arising out of fundamental rights. The US Supreme Court thus has made clear that it has no intention to recognise a general right to free court access for indigent litigants, and in its view, a constitutional right to free access exists only in matters of the gravest, most existential importance. Meanwhile, it rejected the idea that the US Constitution requires a filing fee exemption for an indigent in bankruptcy proceedings, stating that 'access to courts is not the only conceivable relief available to

[447] Korean report, 6.
[448] Korean report, 7; J Kim, 'The Unconstitutionality of the Filing Fees System: With Focus on the Right to Access to Justice and Constitutional Principles' (2015) 50(12) Korean Law & Society Association, 1 ff.
[449] *Boddie v Connecticut* (n 31).
[450] *M.L.B. v S.L.J.* (Supreme Court, US) [519 US 102, 120 ff. (1996)].
[451] See Ibid 124 ff. and the references cited there.

bankrupts', and that 'there is no constitutional right to obtain a discharge of one's debt in bankruptcy'.[452]

4.3 Legal Advice and Representation[453]

275 Article 6(3) ECHR gives everyone charged with a criminal offence the right 'to defend himself in person or through legal assistance of his own choosing […].' Article 6(1) ECHR does not contain an explicit equivalent rule for civil proceedings. In the *Golder* case, the ECtHR has, however, clarified that Article 6(1) ECHR covers the right to consult a lawyer of one's own choice in relation to the institution of civil litigation, including for incarcerated persons, where that is factually necessary to commence a lawsuit.[454]

276 Meanwhile, it seems less clear whether it would be compatible with Article 6(1) ECHR to exclude the right to be represented by a lawyer for certain proceedings.

277 There are only some isolated examples where representation or even taking of legal advice is restricted, particularly in small claims proceedings or in conciliation and ADR.

278 In Switzerland, parties normally cannot be represented in pre-trial conciliation proceedings (Article 204 of the Swiss CPC), although they may be accompanied by legal counsel (Article 204(2) of the Swiss CPC). Before the entry into force of the Swiss CPC, ie, until 2011, some cantons, such as Zurich, even prohibited the parties (with limited exceptions) from bringing their lawyer along with them to the conciliation hearing, as there was a misguided apprehension that the presence of lawyers would imperil the success of settlement negotiations.

279 Most jurisdictions rather take the opposite approach and make representation by a lawyer mandatory for some types of proceedings. Even where that is not the case, there is often a lawyers' monopoly on all, or at least on professional, representation in litigation. In the *Airey* case, the ECtHR signalled that it is within states' margin of appreciation to institute such requirements, but that this may trigger an obligation to provide legal aid to indigent litigants.[455]

280 Some scholars have been much more critical of the lawyers' monopoly, and have characterised it as a major obstacle for court access for low- and middle-income would-

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[452] *United States v Kras* (Supreme Court, US) [409 US 434 (1973)]. For a critical analysis of the Supreme Court's case law, see FI Michelman, 'The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights' (1973) Duke Law Journal 1153 ff (Part I), (1974) Duke Law Journal 527 ff (Part II).

[453] This section only deals with the right or obligation to be represented by a lawyer (or other representative) of one's own choice. The right to free legal advice and representation will be addressed below in the context of legal aid (section 4.5).

[454] *Golder v* UK (n 48) para 26 ff.

[455] *Airey v Ireland,* Case 6289/73 (ECtHR), Judgment 9 October 1979 [ECLI:CE:ECHR:1979:1009JUD 000628973] para 26.

be litigants.[456] There is indeed evidence that at least in some jurisdictions, this group frequently has difficulties in finding representation for their cases.[457]

281 Depending on the constitutional framework, the lawyers' monopoly can also be a limitation of the constitutional right to free enterprise (see eg, Article 27 of the Swiss Constitution) or the freedom to choose an occupation (see eg, Article 12 of the German Basic Law), and therefore must be justified according to the criteria applying to limitations of such rights.[458]

