

PART IV

CONSTITUTIONALIZATION AND FUNDAMENTALIZATION OF CIVIL PROCEDURAL GUARANTEES AND PRINCIPLES

CHAPTER 3

CONSTITUTIONALIZATION AND FUNDAMENTALIZATION OF THE DESIGN OF THE PROCEEDINGS AND THE PARTIES' AND THE JUDGES' RESPECTIVE ROLES

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1 INTRODUCTION

- 1 This chapter examines what principles of civil litigation have constitutional or fundamental value and what constitutional or fundamental rights have affected civil proceedings concerning the roles of the parties and judges. In common law jurisdictions, England has a centuries-old tradition of considering certain rules essential to civil procedures as what has been called *natural justice*. The United States has provisions on due process in the Constitution, such as the Fifth, Sixth, and Fourteenth Amendments, and the principles of civil procedures are based on it. In civil law jurisdictions, the right to a fair trial in France (*Droit à un procès équitable*) resulted from the general principle of the rights of the defence, which has been guaranteed since 1789. After World War II, many countries enshrined the right to a fair trial in their Constitutions¹ or interpreted it as a constitutional norm. In addition, supranational norms, including the rights of parties in judicial procedures, have emerged.² Some countries enshrined the right to judicial protection in the newly enacted constitution with the transition of the state system in the early 1990s.³ The contents of the right to a fair trial or due process were also reflected in the Principles of Transnational Civil Procedure developed by the ALI/UNIDROIT (2004, hereinafter referred to as PTCP) and the Model European Rules of Civil Procedure by the ELI/UNIDROIT (2020, hereinafter referred to as ERCP).
- 2 The understanding and institutional design of the right to a fair trial or due process in civil proceedings differs from country to country according to historical context. Recently, alongside the development of information technology, online hearings, electronic document management, and open access to digital information at all stages of such proceedings have been introduced into judicial practice. The process of proceedings digitalization has also significantly accelerated due to the COVID-19 pandemic, which became a pandemic in early 2020. The digitization, automation, and virtualization of processes are expected to drive judicial reform in the direction of

¹ Eg, Art 5 of the Brazilian Constitution, Art 24 of the Italian Constitution, Art 24 of the Spanish Constitution, Art 19 (4), 20 (3), 101 (1), and 103 (1) of the German Constitution (the Basic Law), Art 27 (1) of the Korean Constitution; cf A Koprivica, 'Right to a Fair Trial in Civil Law Cases,' in *Max Planck Encyclopedia of Comparative Constitutional Law* <https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e120> accessed 1 February 2023, para 16-28, on how other countries stipulate the right to a fair civil trial in the Constitution.

² Such supranational norms include:

Art 10 of the Universal Declaration of Human Rights (1948),

Art 6 (1) of the European Convention on Human Rights (1950, hereinafter referred to as ECHR),

Art 9 (1) and 14 of the International Covenant on Civil and Political Rights of the United Nations (1966, hereinafter referred to as ICCPR),

Art 8 (1) of the American Convention on Human Rights (1969, hereinafter referred to as ACHR),

Art 7 of the African Charter on Human and Peoples' Rights (1981, hereinafter referred to as ACHPR),

Art 47 of the Charter of Fundamental Rights of the European Union (2000, hereinafter referred to as CFREU).

³ Eg, Art 46 of the Russian Constitution.

increasing the openness and accessibility of the judiciary and the overall efficiency and acceleration of all court proceedings.⁴

- 3 In this chapter the principles of civil proceedings that have had or should have constitutional or fundamental value will be examined. The principles are derived from the contents of each country's constitutional norms or supranational standards that construct the contents of the right to a fair trial. The first is the right to an independent and impartial judge (the principle of independence and impartiality of judges). The role of judges in protecting individual rights and freedoms during civil proceedings is very important. The second is the right of all parties to equal treatment (the principle of procedural equality), which should be a prerequisite for adversarial civil proceedings. The third is the right of all parties to be heard (the principle of *audiatur et altera pars*), which is a requirement for just decisions as a result of proceedings. The principle of the independence and impartiality of judges is to ensure the rights of the parties. The second and third rights will be grouped in a subchapter concerning the parties' roles. The fourth is the right to a speedy trial (the principle of effectiveness or avoidance of undue delay), which is important not only for the efficiency of the judicial administration but also for effective remedies. The fifth is the right to publicity (the principle of publicity or open justice), which is related to guarantee the rights of the parties as well as public monitoring and trust in judicial operations to uphold the independence and impartiality of judges.

