



NEDERLANDSE VERENIGING VOOR RECHTSVERGELIJKING
NETHERLANDS COMPARATIVE LAW ASSOCIATION

Access to Justice. A Renewed Global Issue?*

Ugo Mattei¹

Readers are reminded that this work is protected by copyright. While they are free to use the ideas expressed in it, they may not copy, distribute or publish the work or part of it, in any form, printed, electronic or otherwise, except for reasonable quoting, clearly indicating the source. Readers are permitted to make copies, electronically or printed, for personal and classroom use.

1. The Issue

The topic of access to justice is quite a classic of comparative legal research. The challenges which a plaintiff must face in order to have his day in court is an important indicator of the attitude of a legal system towards its courts of law, which in turn reflects on the very fundamental issue of what general role law has in society. Consequently, the topic *Access to Justice* has quite a significant place in the organization of the leading US Comparative Law casebook by Rudolf Schlesinger, and a class on *Access to Justice* is always fun to teach because students immediately realize the practical significance of the question.

Almost thirty years ago, the leading Comparative law scholar Mauro Cappelletti launched a monumental comparative research project in Florence that produced a multi-volume outcome entitled *Access to Justice*, published in 1978. During the same year the foundational work by Laura Nader and H. Todd, *The Disputing Process: Law in Ten Societies* was published. These early works used anthropological tools of inquiry. Two years later, the anthropologist Laura Nader produced the groundbreaking documentary film “Little Injustices”, comparing access to justice in a small Zapotec community with the American model. Also Nader in the same year edited the critical work, *No Access to Law. Alternatives to the Judicial System*. Another two

* Session IIC2. National Reports received from: Belgium, H. Boularbah; Chile, R. Miguez; China, G. Liu; France, J.-M. Baudel; Germany, P. Gottwald; Greece, P. Yessiou-Faltsi & L.-M. Pipsou; The Netherlands, A. W. Jongbloed; India, A. Singh; Iran, M. Adel & A. A. Bozorgmehr; Italy, V. Varano & A. De Luca; Japan, Sh. Kakiuchi; Mali, A. Keita & M. Djiré; Poland, J. Jankowski; Spain, J. F. Herrero Perezagua; Sweden, M.-L. Larsson; US, J. P. George.

¹ This report has been prepared with the very skilful assistance of: Saki Bailey, J.D., U.C. Hastings College of Law who is the author of the Annexed tables.

years later, Cappelletti again edited a collective work, significantly called *Access to Justice and the Welfare State*. This early wave of systematic work offered data on both industrial and preindustrial societies, proving that this area of comparative research was well ahead of other areas in which Comparative Law was still suffering from severe Euro-American centrism. Finally, in 1985 Harry M. Scoble and Laurie S. Wiseberg co-edited *Access to Justice. Human Rights Struggles in South East Asia*, showing the “activist” potentials of these lines of inquiry.

Then nothing or almost nothing was produced in this area for almost two decades. In a sense it is natural that projects of the ambition and magnitude of Nader’s and Cappelletti’s become “definitive”, both as data collections and as methodological masterpieces. Nevertheless, the degree of silence before a revival of scholarly interest in the field was unusual. Only in 2002, did Jonas Ebbesson publish a book called *Access to Justice in Environmental Matters in the EU*. In the same year, Christina Jones Pauli and Stephanie Elbern edited *Access to Justice: Role of Court Administrators and Lay Adjudicators in the African and Islamic Context*. In 2003, Fazal Karim published his monumental *Access to Justice in Pakistan*, and in 2004 Deborah Rhode published for the prestigious Oxford U.P. a book called, once more, *Access to Justice*.

When I attended a meeting of experts of the International Academy of Comparative Law held in Paris in May 2004 I was asked to serve as a general reporter on the topic of Access to Justice. I confronted the state of the literature in this area, and I looked for a theory explaining this curious phenomenon, in order to tune my questionnaire in such a way as to make our collective effort worth entertaining.

I noticed that the first wave of writing historically precedes the so-called Reagan-Thatcher revolution, the moment at which public institutions started being transformed and significantly privatized. Cappelletti’s work, in particular, witnessed a moment of general optimism in the public interest model, an idea of an activist, reredistributive, democratizing, public-service-minded approach to the public sector in general and to private law in particular. In this intellectual mode of thought, the Welfare State in Western Societies was seen as a point of arrival in civilization, and access to justice was the device through which communities could provide law as a public good, after having provided shelter, healthcare and education to the needy. Nader’s work was skeptical as to the possibility to provide law to the people in faceless industrial societies, but it was still motivated by a sincere belief in the possibility to bring justice to the people, though already suspicious towards the rise of the ADR industry.

Beginning in the early eighties, the global ideological picture had changed. Neo-liberal policies, inaugurated by prime minister Thatcher in Great Britain, the crib of the welfare state, and imported on a much weaker institutional background in Reagan’s America, were based on the very basic assumption that the welfare state was simply too expensive. A Western capitalist model, busy to outspend the Soviet block in order to win the cold war had to save

resources by privatizing as much as possible of its welfare services. Public shelter, health, education and justice for the poor were the natural “victims” of such budget cuts. By the end of the eighties, with the “successful” outcome of the cold war, this policy of “privatization” had overcome the boundaries of the Anglo-American world, as well as those of the traditional political right. At the “end of history,” redistributive practices, both direct and indirect, could not be structurally afforded in the domain of shelter and health, let alone in those, secondary in survival importance, of education and justice.

With no desire to invest money in legal aid and programs of access to courts for the poor and with a quite sustained cultural crusade against the welfare state and its policies, the future of access to justice, in the original sense of granting equal opportunities to litigation for the rich and the poor, seemed quite grim. Some countries simply stopped worrying about the unsatisfactory state of their systems of access to justice, while others, where their systems were in a more advanced phase of “privatization”, were undermining its legitimacy by working out even more privatized and justice-remote models of dispute resolution. The birth of the ADR industry, and the development of a professional class of mediators, not necessarily trained in the law and serving the interests of harmony and non-adversary social control, had transformed *the issue of access to justice, by limiting as much as possible access to courts of law*. This was accomplished by creating an alternative system not based on justice but on harmony and, most importantly, a system that was almost entirely privatized. These general transformations of Western law, involving a variety of aspects of the legal system, including the rehabilitative ideal (itself very expensive) in criminal law and more generally the target of pursuing social justice through law, were exported worldwide, incorporated into the “Structural Adjustment Programs” and other vehicles for the diffusion of “global” legal thinking.

Only in very recent times have some scholars become aware of the fact, in the years of the demise of the Welfare State, that access to justice had been transformed into a non-issue (as witnessed by the disappearance of all the scholarly literature) and substituted by a quite opposite and almost certainly “invented” problem, that of “litigation explosion”. Accordingly, the solution to the flood of litigation was closing the doors of adversary justice to everybody, in particular to weaker market actors and the development of a new “industry”, that of ADR governed by the ideology of harmony and social peace. Possibly the less than desirable consequences of this state of affairs, after more than a decade of single thought, explain the revival of interest in the issue in more recent literature. To be sure, closing the doors of justice to the non-wealthy constituted a further empowerment of the strong economic actors and because there is no legal venue relatively open to the average individual, powerful market actors became free not to confront the social consequences of their actions.

It is within this background that the problem of “access to justice” should be approached by comparative lawyers, eager to pay attention to the more recent transformations of our discipline.