4.4 Recovery of Litigation Costs

282 Jurisdictions take different approaches to the winning party's right to recover litigation costs from the opponent. Under the 'American rule', each party bears their own costs. Meanwhile, under the loser pays rule, sometimes referred to as the 'English rule', the losing party must reimburse the successful party's costs. Most jurisdictions adhere to some form of the loser pays rule. Yet often not the full costs that were actually incurred are shifted on the losing party. As a result of tariffs used for the calculation of recoverable counsel fees, or of other cost-capping measures, there can often be a significant recoverability gap.[459]

283 From the perspective of the right of access to a court and to a fair trial, all such rules play an ambivalent role. While some contend that the American rule promotes access to justice by ensuring that plaintiffs are not deterred from pursuing meritorious claims by the risk of having to reimburse the opponent for an expensive defence,[460] others point to the fact that the rule makes it very unattractive to pursue lower-value claims.[461] The loser pays rule is often presented as a deterrent to abusive litigation, but also as a

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[456] See eg, DL Rhode, 'Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice' (1997) 22 New York University Review of Law & Social Change 701. A different angle of criticism is that the monopoly stifles innovation, see eg, L Staub, 'The Major Trends in the Legal Market – Liberalisation', blog post 5 March 2018, https://www.vista.blog/en/the-major-trends-in-the-legal-market-liberalisation. But that is not primarily a constitutional or fundamental rights issue.

[457] DL Rhode, 'Access to Justice: Connecting Principles to Practice' (2004) 17(3) Georgetown Journal of Legal Ethics 369, 373 ff; DS Udell and R Diller, 'Access to the Courts: An Essay for the Georgetown University Law Center Conference on the Independence of the Courts' (2007) 95(4) Georgetown Law Journal 1127, 1130 ff.

[458] On the very far-reaching German monopoly, see C Schönberger, 'Rechtsberatungsgesetz und Berufsfreiheit' (2003) Neue Juristische Wochenschrift 249, 252 ff.

[459] For a comparative overview of cost-shifting systems, see C Hodges, S Vogenauer and M Tulibacka, 'Introduction' in C Hodges, S Vogenauer and M Tulibacka (ed), The Costs and Funding of Civil Litigation (Hart 2010) 3, 17 ff. AC Hutchinson, 'Improving Access to Justice: Do Contingency Fees Really Work?' (2019) 36 Windsor Yearbook on Access to Justice 184, 185 estimates that the successful party normally receives about 50 to 60 % of the legal fees actually incurred in the 'Anglo-Canadian system'.

[460] P Karsten and O Bateman, 'Detecting Good Public Policy Rationales for the American Rule: A Response to the Ill-Conceived Calls for "Loser Pays" Rules' (2016) 66 Duke Law Journal 729.

[461] J Leubsdorf, 'Does the American Rule Promote Access to Justice? Was That Why It Was Adopted?' (2019) 67 Duke Law Journal Online 257, 259 f.

mechanism to ensure that the successful plaintiff is not deprived of the fruits of their endeavour by unrecoverable costs.[462]

284 The ECtHR characterises the loser pays rule as a limitation of the right of access to a court that serves to ensure the proper administration of justice and to protect the rights of others by discouraging ill-founded litigation and excessive costs, and thus pursues legitimate aims.[463] The Court normally considers the losing party's obligation to reimburse the winning opponent's costs of legal representation as compatible with Article 6(1) ECHR unless the specific circumstances of the case render the interference with the right of access to justice disproportionate. A violation of Article 6(1) ECHR was found, eg, where the outcome of the case depended on the interpretation of a novel legal issue and the litigation risk was therefore difficult to gauge,[464] and in a cases where damages claims were partially successful, but the amount of costs the plaintiff was ordered to reimburse to the defendant because of the partial defeat was so high that it ate up almost the entire awarded compensation.[465] Conversely, denying a party the right to recover its representation costs from the losing opponent can also be a violation of Article 6(1) ECHR.[466]