2 RIGHT TO AN INDEPENDENT AND IMPARTIAL JUDGE

- 4 An independent and impartial judiciary is the most important component in a fair trial because the judges' role is essential to ensuring the protection of human rights and fundamental freedoms. Judges are to be free in their decision-making, and only relevant facts and laws should form the basis of their decisions. The *right to a natural judge* means that the judge deciding a specific case must be identified based on objective criteria predetermined by law and not based on the discretionary choices of any individual.⁵ Judges' impartiality and independence are essential to guarantee the equality of parties before the courts.⁶

⁴ N Veselovska, V Slipeniuk, D Yasynok, I Zhukevych and A Gorbenko, 'Electronic Proceedings in Modern Legal Conditions' (2021) 21(8) IJCSNS International Journal of Computer Science and Network Security 224, 224.

⁵ M Swart, 'Independence of the Judiciary,' in *Max Planck Encyclopedia of Comparative Constitutional Law* <https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e339?prd=MPECCOL> accessed 1 February 2023.

⁶ M H Redish and LC Marshall, 'Adjudicatory Independence and the Values of Procedural Due Process' (1985) 95 Yale LJ 455, 484 ff.

- 5 The concepts of ‘independence’ and ‘impartiality’ are closely linked.⁷ However, the concepts of judicial independence and judicial impartiality are often distinguished. ‘Independence’ refers to the autonomy of judges to decide cases applying the law to the facts. This independence pertains to the judiciary as an institution and to the particular judge. The former means ‘institutional independence’ from other branches of power, and the latter means ‘individual independence’ from other members of the judiciary. ‘Independence’ requires that neither the judiciary nor the judges be subordinate to the other public powers. On the contrary, ‘impartiality’ refers to the state of mind of a judge or tribunal towards a case and the parties to it.⁸ ‘Impartiality’ relates to the judicial characteristic of disinterest towards parties and their causes in litigation. Thus, while impartiality reflects an open-mindedness on the part of the judges, independence describes functional and structural safeguards against extraneous intrusion into the administration of justice.⁹ Legal guarantees of judicial impartiality are included mainly in statutes, and some of them overlap with the safeguards of judicial independence. Among these are *inter alia*, included in transparent procedures of appointment and promotion; security of tenure; immovability; and accountability.¹⁰⁻¹¹
- 6 The independence and impartiality of judges are ‘the cornerstone of the right to a fair trial’, and the right to an independent and impartial judge is mostly guaranteed by national constitutional sources, as well as by international instruments. This subchapter will examine how the independence and impartiality of judges influence the civil proceedings comparatively as constitutional values.

⁷ *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 150-156; *Sacilor Lormines v France*, Case 65411/01 (ECtHR), Judgment 9 November 2006 [ECLI:CE:ECHR:2006:1109JUD006541101] para 62.

⁸ International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, Practitioners Guide No 1 (2007), 21.

⁹ P Mikuli, ‘Impartiality of the Judiciary,’ in *Max Planck Encyclopedia of Comparative Constitutional Law* <https://oxcon.oup.com/view/10.1093/law-mpeccol/law-mpeccol-e338?prd=MPECCOL> accessed 1 February 2023.

¹⁰ *Ibid.*

¹¹ Cf C G Geyh, ‘The Dimensions of Judicial Impartiality’ (2013) 65 Fla. L. Rev. 493, 513ff; Geyh conceptualizes judicial impartiality in three distinct dimensions as follows: a procedural dimension, in which impartiality affords parties a fair hearing; a political dimension, in which impartiality promotes public confidence in the courts; and an ethical dimension, in which impartiality is a standard of good conduct core to a judge’s self-definition. And he defines the beneficiaries of an impartial judiciary, each with different interests that occupy three distinct dimensions; (1) parties to litigation, who seek a fair hearing from an impartial judge, in a ‘procedural dimension’ of impartiality, (2) the public, for whom the institutional legitimacy of the judiciary depends on the impartiality of its judges, in a ‘political dimension’ of impartiality, and (3) judges themselves, who take an oath to be impartial and for whom impartiality is a standard of conduct that is core to their self-definition, in an ‘ethical dimension’ of impartiality.

2.1 Sources of the Right to an Independent and Impartial Judge

2.1.1 National Constitutional Sources

- 7 The Basic Principles on the Independence of the Judiciary adopted by the United Nations in 1985 (hereinafter referred to as UN Basic Principles), the first principle outlined herein, stipulated that ‘the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country’. The independence of judges and the judiciary are enshrined in the Constitution or at the highest possible legal level.¹²⁻¹³ On the other hand, the impartiality of judges is not stipulated explicitly in their Constitutions, but its constitutional value is not denied.