There are a few dimensions that Comparative Law has traditionally neglected and is now eager to consider, namely the four dimensions explored below. The first important dimension to consider is the dimension of power disparities. Many social sciences, developed in the myth of neutrality and objectivity, are now attempting to confront this dimension. Comparative Law should do the same and the issue of “access to justice” offers an obvious opportunity. A second important dimension to consider is interdisciplinary approaches. Comparative Law has started to make a few timid steps in this direction, opening a dialogue with sociology, economics, anthropology and political sciences. Access to justice cannot be studied, interestingly, without considering data that is beyond and outside of the black letter of the law. Thirdly, there is a need to go beyond Western-centrism in comparative legal scholarship (as in many other disciplines) because access to justice is so intimately connected with the role of law in society, and because many non-Western societies deliver justice to individuals outside of the formal mechanisms of the judicial system. The study of access to justice offers an occasion to Western systems to learn more from non-Western ones, subverting the traditional pattern of influence and thus thoroughly abandoning ethnocentrism. Finally, the issue of access to justice is crucial in discussing the gap between law in the books and law in action, between declarations of principle and actual practice. While the exploration of this gap has been central to modern Comparative Law, recently more formalistic trends have re-emerged, making it opportune to approach an area that so obviously can *only* be studied by paying attention to this gap.

2. The Questionnaire

In the light of these premises, the national reporters have been required to offer data relevant for the general report. In particular, this general Reporter insisted that the answers try to offer the sense of the evolution of the law and that mere black-letter answers are avoided. An attempt was also done within the questionnaire to approach issues of access to justice in general, without sticking to the traditional but geographically unstable distinction between civil and criminal law. The questionnaire has been divided into four parts, devoted to 1) sociological background, 2) costs of the access 3) institutions involved, 4) structures of procedure, 5) Legal Aid Programs.²

² For the full text of the questionnaire, *see* the end of this article.

3. The Legal Systems Covered

The reporter attempted to open up the project beyond the systems traditionally covered in the International Academy of Comparative Law conferences. The questionnaire was circulated to 32 different potential reporters through the world, which generated timely answers for 16 systems covering countries in all subcontinents, with the only exception being Oceania.

In alphabetical order we obtained answers from: Belgium, Chile, China, France, Germany, Greece, The Netherlands, India, Iran, Italy, Japan, Mali, Poland, Spain, Sweden, the United States.

Reports were invited from a number of independent respondents, on top of the official ones selected by the International Academy of Comparative Law. Answers have thus been obtained by such important but traditionally less available countries like China, India, Mali, India and Chile. More traditional venues of comparative research such as the United States, Germany, France, Italy, The Netherlands, Belgium, Spain, Poland, Sweden and Japan are also included in this discussion thus offering a sample of countries that can well be considered of some comparative significance.

Using a traditional taxonomy we obtained answers from the civil law (Germany, Spain, Italy, France, Germany, The Netherlands and Belgium), from the common law (the US) from former socialist law (Poland), from Scandinavian Law (Sweden), from countries outside the Western Legal Tradition, Islamic (Iran), African (Mali), Latin American (Chile) and Indian. Unfortunately we missed significant parts of the puzzle (e.g. Great Britain, Canada, Russia), prohibiting more significant generalizations.

The answers obtained have been included in tables that are reproduced as an appendix to this report for the reader interested in a more detailed description of the data than the one that can result by this summing-up paper. The present comparative treatment has to be considered highly tentative and we hope that the months following the discussion in Utrecht will prove useful in homogenizing our data after feedback to the respondents and perhaps even in filling some geographical gaps for the purpose of publication.

Predictably, the methodology we have used, constrained by the very obsolete framework of the Academy's meetings, has proved quite unsatisfactory, which points very clearly at the necessity to rethink the general framework of this kind of projects. Not only due to the bureaucratic mechanism of the selection of National reporters we experienced a serious lack of communication, but we also experienced from many countries a disappointing tendency to offer only black-letter answers, sometimes claiming incompetence due to the assumed sociological purity of the "professional" lawyer's expertise. The classification of Access to Justice as a topic of "procedure" might have expanded the problem of black-letter answers. The invitation of the project was to consider the law as a phenomenon in flux, which can only

be described as an historical path; however, this was largely ignored by many respondents. Moreover, the state-based framework made us miss at this point any contribution (more or less significant) that non-territorial suppliers of law might have offered in this highly political field of inquiry.

While the plethora of recent writings about the crisis and under-theorization of current comparative law should have warned me of this possibility, this first experience as a General reporter certainly revealed that these challenges were an obstacle beyond my expectations.

4. A Comparative Discussion

A comparative discussion involving 16 legal systems faces the problem, classic to comparative law, of the need for some taxonomy to work as a compass in the jungle of legal systems covered. Due to the random sample of legal systems; of the clear preponderance of European civil law jurisdictions (France, Germany, Italy, Spain Belgium, The Netherlands, Greece, Poland and perhaps Sweden); of the availability of only one country clearly belonging to the Common Law (the US), despite the thick layer of common law legacy characterizing India; and of the objectionable choice of considering Chile, Mali and Japan as civil law jurisdictions, despite the colonial or hegemonic legacy respectively, the utility of the classical taxonomy (common law, civil law, socialist law, other conceptions) of David and of its amendments provided by Zweigert and Kotz appears very limited for our purpose. My preference thus extends to a tri-partition, based on the comparative hegemony of legal layers between countries belonging to the Western legal tradition with their hegemony of professional law and countries in which professional law competes with hegemonic aspects of political law, of traditional law or of both. We will thus have two groups, one composed of 10 countries (the civilian jurisdictions plus USA and Sweden) and one of the remaining six countries, arguably areas in which at least among significant parts of the population, the professional legal system is quite significantly supplemented in its providing access to conflict resolution by alternatives to the professional legal system. It is worth noting that in the aggregate of slightly less than three billion people residing in the sixteen countries covered by this report about 2.3 billion live outside of systems belonging to the rule of “professional law”, and only around half a billion within the “professional law-based” Western Legal Tradition, which shows even more dramatically the shortcomings of an approach to comparative law based on Western-centric assumptions of the black letters as an expression of the law.

The following sections will follow the five partitions of the questionnaire attempting just a few general remarks for each of them. There is no pretense whatsoever of being complete nor of any final or even reliable nature of the aggregate of generalizations and/or banalities that I have been able to offer.

5. Sociological Background

The first part of this section is aimed at exploring whether access to justice could be considered a social and political issue in the countries analyzed. Whether, in other words, this issue can be considered as internal to the professional group of lawyers or whether it could be considered of some concern to the population at large.

(a) All the respondents have offered quite nuanced answers to this question. Three countries: France, Germany and The Netherlands, plainly state that access to justice is a resolved issue in their systems and that society is quite content with it. As a consequence, the press does not deal with the issue, and the topic is “hardly ever an issue in election campaigns.” On the opposite side of the spectrum are Chile where “the media deals with the issue of access to justice almost every day,” China where access to justice is “a very common theme in the current media,” and in Mali where it is a high-profile political issue due to its connection to the establishment of “the rule of law” and where an ambitious program (Prodej) has been established to cope with the issue. Also in Greece the press demonstrates a need to cope with the problem particularly because of the issue of delay. In Belgium, media attention is attracted by the law only when some high-profile criminal case arises, or when attorneys begin a strike. A similar attitude is found in Sweden, even if it seems that recent changes in the law are highlighted in the media on “an occasional basis.” In India the issue exists only for those “involved in the profession of law,” which seems to be an attitude which is shared in Japan where, despite its being “one of the main topics in the recent judicial reform”, it has given rise to only “some public interest.” In Poland, it seems that the debate is absent because of a “lack of reliable information.” While in the United States, the high degree of “spectacularization” of the law as reflected by the media and TV shows “give the impression that litigants have lawyers as a matter of course and that courts are readily available within the hour.” The issue, if at all discussed, is not discussed from the perspective of the poor litigant, but from that of a system where too many lawyers have undermined health care, the manufacturing sector, and other vital American interests. In the United States, as in China, a great deal of time seems to be devoted on the TV to talking about or featuring the law.