285 In some cases, the ECtHR has approached the possibility to recover litigation costs from the perspective of substantive fundamental rights. In *MGN Limited v UK,* eg, it took the view that the recoverability of success fees under the English costs rules then in force[467] violated the freedom of expression and information (Article 10 ECHR), as it exacerbated the financial risks of defamation litigation to a degree that created an undue chilling effect on free speech.[468]

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[462] For analyses of different costs allocation systems, see eg, S Shavell, 'Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs' (1982) 11(1) Journal of Legal Studies 55 ff; N Andrews, 'Fundamentals of Costs Law: Loser Responsibility, Access to Justice, and Procedural Discipline' (2014) 19(2) Uniform Law Review 295 ff; A Higgins, 'The Costs of Civil Justice and Who Pays?' (2017) 37(3) Oxford Journal of Legal Studies 687 ff.

[463] *Cindrić and Bešlić v Croatia,* Case 72152/13 (ECtHR), Judgment 6 September 2016 [ECLI:CE:ECHR:2016:0906JUD007215213] para 96; *Marić v Croatia,* Case 37333/17 (ECtHR), Judgment 10 November 2020 [ECLI:CE:ECHR:2020:1110DEC003733317] para 52.

[464] *Cindrić and Bešlić v Croatia* (n 463) para 107, 122.

[465] *Klauz v Croatia,* Case 28963/10 (ECtHR), Judgment 18 July 2013 [ECLI:CE:ECHR:2013:0718JU002896310] para 86 ff. (concerning a claim against the State based on police violence); *Čolić v Croatia* (n 439) para 47 (concerning a private dispute).

[466] *Stankiewicz v Poland,* Case 46917/99 (ECtHR), Judgment 6 April 2006 [ECLI:CE:ECHR:2006:0406JUD004691799] para 61 ff; *Černius and Rinkevičius v Lithuania,* Cases 73579/17 and 14620/18 (ECtHR), Judgment 18 February 2020 [ECLI:CE:ECHR:2020:0218JUD007357917] para 68 ff.

[467] The recoverability of success fees was abolished for most cases by the so-called Jackson Reforms in 2013, but for defamation cases, success fees only became unrecoverable in 2019; see the Ministerial Statement made on 29 November 2018, UIN HCWS1125, https://questions-statements.parliament.uk/written-statements/detail/2018-11-29/HCWS1125.

[468] *MGN Limited v UK,* Case 39401/04 (ECtHR), Judgment 18 January 2011 [ECLI:CE:ECHR:2011:0118JUD003940104].

4.5 Legal Aid

286 In 2013, the then UN Special Rapporteur on the Independence of Judges and Lawyers Gabriela Knaul presented a report on legal aid in which she wrote that '[l]egal aid is an essential component of a fair and efficient justice system founded on the rule of law'.[469] She noted that to remove barriers for access to justice, the right to legal aid should be construed as broadly as possible and apply 'in any judicial or extrajudicial procedure aimed at determining rights and obligations'.[470] She took the view that while international human rights instruments usually do not explicitly provide for a right to civil legal aid, this right should be considered as inherent in the right to an effective remedy for acts violating fundamental rights, and, where fundamental rights are not at stake, in the right to a fair trial.[471]

287 The ECtHR also recognises that to ensure an effective right of access to the court, free legal representation is sometimes required for indigent litigants in civil proceedings, even if the ECHR explicitly addresses legal aid only in Article 6(3)(c), ie, for criminal cases. That is particularly the case where legal representation is compulsory.[472] Yet a litigant's theoretical right to self-represent does not per se justify denying them legal aid, as the ECtHR made clear in the *Airey* case. The test is whether a self-represented litigant can effectively conduct their own case. The ECtHR pointed out that it would be unrealistic to expect a litigant to be able to effectively self-represent in a legally or factually complex case, particularly if there is high emotional involvement, and even more so if the opponent is represented by a lawyer.[473] A similar stance was taken in the *Steel and Morris* case with respect to a defamation lawsuit brought against private parties by a corporation against two activists who were members of a small campaigning group. The Court took the view that having to present a complex case without the assistance of a lawyer against a large corporation created an unacceptable inequality of arms, leading to a violation of Article 6(1) ECHR.[474] In the same judgment, the ECtHR also found a violation of Article 10 ECHR, ie, the freedom of expression, due to the unfairness of the proceedings caused by the lack of access to legal aid.[475]