2.1.1.1 Brazil

- 8 The Brazilian Constitution offers some guarantees for the judicial system¹⁴ and the judges and some prohibitions to assure their independence and impartiality. Art 95 of the Constitution guarantees the life tenure, irremovability, and irreducibility of judge remuneration and forbids the judges to

I - hold, even when on paid availability, another office or position, except for a teaching position; II - receive, on any account or for any reason, court costs or participation in a lawsuit; III - engage in political or party activities; IV - receive, on any account or for any reason, payments or contributions from persons, public or private entities, with the exception of the cases determined by law; V - exercise lawyer activities in the jurisdiction or court in which they had worked, before the elapsing of three years of leaving office by retirement or dismissal.

2.1.1.2 England and Wales

- 9 The fundamental concept of judicial independence came into being in England and Wales in 1701 with the enactment of the Act of Settlement.¹⁵ This statute formally recognised the principles of judicial tenure security by establishing that High Court Judges and Lords Justice of Appeal hold office during good behaviour. Appropriate and

¹² The concepts of the independence of the judiciary and the independence of judges are not clearly used separately. In this chapter, the discussion is developed under the premise that the independence of the judiciary is guaranteed at the institutional level and the independence of judges is protected by the independence of the judiciary.

¹³ For more detailed information about each country's constitutional provision of judicial independence, see M Swart (n 5).

¹⁴ For instance, financial and administrative autonomy and the initiative for shaping the judicial system budget to be submitted to the congress are guaranteed.

¹⁵ Cf S Shetreet and S Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (2nd edn, Cambridge University Press 2013), 21 ff; R Clayton and H Tomlinson, *Fair Trial Rights* (2nd edn, Oxford University Press 2010), para 11.10.

formal mechanisms had to be in place before a judge could be removed.¹⁶ The Lord Chancellor was a senior cabinet minister and, therefore, a member of the executive, a judge and the head of the judiciary of England and Wales, and a member of the legislature, indeed the person who presided over the deliberations of the House of Lords, its Speaker in effect. The one office involved and combined all three branches of government.¹⁷ The *Constitutional Reform Act* of 2005 transferred the Lord Chancellor's judicial functions to the Lord Chief Justice, who became the President of the Courts of England and Wales and modified the system for the recruitment and promotion of judges. The new court has its own independent appointments system, staff, budget, and building in the former Middlesex Guildhall, opposite the Houses of Parliament. The changes to the constitutional position since 2003 have also had important practical consequences. These changes have helped to clarify the independence of the judiciary and are designed to enhance accountability, public confidence, and the effectiveness of the work of the judiciary.¹⁸

- 10 In England, it is a centuries-old tradition to consider the rule of judicial impartiality (*Nemo iudex in causa sua*) with the rule of the parties' right to be heard (*Audi alteram partem*), essential to what has been called 'natural justice'.¹⁹ In *Dimes v Grand Junction Canal Proprietors* in 1852 the House of Lords held that the Lord Chancellor should have been disqualified from hearing the case due to his interest in the claimant.²⁰ The House of Lords held that a decision it had given in the Pinochet case in 1999 had to be set aside, and the appeal before it was heard again by a panel of different Law Lords. It had come to light after the original decision that one of the Law Lords might have given an appearance that he was not independent and impartial because of a connection with a campaigning organization that was involved in the case. In those circumstances, and even though there was no suggestion that the Law Lord was not, in fact, independent or impartial, the decision could not stand. Justice demanded that the appeal be heard again

¹⁶ <https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/independence/> accessed 1 February 2023. Before 1701, senior judges held office at the sovereign's pleasure, and there are many examples of judges being removed from office for failing to decide cases in accordance with the wishes of the King or Queen. Since the Act of Settlement, it has only been possible to remove a senior judge from office through an Address to the Queen agreed by both Houses of Parliament.

¹⁷ *Findlay v UK*, Case 22107/93 (ECtHR), Judgment 25 February 1997 [ECLI:CE:ECHR:1997:0225JUD002210793]; the court-martial system has been scrutinised under Art 6 (1) of the ECHR.

¹⁸ 'The Justice System and the Constitution' <https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/justice-sys-and-constitution/> accessed 1 February 2023. The creation of a Ministry of Justice in 2007, which brought together responsibility for criminal justice, prisons, and penal policy (previously the Home Secretary's responsibility) and responsibility for the courts' service and legal aid (previously the Lord Chancellor's responsibility), led to a further agreement between the government and the judiciary in January 2008. This recognises that the judiciary has a distinct responsibility to deliver justice independently.