(b) This part of the question aimed at perceiving the stigma issue i.e. whether the use of professional legal agencies was socially accepted or discouraged. It also aimed to test the perception of the presumption of innocence in criminal cases. A vast majority of reporters, including from France, Germany, Italy, Belgium, Greece, The Netherlands, India, and Italy clearly state or imply (US) that there is no social stigma whatsoever in suing or being sued in a civil action. The social stigma is registered in Japan as “there are some tokens suggesting evidence of such a stigma,” in China (mostly in the countryside) where someone suing or being sued is likely to be subject to “humiliation and dishonor” affecting the whole family, clan, and even in laws. Something similar appears to be the case in the Polish countryside, where never having being sued is still evidence of “someone’s integrity or honesty.” In Chile being sued attaches some social stigma to merchants, and this also appears to be the case in Sweden, “commonly regarded as a country of no litigation.”

The social stigma reappears on the criminal side of the law despite the generalized phenomenon of language in laws and constitutions stating the presumption of innocence. All countries, with the only exception being Germany, experience problems in the way in which, in practice, such a presumption survives media coverage. Often social stigma is attached to criminal prosecution despite the presumption of innocence. This is reported in Chile, India where “criminal prosecution does carry a stigma”, Italy where “society certainly attaches a social stigma to people involved in criminal investigation”, Japan due to the fact that “99% of cases brought to court result in a conviction” and Sweden where “criminal procedures have a more stigmatic character depending on the matter.”

(c) This part of the question aimed at obtaining some quantitative data on the relative percentage of people who are likely to experience litigation and thus stigma where this is attached to it. This question stimulated many answers showing the uneasiness of jurists when dealing with quantitative data. Many reporters denied the existence of data or simply declined to answer. The French reporter had a feeling of “Selon mon opinion ce pourcentage est tres mineur.” Only three reporters were able to offer data in percentages with quite impressive variations: The Netherlands (roughly 4%), China (roughly 0.3 %) Japan (roughly 0.8%). Some reporters offered some numbers which are quite difficult to compare based on pending cases in relation to the population (India) or in yearly filings (the US, Italy) or a combination of the two (Poland), thus showing the prelude to the final part of our “sociological” inquiry.

(d) This part of the question aimed at exploring the so-called issue of a “litigation explosion”, one of the most common alibis in Western societies for the poor state of access to justice. Here again, the subjective nature of an abstract questionnaire methodology is discounted. Only respondents from Mali and the United States and more carefully Greece, perceive the

existence of a litigation explosion. While the first-mentioned does not state numbers but causes, mostly due to social transformations undermining the traditional fabric of society and thus the role of traditional dispute resolution (urbanization, privatization), the US provides data demonstrating this explosion in terms of a rough increase of 15% in the litigation rate from 1993 to 2001. If one compares the US response with that of the Dutch reporter who denies a litigation explosion, but points to an increase of 20% in civil cases between 2003 and 2004, we can see how the litigation explosion is more of an issue of perception (often encouraged by propaganda) than of reality. The Polish report shows a significant increase in litigation after the events of 1989, which together with the situation in Mali suggests a strict connection between the building of capitalism and private law litigation. The German report, as the Dutch situation, shows a connection between times of recession and dire economic straits and an increase in private law litigation, pointing at an unexpected 10% increase in the last years of economic depression. The same correlation is supported by data (not offered in percentages) on Italian law, while the Chilean reporter blames the delay in his system on structural reasons more than on a litigation explosion in the dominant professional discourse.

Practically all respondents complained about delays in justice (with the only exception being France, which, while offering no hard data, suggests a deterioration in quality rather than in speed). Some respondents pointed out that there are significant variations through the territory of the State (Belgium and China) in relation to judicial delays and the comparative size of these two countries suggests that this has nothing to do with geography, but is correlated to the concentration of areas in which business is carried out. The public perception of the law proves to be very poor in the reports that offered some statistics (Chile, Japan, Mali) or that implied this attitude due to the high percentage of individuals who abandon litigation due to frustration (India). Spain offers an interesting insight that the public perception of judicial efficiency might be lower between those who have never experienced it as compared to those who have. A point of optimism that we wish was true for many. Only Japan shows progress in the solution of the problem of delayed justice, whereas the Italian report, though containing duration data comparable to those of many (including Sweden and the US), demonstrates a degree of shame and desperation perhaps due to the many condemnations by the European Court of Human rights, also mentioned as a frequent condemner by Belgium.

6. Costs of Justice

This section intended to complete the description of the socio-economic contexts of access to justice by trying to answer the fundamental question: "How expensive is to litigate?" Again this section confirmed problems due to the accuracy and depth of many of the reports

and the less than homogeneous character of the data offered. Moreover, some confusion was generated by the general reporter's mistake of asking about a "winner pays all" as opposed to a "loser pays all" system.

(a) The questioning began with the issue of legal fees and how attorneys obtain them in order to explore the basic incentives of parties to use the legal system. We can observe a few important common features. Most respondents pointed out that Court fees in their different ways of being accounted are trivial if compared to attorneys' fees. In practically all the legal systems some advance payment can and is required by attorneys. An exception only occurs in the limited amount of cases in which a full contingency fee agreement is available and actually used on a contractual basis by the attorney and his/her client. Contingency fees are available more often than one would expect. Only Germany, Italy and India plainly forbid contingency fee agreements and in Sweden their use is not considered unethical. In Mali, while the rule is strictly against contingency fees, practice very much favors such fees, so one wonders if it might not be the same in other jurisdictions, which appear to deny litigants this effective, though limited in scope, device favoring access to justice. As a number of reporters point out, a variety of contingent elements exist in their fee structures. In Belgium, for example, while the fee must be predictable and negotiated *ex ante* it is possible to require a supplement of the payment if the result is attained. Similarly in France where *quota litis* is forbidden as such, it can reappear if it is not the only element of remuneration. In The Netherlands attorneys and clients may fix two rates, one in case of victory and one in case of loss. As for China we are informed that the parties "still have to pay the lawyer's fees whether he has won the case or not," which might imply that contingency fees are not used or available.

However, in countries as different as Greece, Japan, Poland, and Chile the contingency fee is openly available and very commonly used, although usually less expensive than the US where the reporter points at peaks of about 50%, while the top figures in Greece are 20% and in Chile they can go up to 40% but they may also be as low as 10%. As for Japan a contingency part is contained even in the ordinary account of fees outside of special agreements (4-16%). In Poland the possibility of contingency fees is textually based on an article in the Code of Civil Procedure.

Advertising is also incrementally available, following the trend of the commodification of legal services that seems to be taking place. The United States model, offering a fully advertised market for legal services, is followed by Belgium and The Netherlands (where this is done on a regular basis).