288 At the EU level, Article 47(3) CFR provides that '[l]egal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice'. This guarantee, however, only applies to disputes concerning 'rights and freedoms guaranteed by the law of the Union' (Article 47(1) CFR). Another EU

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[469] Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, Human Rights Council, UN Doc. A/HRC/23/43 (15 March 2013) para 20.
[470] Ibid para 27.
[471] Ibid para 35 ff.
[472] *Airey v Ireland* (n 455) para 26.
[473] Ibid para 20 ff.
[474] *Steel and Morris v UK,* Case 68416/01 (ECtHR), Judgment 15 February 2005 [ECLI:CE:ECHR:2005: 0215JUD006841601] para 59 ff.
[475] Ibid para 94 ff.

legislative act addressing legal aid in civil cases is the Legal Aid Directive of 2003.[476] It establishes minimum standards for legal aid in cross-border cases, including free legal advice and representation, and contains rules intended to facilitate access to legal aid for parties domiciled in an EU Member State for proceedings in another Member State.

289 Some national constitutions also contain explicit guarantees of the right to legal aid, including in civil cases. That is the case, eg, in Switzerland, where Article 29(3) of the Federal Constitution states, as a general procedural guarantee, that '[a]ny person who does not have sufficient means has the right to free legal advice and assistance unless their case appears to have no prospect of success. If it is necessary in order to safeguard their rights, they also have the right to free legal representation in court.' In Spain, the right to assistance by a lawyer is guaranteed in Article 24(2) of the Spanish Constitution for both criminal and civil proceedings; this is considered to include the right to free legal aid for parties lacking the necessary means to pay for such assistance.[477] Article 48(1) of the Russian Constitution also explicitly establishes a right to free qualified legal assistance for indigent litigants, though limited to Russian citizens.[478]

290 In some other jurisdictions, there are no explicit constitutional guarantees of civil legal aid, but constitutional courts take similar approaches as the ECtHR and consider the right to legal aid as implicit in other fundamental judicial rights. An example is Germany, where the right to legal aid is considered to be inherent in *Justizgewährungsanspruch* (the right of access to justice) and the principle of equal protection under the law.[479] The situation is similar in France, where the right to legal aid is treated as an element of the right to an effective judicial remedy by the Constitutional Council[480] and the Council of State[481]. It is an infringement of the right to an effective remedy if the costs of legal proceedings prevent litigants from pursuing them.[482] In the Republic of Korea, there is also no explicit constitutional guarantee of civil legal aid, but the reasoning behind the Legal Aid Act that was enacted in 1987 was that it should protect fundamental human rights through better access to justice for economically disadvantaged citizens.[483] In

[476] Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.
[477] See Spanish report, 14; Case STC 174/2009 (Constitutional Court, Spain), Judgment 16 July 2009 [ES:TC:2009:174].
[478] Russian report, 20 f.
[479] See, with reference to Article 3(1) of the German Basic Law, Cases 2 BvR 94/88 and others (Federal Constitutional Court, Germany), Order 13 March 1990, BVerfGE 81, 347.
[480] *Loi relative à l'immigration,* Case no 2011-631 DC (Constitutional Council, France), Decision 9 June 2011.
[481] *Mme Coren,* Case no 2118/78 (Council of State, France), Decision 10 January 2001.
[482] No infringement was found in Case 2011-198 QPC (Constitutional Council, France), Decision 25 November 2011 (pleading fee of 8.54 Euros payable by recipients of legal aid) and *M. Stéphane C. and others,* Case no. 2012-231/234 QPC (Constitutional Council, France), Decision 25 November 2012 (legal aid contribution and fee for appeal proceedings).
[483] Korean report, 7.