¹⁹ M Cappelletti, 'Fundamental Guarantees of the Parties in Civil Litigation: Comparative Constitutional, International, and Social Trends' (1973) 25 (5) *Stanford Law Review*, 651, 655.

²⁰ The claimant was the public company which the Lord Chancellor had an interest in as a shareholder. 10 E.R. 301 | *Dimes v Grand Junction Canal* (House of Lords, UK), Judgment 29 June 1852 ([1852] 6 WLUK 192).

before a panel of Law Lords who had and gave the appearance to reasonable, well-informed observers that they were independent and impartial.²¹ In *Porter v Magill*, the House of Lords approved a modification of the common law test of bias enunciated in *R v Gough*.²² This modification was first put forward in *In re Medicaments and Related Classes of Goods (No 2)*.²³ The precise test to be applied when determining whether a decision should be set aside on account of bias is the court's ascertainment of all the circumstances that have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased. Public perception of the possibility of unconscious bias is the key.²⁴ In *Lawal v Northern Spirit*, the House of Lords decided that the practice of permitting a Queen's Counsel to appear before the Employment Appeal Tribunal, who also sat as a part-time judge, breached the right of a hearing before independent and impartial judges.²⁵

2.1.1.3 France

- 11 Art 64 of Constitution of 4 October 1958 and the Constitutional Council of France (*Conseil Constitutionnel*, hereinafter referred to as CC) guarantee the independence of judges.²⁶ They derive the right to justice from Art 16 of the French Declaration of the Rights of Man and the of Citizen of 1789 (*Déclaration des droits de l'homme et du citoyen de 1789*, hereinafter referred to as DDH). The judgment of the CC related to the appointment of judges in the commercial court is noteworthy. The court held that, as a whole, the provisions on the appointment of judges of the commercial court²⁷ did not violate either the principles of impartiality and independence or the separation of powers, as the

²¹ <https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/independence/> accessed 1 February 2023.

²² *R v Gough* (House of Lords, UK), Judgment 20 May 1993 ([1993] UKHL 1); the case was concerned with the apparent bias of a juror.

²³ *In re Medicaments and Related Classes of Goods (No 2)*, Case C/2000/3582 (England and Wales Court of Appeal, UK), Judgment 21 December 2000 [2001 1 WLR 700].

²⁴ *Magill v Porter* (House of Lords, UK), Judgment 13 December 2001 [2001 UKHL 67], para 102-103.

²⁵ *Lawal v Northern Spirit Ltd* (House of Lords, UK), Judgment 19 June 2003 [2003 UKHL 35], para 19-23.

²⁶ Case 2012-250 QPC (CC, France), Decision 8 June 2012 [ECLI:FR:CC:2012:2012.270.QPC]; Case 2003-466 (CC, France), Decision 20 February 2003 [ECLI:FR:CC:2003:2003.466]; Case 78-40 DC (CC, France), Decision 9 July 1970 [ECLI:FR:CC:1970:78.40.DC]: A student magistrate - *auditeur de justice* - cannot sit in a court with a deliberative vote because he or she is still under the supervision of the school director and is therefore not independent.

²⁷ The judges of the commercial court are lay judges who are eg, businessmen or who work for companies and therefore know the business community and issues. They are volunteers, must be elected and do not receive any remuneration.

provisions establish guarantees that prevent judges of the commercial court from participating in the examination of a case in which they have interests, even if indirect.²⁸

- 12 The rules relating to the recruitment, promotion, tenure, and liability of judges are contained in Ordinance No 58-1270 of 22 December 1958, combined with the Organic Law No 94-100 of 5 February 1994 on the *Conseil supérieur de la magistrature*. The Ordinance of 1958 creates a status for all magistrates that aims to preserve the independence of judges.²⁹ On the required independence of judges and the possibility to appoint judges for a limited period,³⁰ the CC held that the Constitution did not prevent functions normally reserved for career judges from being exercised temporarily by persons who did not intend to embrace the judicial career. In this case, appropriate guarantees make it possible to satisfy the principle of independence, and, to this end, the persons concerned should be subject to the rights and obligations applicable to all judges. In a recent decision³¹, the CC declared a provision contrary to the Constitution that allowed the director of *caisse d'allocations familiales* (a family allowance office) to issue an enforceable title modifying the amount of maintenance payment to be paid for children after a judgment had been rendered by the family judge. The modification was subject to changes in the parents' earnings, and an official scale had to be applied. Nevertheless, the CC held that

although the review decisions taken by the director could be appealed to the family court, the legislator has authorised a private person in charge of a public service to modify judicial decisions without providing sufficient guarantees about the requirements of impartiality arising from Art 16 of the DDH.