Advertising, on the other hand, is strictly limited in Germany, France, Italy, Poland, and Sweden with such ideas as objectivity standards, the media for advertising or the permitted

layout structure. Only the US goes as far as making advertising a “constitutional right.” Reports which are usually very accurate such as China, Mali, India and Chile did not comment on this point which probably shows that the practice is not (yet?) in use in those contexts.

As to the party responsible for the costs or expenses we might be faced with a clear example of convergence at a midway point. Systems are divided in principle between those following the American rule, according to which each party has to sustain its own costs (US, China, The Netherlands, Japan), and those in which the loser has to pay (Belgium, Chile, France, Germany, Greece, India, Italy, Poland, Sweden). Nevertheless, all the countries of the second group signal a variety of cases in which some or all of the winner’s expenses cannot be recovered (mostly due to the narrow margin of victory or the unreasonable nature thereof), while those of the first ground point to cases where the winner can recover some of his expenses from the loser.

(b) From many answers to the set of questions in sub. a) it already appeared that a freedom of contractual agreement between the attorney and his/her client is at least in principle the rule, with variations as to the scope of this freedom varying from very strict regulation (Germany) to practically absent limitations (the US). The issue of freedom of contract is the specific object of the set of questions in sub. b). A number of reports pointed to different regulations concerning the calculation of fees that might be hourly (Belgium between 50 and 450 Euros; China with dramatic variations between different provinces; The Netherlands with variations determined by the Bar association fixing different hourly rates for more or less experienced lawyers; Sweden with a maximum hourly rate of Euro 121), based on the value of the issue (Italy, Belgium, France but only at the Grand Instance and Court of Appeals; Greece no less than 2% of the value) or on a quantum meruit standard whose most important example is Germany with its well known system based on points.

Many countries, following what has been characterized by the Japanese reporter as “a strong demand for deregulation,” fully endorse the principle of freedom of contract. A very good follower of the US model, Chile, leaves lawyers “completely free” to state their fees. The same solution is followed in India, Spain, and in Poland, where despite a body of default fees, attorneys can go “above the maximum and below the minimum.” In China, freedom of contract is the law in action since “breaches of local governmental guidance happens all the time.” Also in France, fees are not regulated (increasingly used is the hourly rate (150-400 Euros) and in The Netherlands even the “recommended rates” of the Dutch Bar Association are no longer published, being deemed to be “adverse to competition.” Freedom of contract (already undermined by the ban on *quota litis*) is further tempered in Belgium by the idea that the lawyer has to use “fair moderation” in his/her requests with no prohibition on going above

the maximum or below the minimum unless this is done in a grossly unconscionable manner. In countries where freedom of contract cohabits with provisions on the way in which fees are set, the latter works as a default system or most importantly (very clearly stated for Belgium and Spain) as the way for setting the fees to be charged to the loser, thus making any deviation from the default standard a risky operation.

On the aspect of effectively limiting contractual freedom, Germany, where one can go above the maximum “only in commercial disputes of high value,” is in company with Italy where the maximum amount determined on the basis of value in dispute and the level of the Court involved can be departed from in only “special circumstances,” while one can go below the minimum only with the special leave of the local Bar council. The minimum level of 2% of the value of the dispute is also protected in Greece where “agreements for less than the minimum are deemed invalid,” while apparently the current practice allows one to exceed the maximum. The fact that the minimum proves more resistant to contractual freedom than the maximum shows that the goal of systems that choose regulation might be more about protecting the powerful professional group of attorneys than that of obtaining access to justice at affordable prices.

In c) and d) in the question sub. c) and d) we once more tried to push our reporters to give some information on how access to justice works in society by attempting to estimate the economic effort required of parties in order to litigate. The difficulty experienced by lawyers in looking for statistics, if at all available, and the variation depending on the quality of attorneys involved makes it difficult to make generalizations. In most countries the average lawyer earns roughly the same amount as an average doctor, both of whom earn less than the average notary, however. Tables attempting some homogeneous comparison of data offered in a variety of currencies and the average social income in each country were attached in the annexed portion of this report, but are not reprinted here. Only Poland states that “Compared to the average Polish income, the costs of litigation are very high.”

The group of questions in sub. e) looked at further information on the burden of being sued for an innocent defendant. Generally speaking, even countries that have followed the loser pays all system point to the fact that recovery will not be complete, either because certain expenses might turn out to be unreasonable (i.e. appointing a high-flying attorney compensated well beyond the average) or because the emotional component of the litigation suffered is not reflected (the French reporter pointed to this aspect). Of course, the innocent defendant will be much worse off in countries that have followed the so-called American rule.

A wide variety of variation exists concerning the availability and popularity of insurance schemes sheltering the defendant from this accidents in life. No insurance coverage is available in Chile, China, India, Greece, Japan (insurance is available for plaintiff, but not for defendant). They are available but not generally used in Italy (due to the under-evaluation of

litigation risks and costs) and in Poland; they are available in limited forms, usually attached to car or home insurance, but also not much used outside of this in France. On the opposite side, insurance is very popular and broadly used in Germany where the burden of being sued and turning out to be innocent is very modest anyway (just selecting an attorney and anticipating limited expenses), in The Netherlands (1.3 million people are covered by such schemes and many more by those attached to cars and home insurance), Sweden (97% of the population are automatically covered), and Belgium where a very recent reform (in May 2006) made insurance coverage compulsory in order to facilitate access to justice.

The group of questions in sub. f) and g) is aimed at understanding if and to what extent the private Bar offers help in access to justice. As a general rule one can observe that the availability and the very existence of voluntary work by the legal profession is useless and not used in those countries, like Germany, Sweden, Belgium and The Netherlands, which have a well developed publicly-funded system of legal aid. Also in these countries, with the exception being Belgium, despite quite a high standard of academic education in law, they do not have organized legal clinics open to the public. In Germany this is even illegal! Thus the issue and the importance of pro bono practice can be seen as a second-best option, followed by those States that have privatized the issue of access to justice in the sense of not investing public funds in basic social necessities. The institutional vacuum left by the State is thus filled by private or semi-private organizations (trade unions, consumer organizations, Universities), providing some relief to their members or to the more disadvantaged members of society either by employing their own lawyers or by referring these needy people to attorneys with which they have some arrangement. No surprise, then, that the model of pro bono legal practice, of public interest lawyering and of University clinical legal education is found in the United States. Chile demonstrates quite a well developed number of these surrogates such as a variety of pro bono foundations including a pro bono committee of the Chilean Bar Association. In India, pro bono legal practice is used extensively and NGOs, in domains such as HIV or women's rights, provide assistance in accessing the law. In France the burden has been traditionally borne by the Bar organizations which attempt to deliver justice even to the *Sans Papier* by driving a bus around Paris! There is no clinical education in France and even trade unions and other organizations have a very limited role in delivering justice to the poor. Italy shares with France the absence of clinical education but trade unions, consumer associations, and similar groups are quite aggressive in the defense of their members. Italy has a long-running tradition of gratuitous work for indigent people, imposed as a duty on the legal profession and the reaction can be seen in the absence of pro bono mediums to supplement the lack of public-funded service. In Japan there is a major reform effort in this domain, with legal clinics appearing in the new advanced law schools established since 2004 and the Justice System reform states that "pro bono activities should be deemed one of the

lawyer's duties." Some local bar associations are apparently implementing this language. The Bar Association of Japan has endowed a fund for law firms willing to provide legal aid in the remote countryside with an interesting system of subsidization. However, according to the reporter the future of the 62 firms established under this program is grim. China is also attempting to develop a pro bono system and the first public interest law firm was funded in Beijing in 2003. Chinese law schools provide a significant amount of legal aid by means of clinics. In contrast, clinics do not exist in Mali where other groups such as trade unions seem to be active in protecting the rights of their members. Finally, we are informed that Greece is foreign to the concept of public interest law firms, while in relation to Poland the scenario is rich and extensively described. In this system District Courts provide some legal consultation with a week of free legal advice every year; there is a fully-fledged network of University legal clinics, funded by a private foundation, which are now the first venue where an indigent litigant would go. In many other countries the first step for a litigant would still be a law office, sometimes as in the more generous systems because it will be free (as in Germany) or often because the other possibilities are usually poorly advertised and unknown. In Chile information about free services is nevertheless sufficiently available in any city hall, while in other places such as China or India a literate relative or a friend will be consulted in order to find an attorney. Religious groups are usually not involved in offering or subsidizing legal services with the possible exception of Poland, Sweden, and China, but only in the Tibetan region.