China, the principle of equality before the law is cited as the basis for the government's responsibility to ensure the access to adequate legal aid. [484]

291 The most aspirational approach to legal aid is that it should put recipients on the same footing as those litigants who can afford a lawyer out of their own pockets.[485] Yet this is hardly ever achieved, or even achievable. The German Federal Constitutional Court has explicitly stated that there is no right of 'complete equality between indigents and the wealthy' with respect to court access, but that legal aid only guarantees access in cases where a person of means, based on a rational assessment of the likely outcome and the risks of litigation, would be willing to take these risks on themselves.[486] Based on such considerations, besides a means test, legal aid systems usually also provide for a preliminary merit assessment. Furthermore, legal aid often does not remove the litigation risk. If the recipient of legal aid loses the case, they often remain liable to reimburse the opponent's litigation costs,[487] though some jurisdictions provide for at least some protection of indigent parties from (excessive) adverse costs orders.[488]

292 The US is one of those states where a constitutional right to civil legal aid is not recognized in almost any circumstances.[489] While the Sixth Amendment of the US Constitution gives criminal defendants the right to have the assistance of counsel for their defence, which is understood to include the right to free legal representation for indigent defendants,[490] there is no comparable rule for parties in civil lawsuits.[491] In *Lassiter,* the US Supreme Court established a presumption that an indigent litigant has no right to an appointed counsel in a civil case if their physical liberty is not at stake.[492] In *Turner v Rogers,* the Court denied an automatic right to counsel in civil cases as an element of due process even in civil contempt cases that could result in the loss of liberty.[493] The majority opinion did state that there was a requirement to provide 'alternative procedural safeguards', but even that was rejected in the dissenting opinion by Justice Clarence Thomas, the relevant part of which was joined by the other conservative justices then on the Court (Roberts, Scalia, and Alito). It therefore seems questionable whether the Supreme Court would uphold the requirement of any specific procedural safeguards for unrepresented indigent litigants if the issue should arise before it again.

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[484] Chinese report.
[485] Cappelletti and Garth (n 392) 199.
[486] Cases 2 BvR 94/88 (n 479) 357.
[487] See eg, German report, 14.
[488] See eg, Section 26(2) of the UK Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012.
[489] MYK Woo, C Cox, and S Rosen, 'Access to Civil Justice' (2022) 70 American Journal of Comparative Law i89, i90 ff. See also already para 274.
[490] The leading case is *Gideon v Wainwright* (Supreme Court, US) [372 U.S. 335 (1963)].
[491] See eg, TL Brito, DJ Pate Jr., D Gordon and A Ward, 'What We Know and Need to Know about Civil Gideon' (2016) 67(2) South Carolina Law Review 223 ff.
[492] *Lassiter v Department of Social Services* (Supreme Court, US) [452 U.S. 18 (1981)].
[493] *Turner v Rogers, et al.* (Supreme Court, US) [564 U.S. 431 (2011)].

293 There are different approaches to whether legal aid is only provided to domestic or also to foreign litigants. Some jurisdictions, such as the German-speaking ones, do not discriminate based on nationality or domicile in this regard. China has also removed the requirement the applicant be a 'citizen' in its new Legal Aid Act of 2021, and thus responded to scholarly criticism of the previous rules.[494] Other jurisdictions, however, do discriminate against foreign parties in this area. In Russia, eg, foreign parties are only entitled to legal aid where that is provided for in an international treaty.[495] There are several global and regional treaties aimed at ensuring equal access to legal aid and/or exemptions from the requirement to provide security for costs based on foreign nationality or domicile.