²⁸ Case 2012-241 QPC (CC, France), Decision 4 May 2012 [ECLI:FR:CC:2012: 2012.241.QPC] outlines the compatibility of Art L. 722-6 to L. 722-16 and L. 724-1 to L. 724-6 of the Commercial Code with the rights and freedoms guaranteed by the Constitution. In the case, the applicant argued that the provisions violated the principle of the separation of powers because they permitted concurrent appointments as a judge of the commercial court and as a member of the chamber of commerce and industry.

²⁹ A Garapon and H Epineuse, 'Judicial Independence in France' in A Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012), 298.

³⁰ Case 92-305 DC (CC, France), Decision 21 February 1992 [ECLI:FR:CC:1992:92.305.DC]; Case 94-355 DC (CC, France), Decision 10 January 1995 [ECLI : FR : CC : 1995 : 94.355.DC].

³¹ Case 2019-778 DC (CC, France), Decision 21 March 2019 [ECLI:FR:CC:2019:2019.778.DC] para 37-42.

2.1.1.4 Germany

- 13 The independence of judges is formally protected by Art 97 (1) of the Basic Law 1949.³² The Federal Constitutional Court (hereinafter referred to as BVerfG) derives the requirement of judicial independence not only from Art 97 (and Art 92) but also from Art 20 (2)(3) of the Basic Law,³³ so the judicial independence could not be abolished by amending the Basic Law.³⁴ According to German legal doctrine, the guarantee of judicial independence has three dimensions: substantive independence requires that judges are subject only to laws in their decision-making process, not to any other means of influence;³⁵ personal independence protects judges from involuntary transfer, suspension, and dismissal by requiring a judicial decision based on statutory grounds; and the notion of structural independence forbids judges to exercise legislative or executive functions at the same time as judicial functions.³⁶ The Federal Court of Justice (hereinafter referred to as 'BGH') stated that, since the independence of the judge primarily means freedom of instruction, an assessment must not contain any, not even indirect, instructions for the judges on how they should proceed and decide in the future.³⁷
- 14 The BVerfG has earlier derived the basis for the impartiality of judges from the second sentence of Art 101 (1) of the Basic Law. The BVerfG held the following:³⁸

Art 101 (1) s 2 Basic Law must be given a more extensive meaning. It cannot be understood as a purely formal provision that is always fulfilled when the jurisdiction

³² The independence of judges was identically worded – as far as the objective independence is concerned – in Art 102 of the 1919 Constitution of the Weimar Republic. During the National Socialist regime, however, the executive's role was substantially strengthened to the detriment of the judiciary. Judges were expected to be aligned with the regime's ideology. In this context, the independence of the judiciary was largely suppressed, and Hitler was even authorized by the Parliament to remove judges from office by April 1942. This guarantee also remained weakened later in East Germany (German Democratic Republic). H Schulze-Fielitz, in H Dreier (ed), *Grundgesetz Kommentar* (Band III, Mohr Siebeck 2008), Art 97, para 5-7.

³³ Case 2 BvL 26/81 (BVerfG, Germany), Decision 20 April 1982 [BVerfGE 60, 253 (296), NJW 1982, 2425(2427)].

³⁴ Morgenthaler in V Epping and C Hillgruber (ed), *BeckOK Grundgesetz* (48th edn, C.H. BECK München 2021), Art 97, para 2.

³⁵ Case 1 BvR 335/51 (BVerfG, Germany), Decision 17 December 1953 [BVerfGE 3, 213 (224)].

³⁶ A Seibert-Fohr, 'Judicial Independence in Germany' in A Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012), 447, 449 ff; The general view is that Art 97 (1) of the Constitution stipulates material independence, and Art 97 (2) stipulates personal independence. In the report, which was submitted at the 73rd German Lawyers' Congress, it was argued that material and personal independence have nothing at all to do with the separation of powers and a clear distinction have to be made between material (a), personal (b), and institutional independence (c) according to German and European law; F Wittreck, 'Empfehlen sich Regelungen zur Sicherung der Unabhängigkeit der Justiz bei der Besetzung von Richterpositionen?' in Ständige Deputation des Juristentages (ed), *Verhandlungen des 73. Deutschen Juristentages Hamburg 2020/Bonn 2022* (Band I, C.H. Beck oHG 2020), I/G 13-34.

³⁷ Case RiZ (R) 4/71 (BGH, Germany), Judgment 10 December 1971 [NJW 1972, 634(636)].