While most of the focus thus far has been on civil litigation, the final set of questions in sub. h) pointed to the most dramatic encounter of an individual with the law, i.e. that with criminal prosecution. Here the legal sensitivity of different countries differs quite substantially. The principle that each party has to bear his or her costs is coherently followed in the United States and China or introduced *ex novo* in countries such as Italy or France, with the unfair result that the defendant who should not have been prosecuted might still be economically ruined by the need to pay expensive attorneys after prosecution. True, these countries or others following this quite cynical approach of leaving the burden where it falls are making some attempts at mitigation. Some, like France, Greece, or Mali try to blame the accuser (the would be victim), thereby sheltering the State. Others, (Chile, Spain, and Japan) attempt to introduce some exceptions to the harsh nature of this rule where the prosecution was grossly negligent or when the defendant has been unfairly incarcerated. Only Germany, Sweden, and Poland appear to have attained a civilized stance where the costs of prosecution are fully internalized by the State.

8. Institutions

Part of the subset of questions in the heading “institutions” continue to be aimed at exploring the costs of justice and portions of this section possibly might have better been included in the previous chapter. The first question attempted to obtain reliable data on how much States invest in justice and whether one could observe an increase or a decrease in the trend. Here we have confirmed the fact that lawyers do not like to work as sociologists. Only a few reporters offered percentages of the GDP while others gave the answer in percentages of the yearly state budgets, while still others answered according to percentages of the increase in the former or in the latter. The result is that in redrafting the questionnaire it would be crucial to make sure that the data are comparable. A slight increase in the investment in justice can anyway be perceived by the figures offered in almost every report that approached the question.

The subset of questions in sub. b) was aimed at knowing what kind of burden it is to litigate for an ordinary person, particularly from the point of view of understanding to what extent the court system is subsidized by the State and to what extent it is paid by its users. Here, again, in order to make meaningful comparisons we needed to homogenize the data available (still very rough and incomplete) by unifying the currency and trying to contextualize the fees according to the costs of living. The reader is referred to the tables in Annex B. All reporters stated that the costs of litigating even in simple cases are higher than those involved in a medical check-up, even though, with the only exception being Germany, reporters believe that the Court system is still subsidized. The Malian reporters inform us that litigating is “clearly beyond the financial possibilities of the majority of the population,” which is probably also the case in India. The Italian reporter offers some information to the extent that the costs of instigating litigation in Italy are “substantially lower than in most other European countries” (46-61% less), as much as eight times lower than the most expensive system of ordinary litigation, Great Britain.

The subset of questions c) was aimed at understanding whether ordinary litigation was to be considered the rule or if, for lesser claims, access to justice was facilitated by alternative official institutions, like the US small claims Courts, which were established about fifty years ago across the Ocean within the mood of much (very soon deluded) hope in popular justice brought to the parties without the involvement of attorneys. In this respect four systems, The Netherlands, China, Spain, and Germany do not use some form of institutional alternative to the ordinary court system. In the latter context within the ordinary first degree jurisdiction of the *Amtsgericht* (up to €5,000) attorneys are not required, but are used anyway in most cases. A similar phenomenon is seen in most of the other systems that have introduced institutions such as “justices of the peace” to deal, more informally, with less important cases. This is the

case in Belgium (where one can save about 50% in costs compared to the ordinary courts), Chile, and Italy, whereas the Greek report describes an informal and very inexpensive system of justices of the peace, but does not provide any information on the need to use an attorney there.

Attorneys are required in the Indian small claims courts. They are neither required nor used in the recently established French system of small claims courts, described as something of a delusion by the reporter. Attorneys are not required and not used in 92% of cases in the newly established special *procedure* for small claims in Japan, a solution, that of a special procedure (without attorneys) in the ordinary courts, which is also followed by Poland. Something resembling a special procedure for small debts is also used in The Netherlands. Finally, as to the staff of small claims courts, in all systems they are staffed with somewhat “lesser” personnel, though respondents do not dwell on details. Ordinary judges are still in charge where only simplified procedures are available.

Some consistency across nations can also be observed in the fact that appeals are limited percentage wise, an inquiry which was made in question d). We go from a minimum of about .0003 % in the United States, through to 4-5% (in Belgium, Poland), while the average figures are around 10% (Chile, France, China, Italy); Japan, however, is slightly on the high side with its 20%. We find a maximum rate of 40% (Germany), where nevertheless only about 25% of cases are appealable, which again boils down to a rough 10%. The reporters did not offer significantly comparable data on settlements both in and out of court.

The subset of questions covered by e) and f) aimed at exploring the phenomenon, noticed by many observers, of the increase in so-called Alternative Dispute Resolution (ADR) schemes, most interestingly in the form of mediation rather than adjudication. ADR is indeed often presented as an improvement in the possibility for people to “access justice” not in a confrontational or rights-based form, but rather in the form of a reasonable compromise between opposing interests. Two systems that have not traditionally used mediation to any great extent have introduced very recent reforms to introduce a mandatory effort to reach a compromise before granting access to a decision by a Court of law. These systems are Greece (a compulsory attempt at conciliation) and The Netherlands (referral to mediation). In India and Japan the judge tends to act unilaterally as a mediator, thus exercising a “soft” power. This idea of using the judge as a mediator has been broadly extended in recent Italian legislation, but possibly because of the ambiguities of such a soft power, it is resisted and does not work. The use of justices of the peace as a broad agency for mediation is also described by the Greek reporter. All forms of ADR are known in Belgium, arbitration, mediation and conciliation, the last-mentioned being compulsory in many instances (landlord-tenant, and labor disputes). In Belgium contracts often contain ADR clauses, but their validity for a party suing anyway is still in dispute because such clauses can be considered to be abusive. A

similar attitude concerning the risk of these clauses being abusive is described by the Chilean reporter who points to the quite extensive diffusion of mediation in many areas of the law including health, labor and criminal law (the only other reporter that points to the existence of penal mediation is the Polish). Not very diffused is ADR in France, according to our reporter, but he notices that mediation is on the increase and he even mentions the existence of specific courses in this respect (similar short courses are also available in Belgium, The Netherlands, and the United States). In all countries that have addressed the issue, the lion's share of the mediation profession is still in the hands of professional lawyers, but psychologists or sometimes simply "wise men" can perform a function that is very scarcely regulated. In France when an ADR clause is introduced it becomes binding and whoever wishes to access ordinary justice after having entered into such an agreement will have to "prove the impossibility of carrying out mediation." Rarely used and absolutely voluntary is ADR in Germany, while in The Netherlands, despite constitutional language to the effect that "no one can be kept from a state court," ADR is quite diffused in society and offered by a variety of organizations in which certainly not only lawyers are present. According to the Dutch reporter ADR clauses are very rare in contractual practice, something that is shared by Poland. In Japan, Mali, and China informal mediation before or during litigation is very diffused and is usually encouraged by judges and by society. Nevertheless, it does not appear to be capable of entirely foreclosing the use of courts to very stubborn litigants, those who in India, as the reporter informs us, bring "even petty consumer disputes to court and which may be litigated for over ten years costing both litigants and companies more money than the cost of the injury." Perhaps this attitude explains why many international investors, as pointed out by India and Mali, do introduce ADR clauses in their contracts and do condition cooperation money to legislation allowing such clauses, thereby denying access to the state courts in order to avoid judicial scrutiny. In Spain and Sweden, ADR, although it is not very diffused, is encouraged or recommended by different pieces of legislation.