294 Another issue where approaches differ is the treatment of legal persons. The ECtHR acknowledges 'the absence of a consensus, or even a consolidated tendency' among the contracting states of the ECHR, but nonetheless takes the view that the principles developed in this regard under Article 6(1) ECHR apply to natural and legal persons alike.[496] It has accepted, however, that national law may make legal aid for foreign legal persons dependent on reciprocity.[497] Furthermore, presumably ECHR contracting states can continue to withhold legal aid from legal persons where they grant it to natural persons in excess of what is necessary under the ECHR.

295 The ECJ takes the view that the guarantee of legal aid under Article 47(3) CFR in principle applies to natural and legal persons alike.[498] It does accept, however, that specific considerations can apply to legal aid for legal persons, and allows national courts to take into account circumstances such as 'the form of the legal person in question and whether it is profit-making or non-profit-making; the financial capacity of the partners or shareholders; and the ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings'.[499]

296 Some jurisdictions, such as Germany, Switzerland, and Austria, only provide for legal aid for legal persons if not only the legal person itself, but also the natural persons 'economically involved in the subject matter of the dispute' lack the necessary means. This is explicitly provided in § 116(2) of the GCCP and § 63(2) of the Austrian CPC. Meanwhile, the Swiss CPC contains no such restriction, and the constitutional guarantee of free legal aid is not explicitly limited to natural persons. Nonetheless, the Swiss Federal Court has implemented similar restrictions as those applying under German and Austrian law, arguing that legal persons 'are not poor or indigent, but only insolvent or

[494] Chinese report.
[495] Russian report, 20 f.
[496] *Nalbant and Others v* Turkey (n 433) para 37 with further references.
[497] *Granos Organicos Nacionales S.A. v Germany,* Case 19508/07 (ECtHR), Judgment 22 March 2012 [ECLI:CE:ECHR:2012:0322JUD001950807] para 48 f.
[498] *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Germany,* Case C-279/09 (ECJ), Judgment 22 December 2010 [ECLI:EU:C:2010:811] para 59.
[499] Ibid para 62.

overindebted', and that therefore the constitutional guarantee of legal aid does not fit their situation.[500]

297 In China, the rules are deliberately ambiguous as regards legal aid for legal persons. Such entities are not explicitly excluded from the new legal aid regime enacted in 2021, and the legislative aim was to include at least associations and legal persons engaging in public-interest litigation. Under some regional rules and under the relevant rules of the Supreme People's Court, some associations and legal persons were already eligible for legal aid before the enactment of the new legislation.[501]

[500] Case 4A_75/2017 (Swiss Federal Court), Judgment 22 May 2017, BGE 143 I 328.
[501] Chinese report.

ABBREVIATIONS AND ACRONYMS

ACCP	Code of Civil Procedure (Argentina)
ADR	Alternative Dispute Resolution
AGO	Allgemeine Gerichtsordnung 1781 (General Court Rules) (Austria)
ALI	American Law Institute
Art	Article/Articles
ATS	Alien Tort Statute (US)
BGH	Bundesgerichtshof (Federal Court of Justice) [Germany]
CEPEJ	Conseil de l'Europe Commission européenne pour l'efficacité de la justice (Council of Europe European Commission for the efficiency of justice)
cf	confer (compare)
CFR	Charter of Fundamental Rights of the European Union (EU)
ch	chapter
CIDH	Corte Interamericana de Derechos Humanos (Interamerican Court of Human Rights)
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECLI	European Case Law Identifier
ECtHR	European Court of Human Rights
ed	editor/editors
edn	edition/editions
eg	exempli gratia (for example)
ELI	European Law Institute
etc	et cetera
EU	European Union
EUR	Euro
FCCP	Code of Civil Procedure (France)
ff	following
fn	footnote (external, ie, in other chapters or in citations)
GCCP	Code of Civil Procedure (Germany)
GDPR	General Data Protection Regulation (EU)
GLO	Group Litigation Order (England and Wels)
HCCH	Hague Conference on Private International Law
ibid	ibidem (in the same place)
ICPR	Civil Procedure Regulations (Israel)
ICJ	International Court of Justice
ie	id est (that is)
JCCP	Code of Civil Procedure (Japan)