³⁸ Case 2 BvR 235/64 (BVerfG, Germany), Decision 8 February 1967 [BVerfGE 21, 139 (145)].

of judges is generally regulated. Judicial activity is not only essential to the freedom to instructions guaranteed in Art 97 (1) of the Basic Law and the personal independence that is institutionally secured in Art 97 (2) of the Basic Law. It is essential that “it is exercised by a third party not involved”. The judicial activity, therefore, requires neutrality and distance on the part of the judge from those involved in the proceedings.

And the BVerfG said that Art 101 (1) s 2 of the Basic Law guarantees the right to impartial judges, and it is the task of the legislature to ensure that judges who do not guarantee impartiality are excluded from the exercise of their office or can be refused.³⁹

2.1.1.5 Korea

- 15 Since the establishment of the Constitution in 1948, the fundamental right to a trial by judges qualified under the Constitution and the law, judiciary power, and the obligation of judges to conduct independently according to their conscience and in conformity with the Constitution and laws have been stipulated in the Constitution (Art 27 (1), 101, 103 of the Constitution of 1987).⁴⁰ Scholars interpret the ‘conscience’ stipulated in Art 103 to mean the official conscience or professional conscience and to express independence from others’ interferences or influences. Art 101 (3) of the Constitution stipulates that the qualifications of judges are determined by law. The status of judges is guaranteed by the Constitution (Art 104, 105, 106). According to Art 105 (3) of the Korean Constitution, the term of office held by judges other than the Chief Justice and Justices of the Supreme Court is ten years, and they may be reappointed under the conditions prescribed by the Court Organisation Act. However, it is customary for judges to be reappointed until the retirement age unless there are special circumstances when they apply for reappointment. Judges can’t be removed from office except by impeachment or a sentence of imprisonment without prison labour or heavier punishment.
- 16 In Korea, there are no temporary judges or lay judges other than professional judges, there is no jury system in civil trials, and appeals against the judgments of the courts to the Constitutional Court are not allowed. For these reasons, there have been few cases in the Constitutional Court, where all issues regarding the independence or impartiality of judges are dealt with. Regarding the independence of judges, there was a recent case in which interference within the judiciary was a problem. The fact is that a higher-ranking judge in charge of evaluating the professional ability of judges in the court gave instructions to a lower-ranking judge dealing with a criminal trial. The judge was directed to point out that the content of the indictment (his article about the President of Korea)

³⁹ Case 1 BvR 730/01 (BVerfG, Germany), Decision 4 July 2001 (NJW 2001, 3533).

⁴⁰ Korea has legal heritage from Japan and Germany. Regarding the diffusion of German judicial structure to Japan in 1880, the transmission to Korea and the reforms on the hierarchical judicial bureaucracy in Korea until the early 2010s, cf N Chisholm, ‘The Faces of Judicial Independence: Democratic versus Bureaucratic Accountability in Judicial Selection, Training, and Promotion in South Korea and Taiwan’ (2014) 62 *The American Journal of Comparative Law* 893.

should be condemned morally or professionally even if the defendant (a reporter for a Japanese newspaper) was not legally guilty. Shortly before the expiration of the higher-ranking judge's term, an impeachment was applied by the National Assembly, but the Constitutional Court rejected the request for impeachment because his term of office had already expired.⁴¹ However, the dissenting opinion of the Constitutional Court concluded that his conduct was a crucial act that undermined the independence of judges under the Constitution and that he should be impeached.⁴² That was the first impeachment case against a judge in Korea.

2.1.1.6 Spain

- 17 Art 24 (2) of the Constitution guarantees the right of access to the judge predetermined by law. Art 117, 122 of the Spanish Constitution and Art 1, 2, 12, 13, 14, and 15 of Law of the Judicial Power (*Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial*, hereinafter referred to as LOPJ) guarantee the independence of judges. They are subjected only to the rule of law and not to any orders or instructions by any other power of the state or other judges. They may only be dismissed, suspended, transferred, or retired on the grounds outlined by the law and are also subject to its safeguards. Art 13 of the LOPJ states forcefully that 'everyone is obliged to respect the independence of Judges'. The protection of independence is specified in eight different ways: through the protection from the General Council of the Judiciary (Art 14 LOPJ), the irremovability (Art 15 LOPJ), exclusivity (Art 2 (1) LOPJ), legal predetermination (Art 122 (1) LOPJ), immunity, and freedom of association of judges (Art 401 LOPJ), by guaranteeing judicial compliance with the law, as well as, finally, by non-submission to other higher-ranking judges (Art 12 LOPJ). Judges are granted economic independence (Art 402-404 LOPJ). Judges are not allowed: 1- Exercise in any other jurisdiction outside that of the Judicial Power; 2- Exercise over elected public offices; 3- Exercise of any other public function; 4- Exercise, direct or indirect, of public or private commercial activity. Although it is unnecessary, the law specifies that those with such employment may in no case be allowed to practice in the legal profession or the attorney general's office, as well as related to any legal advice, paid or not (Art 389 LOPJ).
- 18 The right to an impartial judge is not explicitly included in the Constitution, but the Constitutional Court held that the right to a trial with all guarantees encompasses the right to an impartial judge. It is essential that they also 'appear' impartial, given that, although appearance is not always a good predictor of emotions, it is undoubtedly alarming for the population to know that judges may have an obvious desire that may be adverse to them in the process since it is truly difficult to have such steadfast self-