Subsection g) has been specifically devoted to arbitration. Arbitration is regularly used and is mostly offered by Chambers of Commerce or similar institutions in Chile, Germany, France, Italy, The Netherlands, Poland and Sweden. With the only exception being Germany where apparently an arbitral process is not shorter than an ordinary procedure, all other reports point to speed, efficiency and privacy as the main reasons for the success of this form of ADR "for the rich" (as the Italian report points out), as it is almost entirely used for commercial disputes of significant value. Reporters from China and India nevertheless observe that, in general, an arbitration award can be subject to ordinary appeal measures; so that at the end of the day it might be more expensive but not significantly faster (in India this explains the relative failure of the special Lok Adalat procedure, a form of arbitration). The cost of arbitration is in reverse proportion to the value of the disputes so that in very

important disputes it might be comparatively inexpensive while in more minor ones it can be very significant because usually expensive lawyers are used for these disputes. The Japanese reporter points out that, of the various forms of ADR, arbitration is the least used, while in Greece its use is “constantly on the increase.”

The set of questions in sub. h) was aimed at exploring the “real” alternatives to dispute resolution and prevention, those not “contaminated” by the official legal system. Here again there was possibly too much faith in the possibility of genuine interdisciplinary work in comparative legal analysis. In Mali, for example, there is a fully-fledged and very sophisticated system of informal justice in the countryside, carried out by *tontiguis* and other traditional figures, which coexists with the formal legal system and is mostly the only venue which is open to justice as far as the people are concerned. In a subsequent draft of the report it would be interesting to know more about this. It would also be interesting to know something about the way in which justice is carried to the people in the remote Chinese countryside, where the formal system of the Chinese “rule of law” is still not likely to be effective. For Chile we are informed that other informal mechanisms “are very common” but it would be useful to know more about the actual practices in the countryside or other remote areas still populated by the indigenous population on top of the role of modern religious associations aimed at solving family disputes and thereby avoiding the trauma of litigation. As for India the reporter indicates that adjudicatory power is vested in the *panchayats* (village councils) and interestingly points to the non-authorized *panchayats* deriving their legitimacy not from the State but “from their community, caste or religion” and which are very influential in family matters. It is a pity that the Iranian report chose to answer only the questions specifically related to the Legal Aid System because it would have been most interesting to know how accessible the law is for the people of a system with a thick layer of religious law. As for Japan, another system where, according to traditional comparative taxonomy, one could expect some informal institutions presiding over social norms such as *giri*, we are specifically informed that family networks of religious organizations or political parties “are not likely to play an important part in the dispute resolution process.” Almost all of the reporters from Western countries either did not reply to the question or simply deny any role for non-professionalized institutions in adjudication.

9. Structures of Procedure

The set of questions under the heading of structures of procedure starts from the well known comparative observation that the more a country follows an adversary system of procedure the more it actually privatizes fact finding. In other words, a system such as the United States, which grants a strong power of discovery to the parties, will end up using privately

compensated attorneys as the main fact finders in the procedure, while countries using an inquisitorial model will use publicly compensated officials for the same purpose. This explains why, generally speaking, litigation is more expensive in the US than elsewhere. This observation, tested in the sub-set a) is in principle confirmed by the German reporter who points to the absence of the parties' power of discovery and emphasizes the judge's role in this matter. The Japanese reporter clearly points at the mixed nature of her system, midway between the US and Germany, and a similar answer is given by Belgium. Sweden mentions "the very active role" of the judge in this matter. Nevertheless, in practice, this distinction blurs. In civil matters, while countries such as Chile, China, Mali, Greece, Poland and The Netherlands emphasize the adversary nature of their procedures and inform us that the parties are accordingly the main fact finders, the Italian and Greek reporters mention that, in practice, judges are quite passive and that the adducing of evidence (such as expert witnesses etc.) ordered by the judge is nevertheless paid for by the parties. In criminal matters all countries point to the public nature of the prosecution that is carried out either by a judge or by a prosecutor. This quite banal observation needs to be observed in practice by the answers to points b) and c) of the report. Indeed the amount of power granted to the "victims" of a crime is also a factor showing how much law enforcement can be considered to have been actually privatized. Moreover, these questions were aimed at understanding if and in what measure criminal prosecution could be seen as a way for the victim to access justice. From this perspective the Italian report is quite open in pointing to the fact that criminal prosecution is actually a good substitute for civil prosecution, being cheaper, quicker and endowed with more effective discovery. The same point is made by the Chilean reporter. It seems that victims' rights in the criminal trial have been increasing in recent years, mostly because of the strong political appeal of their claim. In Belgium, for instance, the access of crime victims to the criminal prosecution process has been a direct consequence of the commotion produced by the infamous *Doutroux* affair. Countries may be roughly divided into two groups. Some do maintain a pretty strict distinction between criminal prosecution and civil procedure. India, the United States and Japan seem to follow this model. Most countries, on the other hand, adhere to the French model granting the victim of a crime full participatory powers in the prosecution, although limited to obtaining the remedy of restitution and damages. However, as the Chinese report points out, even in these countries, "The criminal litigation can't take the place of civil litigation" and the same principle can yield opposite results such as in Germany, where "despite the last reform of June 2004 it is still extremely unpopular that a victim claims damages within the criminal proceeding." The decision of the prosecutor not to prosecute is appealable, in one way or another, in most countries, such as for example in The Netherlands, Germany, and China. In other systems, such as France, Greece, or Belgium, it seems that the discretionary power of the prosecutor is not subject to an appeal, but the victims might initiate

a surrogate criminal prosecution. This model appears to be very popular in Chile. In some countries, such as India, the decision is neither appealable nor can it be substituted. Finally, from this set of questions it emerges that in some countries, such as Greece or Italy, for some categories of crimes (sex-related or usually less important) the prosecutor cannot prosecute without the victim's consent.