JPY	Japanese Yen
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act (UK)
n	footnote (internal, ie, within the same chapter)
no	number/numbers
ODR	Online Dispute Resolution (EU)
para	paragraph/paragraphs
PCIJ	Permanent Court of International Justice
PD	Practice Direction
PDPACP	Pre-Action Conduct and Protocols
PiS	*Prawo i Sprawiedliwość* (Law and Justice) (Poland)
pt	part
RSC Order	Rules of the Supreme Court (UK)
SCC	Supreme Court Canada
SDG	Sustainable development goal
Sec	Section/Sections
SLAPP	Strategic Litigation Against Public Participation
SOFAs	Status of Forces Agreements
supp	supplement/supplements
TFEU	Treaty on the Functioning of the European Union (EU)
trans/tr	translated, translation/translator
UK	United Kingdom
UKCPR	Civil Procedure Rules (UK)
UNODC	United Nations Office on Drugs and Crime
UNIDROIT	Institut international pour l'unification du droit privé (International Institute for the Unification of Private Law)
UP	University Press
US / USA	United States of America
USD	United States Dollar
USFRCP	Federal Rules of Civil Procedure (US)
v	versus
vol	volume/volumes
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LEGISLATION[502]

International Treaties

European Convention on Human Rights 1950

UN International Covenant on Civil and Political Rights 1966

American Convention on Human Rights 1969

African (Banjul) Charter of Human and Peoples' Rights 1981

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) 1998

EU Legislative Acts

Treaty on the Functioning of the European Union

Council Directive on unfair terms in consumer contracts, 93/13 of 5 April 1993 (EEC)

Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 44/2001 of 22 December 2000 (EC)

Council Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, 2002/8 of 27 January 2003 (EC)

Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (EC), 2201/2003 of 27 November 2003 (EC)

Directive on injunctions for the protection of consumers' interests (Codified version), replacing Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, 2009/22 of 23 April 2009 (EC)

Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, 650/2012 of 4 July 2012 (EU)

Charter of Fundamental Rights of the European Union, 2012/C 326/02 (EU)

Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 1215/2012 of 12 December 2012 (EU)

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Regulation on insolvency proceedings (recast), 2015/848 of May 2015 (EU)

Council Regulation implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, 2016/1103 of 24 June 2016 (EU)

Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), 2019/1111 of 25 June 2019 (EU)

Directive on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, 2020/1828 of 25 November 2020 (EU)

Directive on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation') (EU) 2024/1069 of 11 April 2024 (EU)

National Legislation

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Bundes-Verfassungsgesetz 1920/1929 (Federal Constitution) (Austria)

Zivilprozessordnung 1895 (Code of Civil Procedure) (Austria)

Constitution of the Federative Republic of Brazil 1988

Chinese Code of Civil Procedure 1991

Grundgesetz 1949 (Basic Law) (Germany)

Bürgerliches Gesetzbuch 1896 (Civil Code) (Germany)

Zivilprozessordnung 1879 (Code of Civil Procedure) (Germany)

Constitution française 1958 (French Constitution) (France)

Code de procédure civile 1975 (Code of civil procedure) (France)

Constitution of the Russian Federation 1993 (Russia)

Bundesverfassung 1848 (Federal Constitution) (no longer in force) (Switzerland)

Bundesverfassung (1999) Federal Constitution (Switzerland)

Zivilprozessordnung 2008 (Code of Civil Procedure) (Switzerland)

Reglement über das Bundesgericht 2006 (Federal Court Regulations) (Switzerland)

Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 (United Kingdom)

Constitution of the United States 1787

First, Fifth and Sixth Amendments to the United States Constitution 1791

Fourteenth Amendment to the United States Constitution 1868

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