⁴¹ In this case, the higher-ranking judge didn't submit the application for reappointment at the end of his ten-year term.

⁴² Case 2021Hun-Ga1 (Constitutional Court, Korea), Decision 28 October 2021.

control that allows them to isolate themselves, even from their passions, for the preservation of their authority before the public.⁴³

2.1.1.7 The US

- 19 The US Constitution protects judicial independence in Art 3, which states that federal judges may hold their positions 'during good behavior'. Judges in the US effectively have lifetime appointments as long as they satisfy the ethical and legal standards of their judicial office. The article has been the subject of controversy, but lifetime mandates are still seen as a guarantee for the independence of the judiciary in the US.⁴⁴ All 1,500 federal judges are appointed by President with the consent of the simple majority of the Senate.⁴⁵
- 20 The right to an impartial judge is guaranteed by the Fifth and Fourteenth Amendments of the US Constitution, namely the Due Process Clauses. It is said that the independence of judges constitutes a necessary condition for the realization of the instrumental value of the procedural due process.⁴⁶ The US Supreme Court held that it was to violate due process for a judge to receive compensation beyond his or her salary out of the fines imposed on convicted defendants in *Tumey v Ohio*.⁴⁷ No man is to be a judge for his case. According to the court, while judges might conceivably have a slight pecuniary interest, the interest cannot be characterized as 'direct, personal, substantial, and pecuniary', and there is no basis for the disqualification of judges under the Due Process Clause. The 'appearance of justice' would be best served by vacating the decision and

⁴³ Case STC 145/1988 (Constitutional Court, Spain), Decision 12 July 1988 [ECLI:ES:TC:1988:145].

⁴⁴ M Swart (n 5) para 35.

⁴⁵ In almost all states, judges serve for terms, generally in the eight-to-ten-year range for appellate judges and the six-to-eight-year range for first-instance judges, and must face some kind of reappointment or re-election to keep their seats. Almost all states have mandatory retirement ages. R Wheeler, 'Judicial Independence in the United States of America' in A Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012), 540.

⁴⁶ M H Redish and L C Marshall (n 6) 477.

⁴⁷ *Tumey v Ohio*, Case 527 (Supreme Court, The US), Judgment 7 March 1927 [273 US 510, 535 (1927)]; the Court struck down an Ohio law that denied citizens their constitutionally guaranteed right to due process by financially rewarding public officials for successfully prosecuting cases related to Prohibition. Following the adoption of the Eighteenth Amendment to the US Constitution in 1919, the Ohio government implemented stringent measures to enforce Prohibition within the state's borders. One law, the Crabbe Act, compensated mayors, justices of the peace, various judges, and other law enforcement officials with additional money beyond their normal pay whenever they arrested, convicted, and fined violators of the Eighteenth Amendment. Many legal officials sought to extend their jurisdiction into nearby cities to arrest and prosecute more violators to increase their income. In North College Hill, Ohio, a man was arrested for illegally possessing alcohol, a violation of the Eighteenth Amendment. This man contended that the law compensating officials with additional money for liquor cases violated the Fourteenth Amendment of the United States Constitution by depriving him of 'due process of law'.

remanding for further proceedings when the judges played the leading role in the decision.⁴⁸

2.1.1.8 China

- 21 Art 131 of the Constitution stipulates that the people's courts exercise judicial power independently, in accordance with the provisions of law, and not subject to interference by any administrative organ, public organization, or individual. However, the Chinese judiciary should be subject to internal and external controls in decision-making. Court adjudicative committees composed of the presidents, vice presidents, and several experienced judges of the people's courts have the power to review and approve decisions in complex or sensitive cases. Judges in lower courts frequently seek the opinions of higher courts before making decisions on cases before them. Local governments often interfere in judicial decisions, the Communist Party can exercise direct influence in individual cases through the Political-Legal Committees (PLCs), and people's congresses and the procuratorate can exert the power to supervise the work of judges and the courts and to call for the reconsideration of cases under the Chinese Constitution and national law.⁴⁹