Questions d) and e) might possibly have been better located elsewhere in the questionnaire, either as part of the costs of litigation or in those questions directly inquiring into legal aid. In principle, the technical idea of *in forma pauperis* seems to be a typical common law device, shared by the US and India. Some countries, such as Chile or Greece, use the broader concept of *benefit of poverty*, determined according to personal circumstances that entitle the beneficiary to a fee reduction or waiver. Most countries are extremely strict in offering such relief either setting very low income limits, such as in Italy (below roughly 9,000 Euros) or Spain (twice the minimum wage), or using notions of extreme hardship in litigation due to personal circumstances such as Greece (where the impact of such provisions is considered "minimal by the reporter") and in Japan or Mali. The Swedish reporter narrowly interpreted the question and simply states that "Court fees or other legal fees cannot be waived due to low income." Germany and China, on the other hand, seem to consider a more contextual approach, considering the nature and the consequent expected costs of litigation as well as the personal circumstances of the parties, which in Germany does not need to be actual "poverty". Most reporters, such as the French, expressly mention that *in forma pauperis* is not a kind of procedure but that this issue should be faced in relation to the circumstances that allow legal aid. Indeed, the issue of whether *in forma pauperis* was actually a structural part of litigation is what justified this general reporter to approach the issue here.

Similarly, subsection f) was not meant to reproduce information on the availability and diffusion of ADR, an issue previously discussed, but only to see whether ADR had found its way into the very structure of the ordinary procedure. Here some of the emerging data are quite interesting. Once again, it is the German model that clearly sees the contradiction between mediation and adjudication, both in general and particularly in criminal matters, where they introduce a culture of harmony rather than of rights: "Victims of crimes are neither encouraged nor required to mediate with alleged perpetrators." The same answer is offered by Sweden, Greece, Italy, and India. These former two countries, endowed with very healthy adjudicatory systems, thus provide a clear alternative to the recent trend of mixing adjudication and mediation, which is quite a clear sign of the diffusion of the US model where a variety of mandatory ADR schemes are diffused at the state level as a prerequisite to access justice. In Belgium, the recent legislation of 2005 and 2006 have introduced both mandatory attempts at conciliation and even criminal mediation that for the time being is not mandatory, but only encouraged. In The Netherlands there seems to be the same approach. This

harmonious solution is also strongly encouraged in Japan (where it is practically obligatory for the alleged perpetrator in order to mitigate the harshness of the prospective sentence), and Chile and Poland confirming quite a notable degree of Americanization. In China the reporter points to a quite different picture, that of a culture of mediation and conciliation, which permeates ordinary procedures outside explicit normative interventions. A similar approach seems to be present in the Malian legal system. Even the French reporter admits that while France does not recognize ADR, more and more frequently the judge will stay the process and send the parties to mediate apparently in both civil and criminal matters.

10. Legal Aid Programs

Having finished what this reporter thought to be the indispensable context of access to justice, the final part of the questionnaire has been an explicit inquiry into the existence and the efficiency of legal aid schemes for the poor in the countries of our inquiry. The importance of this context emerges even more by the fact that, possibly due to miscommunication certainly originating from the General Reporter, the Iranian report only offered comments on this section.

Question sub. a) plainly asked whether legal aid schemes were available. Reports from The Netherlands, India, Italy and Spain pointed to specific articles of the respective Constitutions granting important source of law status to this issue. Quite interestingly, many countries have recent (post-1990) or very recent (post-2000) statutory provisions aimed at organizing this issue. Among such countries are China, France, Greece, Italy, Japan, Mali, Poland, and Spain. Interesting numbers relating to people using the service are available for Chile (25% of the population) or, for China, relating to officials specifically appointed for this purpose (10,458 officials roughly a half of whom are qualified attorneys). France points to the fact that the service has been footed mostly by the legal profession since the middle ages, and also Spain, Chile, Italy and China point to the key role of attorneys' organizations in this issue. Germany emphasized that legal aid, in the form of consultation, is "available to all," with a very moderate fee (€10), while Iran offers free legal advice. Greece, in contrast, says that legal aid, no matter in what form, is practically not available to anybody, while The Netherlands states that it is available to everybody who is single and earning less than €1450 a year or who has a family and earns less than €2701 a year. In India, the legal aid system has only existed in practice since 1995, but it is poorly funded and does not really work. In Mali, the system exists in theory but has practical functioning problems due to a lack of funds, and it is the civil society, by means of a variety of NGOs, that provides legal counseling to the people. Japan and Poland are in the middle of ambitious reform projects directly involving State responsibility, and in the first instance the monies invested in the scheme are "substantially

increasing.” Finally, while in Sweden the lion’s share seems to belong to insurance companies and legal aid provided by the State is only available on a “limited or secondary basis,” the reporter from the United States describes three abstract models available here and there through different States, but does not comment on their effectiveness or availability.

Questions under b) c) and d) are aimed at discovering whether and to what extent free attorneys are available and paid for by the legal aid schemes in the different countries of our inquiry. Here, for the first time, we find a very wide basis of common solutions at least at the level of form. Once someone qualifies for legal aid according to the different or very different standards discussed above, then he or she is entitled to free counsel both in civil and in criminal matters, both in the case of acting a plaintiff and in the case of being the defendant. The only exceptions to this rule, which if nothing else signals a degree of “aspiration”, are Sweden and Japan, where free attorneys are formally limited to criminal cases and not in civil cases. In the US and Iran, they are not even available in many criminal cases. However, in Iran more serious crimes entailing “one of the capital punishments of death: retaliation, execution, stoning, or life imprisonment,” cannot be prosecuted without a free attorney, while in the United States, “capital murder cases involving the death penalty, which would dictate the highest need for the assistance of counsel at every level, are sometimes without attorneys, or at least adequately trained attorneys.”

Answers to question e) do not show significant differences. For administrative matters the wide consensus of offering free attorneys is joined by Iran (which also provides free counsel in civil matters), while only Chile changes its solution by not granting legal aid in administrative matters. The set of questions under f) and g) were aimed at understanding how desirable it might be for an attorney to serve poor clients. There is here again a broad consensus that attorneys for the poor are paid less, significantly less than attorneys for an ordinary client. In some systems they are paid nothing at all (Chile, Greece) or close to nothing (Iran, India). In systems where the loser pays all system is followed in legal fees this introduces a contingency element since the winning attorney for the poor client will be paid his/her full fee by the ordinary losing defendant. This factor, together with the high level of competition in the legal profession, creates a system of incentives for attorneys to accept the job as a better alternative to not having any clients. This is pointed out for France, Italy, possibly Sweden, and Germany where the reporter also signals that the State is a certain payer while private clients might not be so. In some systems attorneys are free to refuse, such as in Belgium or Italy where they receive a fee from the State that is nevertheless much lower than the usual fee. In India, while in principle serving the poor is actually considered a major duty for the legal profession, in practice attorneys often refuse or, worse, might accept and be corrupted by the wealthy counterpart. In Chile, they are not free to refuse and serving the poor is actually a duty imposed on law graduates in their training phase in order to access the

Bar as fully-fledged practitioners. In China and Iran attorneys cannot refuse outside narrowly specified cases having nothing to do with adequate compensation. Some systems have a two-phase model. Attorneys have to apply in order to be considered to represent the poor, but once they are accepted for inclusion in the list, they can no longer refuse. This appears to be the system in Spain and The Netherlands.

Some systems distinguish between civil and criminal cases from a variety of profiles. In Japan the attorney cannot refuse a criminal defense for the poor while he is free to refuse a civil defense and indeed often does so because of lower compensation rates (and a profession enjoying a strong monopoly). In Italy, while the criminal defense attorney appointed for the poor cannot be paid “more than the average”, the civil defense attorney is significantly less compensated since the upper limit is half of the average. In the United States refusing a poor client is routine even in public interest firms because of a work overload. As to who foots the attorneys’ fees, in most systems it is the State. In the United States, its contributions are occasionally integrated by private or semi-private funds. The way in which payment actually reaches the attorneys involved also varies. There are very detailed standards established by law or regulation in some countries, such as Belgium, The Netherlands, and Iran, and in France the amount actually paid is decided by the Bar association, as a function of the budget availability; in Japan the Courts enjoy discretion in this matter.

At the end of the day, the two agencies for legal aid funding through the systems are the State and the Legal Profession.

Question h) was crucial in trying to understand comparatively to what extent systems care for legal aid as determined by the political willingness to pay. We also tried to monitor general trends in terms of an increase or decrease in spending. Here again we discount the usual problems of comparability and the completeness of the data available. Two countries signal clear decreases in the budgets allocated to legal aid: the United States and Sweden. It seems, however, that in absolute terms the former was starting from quite a low base while the latter is still comparatively generous (though it is not clear what the relationship actually is with the extensive use of insurance schemes). Increases, sometimes significant, are signaled in Belgium, China, France, Germany, Japan and Poland. Many reporters did not answer or comment on this. In absolute terms we do not have many figures, however a couple of very small countries such as The Netherlands and Belgium do demonstrate a State budget for legal aid amounting to around 300 million Euros a year, while Italy, a much larger country, has a shameful budget of about 60 million, and the US, much larger than all three put together has decreased its budget in the fiscal year 2006 from 335 to 318 million dollars.

The final question of the questionnaire asked for a concise description of the fundamental features of legal aid systems where available. As to their access, most countries use rigid (usually low) income limits in order to grant the service. Belgium, France, Germany, and

Italy describe this model offering some detail on the amounts. Only Germany appears to use a flexible system, which according to the reporter allows for legal aid also to middle-class applicants. Reports from Iran and China observe that extremely bureaucratic systems have been introduced while the Swedish system, which only intervenes after the around 8,000 Euros from insurance schemes have been exhausted, is based on a quite expensive (minimum 108 Euros) non-refundable compulsory consultation system to check the (comparatively high) income limits for eligibility. In France and Belgium, and probably elsewhere, legal aid can be total or partial (with different income limits); in Japan most legal aid is in the form of a loan whose repayment starts running immediately after having obtained it and which is very rarely waived. Extremely interesting is the system in Belgium, which distinguishes a “first-line” advice phase (free for all, as in Chile), from a “second-line phase,” which includes litigation in which only the needy might be admitted. In India the reporter signals the involvement of both the federal and the local governments in a quite complex system that remains largely unknown to the ordinary people. The complete lack of a free “first-line” phase is lamented in Italy as it is one of the most serious shortcomings of the system.

Questionnaire

Sociological Background

- a) Please describe if access to justice is a social issue in your system. Do newspapers deal with the issue? Do TV shows? Is it an issue in political campaigns? Is there a different platform for different parties in this matter?
- b) Is there a stigma in suing in your society? Is there a stigma in being sued? Does the principle that someone is innocent until proven guilty shelter the criminal defendant from the social stigma of prosecution?
- c) Do you have data showing what percentage of people sue or are sued in your society?
- d) Is there a “litigation explosion” issue in your system? Is the state of civil and/or criminal justice considered efficient? Is there an issue of delays in justice? Can you quantify the delay?

Costs of Justice

- a) Please describe the structure of legal fees in your system. Is the contingency fee available? Is advertising of legal services available? Is there a loser pays all system? Are there discretionary limits to the winner pays all system? Are advances (retainers) usually required by attorneys?
- b) Are fees regulated in your system? Can attorneys contractually go beyond the maximum? Below the minimum?
- c) Please try to quantify the costs of litigation. Use whatever method you prefer to give the sense of how expensive it is to litigate in your system e.g. comparing the cost of attorneys to that of other professionals (doctors, accountants, notaries etc.).
- d) How much does a very simple lawsuit cost for a plaintiff? How much does a non-contested car accident? How much is a non-contested divorce? How much to evict a tenant? How much to sue a manufacturer for a non-working dishwasher?
- e) How much are merely the costs of litigation a burden to defendant? Are there insurance schemes available? Are they commonly used? How expensive are they if compared, for example, to basic car accident insurance?
- f) Is a pro-bono legal practice used in your system? Is it encouraged by tax deduction schemes? Are there public interest law firms? How are these firms funded? Are trade unions involved in offering subsidized legal services to their members? Do law schools offer legal clinics open to the public? Do consumer groups, environmental groups and other organizations provide legal services? Are religious groups, churches or organizations involved in offering subsidized legal services?
- g) Where does someone of the lower or lower-middle class, who is sued, go as a first reaction to get advice?
- h) Can someone who is prosecuted and turns out to be innocent recover his costs, fees, expenses? Can he/she sue to be compensated for his/her losses?

Institutions

- a) What percentage of the GDP is used for justice in your system? Has it increased or decreased in the last twenty years?
- b) How much does it cost to initiate litigation in a standard general jurisdiction? How much does it cost to use a court of general jurisdiction for each step of litigation? Is it subsidized or is it paid by the users? Is it more or less expensive in terms of costs than going to a public hospital for a general check-up?
- c) Are small claims courts available in your system? How much does it cost to litigate there? Are attorneys required to

appear before them? If not required, do you have data on the percentage of individuals using them anyway? Who staffs small claims courts?

- d) What percentage of decisions are appealed? What percentage of filed civil cases are settled?
- e) Are ADR schemes diffused in your system? Are they voluntary, semi-voluntary or mandatory? Do attorneys participate in mediation procedures? Do other professionals? What is their training?
- f) Are ADR clauses included in standard contracts with banks, Insurance Companies, Utilities providers etc.? When such clauses are included in standard contracts can consumers sue anyway?
- g) Is arbitration used for more important civil cases in your system? Is it used also for average cases? How much does it cost to initiate an arbitration procedure in a Chamber of Commerce? Is an arbitration procedure significantly shorter than an ordinary procedure?
- h) Are there other informal mechanisms by which disputes are settled? Is there a role for extended family networks? For churches? For political parties?

Structure of Procedure

- a) Who is the main fact-finder in your system? Is it the judge? Is it the attorney?
- b) What are the rights of victims in the criminal process? Is criminal litigation used as a substitute for civil litigation?
- c) Can victims prosecute crimes?
- d) Can Court fees be waived based on low income? In the affirmative, how low?
- e) Is a procedure in forma pauperis available? How is a plaintiff recognized as too poor to pay for his own attorney's fees and filing fees?
- f) Is ADR incorporated in the ordinary procedure? Are there mandatory attempts at reconciliation? Are alleged victims of crimes encouraged/required to mediate with alleged perpetrators?

Legal Aid Programs

- a) Are legal aid schemes available in your system?
- b) Are free attorneys provided for poor litigants?
- c) Are free attorneys provided only for defendants or also for plaintiffs?
- d) Are free attorneys available also in civil cases or only in criminal cases?
- e) Are free attorneys available in administrative cases?
- f) How are attorneys compensated in these cases? Are their fees significantly reduced compared to ordinary fees?
- g) In case of reduced compensation can attorneys refuse to serve poor clients?
- h) How much does the government spend on legal aid programs? Has the budget allocation to these programs increased or decreased in recent times?
- i) Can you briefly describe the way in which such a program, if at all available, works in your system?

Cite as: Ugo Mattei, *Access to Justice. A Renewed Global Issue?*, vol. 11.3 ELECTRONIC JOURNAL OF COMPARATIVE LAW, (December 2007), <<http://www.ejcl.org/113/article113-14.pdf>>.