2.1.1.9 Russia

- 22 Since 12 December 1993 Russia has taken a legal democratic state by stipulating the rule of law and the principle of separation of powers with independent courts in its Constitution (Art 10). Art 47 (1) of the Constitution guarantees the right to a lawful judge and Art 120, 121, 122 of the Constitution stipulate the independence, the irremovability and the immunity of the judges. Recently there has been a crucial legislation regarding the independence and the impartiality of judges. According to that law⁵⁰, the publication of dissenting opinions by judges of the Constitutional Court of the Russian Federation has been banned since 2021 and a judge may not otherwise disclose their dissenting opinion or invoke it publicly. The changes were criticized in the legal community.

2.1.2 Supranational sources

2.1.2.1 Norms

- 23 Art 10 of the Universal Declaration on Human Rights, Art 6 (1) of the ECHR, Art 14 (1) of the ICCPR, Art 8 (1) of the ACHR, and Art 7 (1) of the ACHPR stipulated the right to a fair

⁴⁸ *Aetna Life Ins. Co. v Lavoie*, Case 84-1601 (Supreme Court, US), Judgment 22 April 1986 [475 US 813, 828-829 (1986)].

⁴⁹ R Peerenboom, 'Judicial Independence in China' in R Peerenboom (ed), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge University Press 2010), 76.

⁵⁰ Federal Constitutional Law dated 9 November 2020 № 5-FKZ 'On Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation'. Collection of Laws of the Russian Federations, 16 November 2020, № 46. P. 7196.

trial by an independent and impartial tribunal. The UN Basic Principles on the Independence of the Judiciary were adopted in 1985, and Recommendation No R (94)12 on the independence, efficiency, and role of the judges was adopted by the Committee of Ministers of the Council of Europe in 1994. Art 47 of the CFREU in 2000 stipulates the right to a hearing by an independent and impartial tribunal. Bangalore Principles of Judicial Conduct 2002 was endorsed by the UN Commission on Human Rights at its 59th Session in Geneva (2003), and profound analyses of judicial independence and impartiality may be found in the principles. Recommendation CM/Rec (2010) 12 on judges: independence, efficiency and responsibilities was adopted by the Committee of Ministers of the Council of Europe.

- 24 The Resolution on the Respect and Strengthening of the Independence of the Judiciary was adopted in 1999 by the African Commission on Human and People's Rights. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa was adopted as part of the African Commission's activity report at the second Summit and a meeting of heads of state of the African Union held in Maputo from 4-12 July 2003.
- 25 In Asia-Pacific, the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region⁵¹ (the Beijing Principles) stipulate that 'the independence of the judiciary requires that it decide matters before it by its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source.'

2.1.2.2 Cases

2.1.2.2.1 European Court of Human Rights (ECtHR)

- 26 The ECtHR has stated that 'regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question of whether it presents an appearance of independence' when reviewing the independence of a tribunal.⁵² The court also stated that 'the irremovability of judges by the executive must, in general, be considered as a corollary of their independence'.⁵³ The notion of the separation of powers between the political

⁵¹ At the 6th Conference of Chief Justices, held in Beijing in August 1995, 20 Chief Justices first adopted a joint Statement of Principles of the Independence of the Judiciary. This Statement was further refined during the 7th Conference of Chief Justices, held in Manila in August 1997. It has now been signed by 32 Chief Justices throughout the Asia-Pacific Region.

⁵² *Findlay v the United Kingdom*, Case 110/1995/616/706 (ECtHR), Judgment 25 February 1997 [ECLI:CE:ECHR:1997:0225JUD002210793] para 73; *Incal v Turkey*, Case 41/1997/825/1031 (ECtHR), Judgment 9 June 1998 [ECLI:CE:ECHR:1998:0609JUD002267893] para 65; *Kleyn and Others v the Netherlands*, Cases 39343/98, 39651/98, 43147/98 and 46664/99 (ECtHR), Judgment 6 May 2003 [ECLI:CE:ECHR:2003:0506JUD003934398] para 190; *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 144.

⁵³ *Campbell and Fell v United Kingdom*, Cases 7819/77 and 7878/77 (ECtHR), Judgment 28 June 1984 [ECLI:CE:ECHR:1984:0628JUD000781911] para 80.

organs of government and the judiciary, as well as the importance of safeguarding the independence of the judiciary, have assumed growing importance in its case law.⁵⁴

- 27 According to the ECtHR, impartiality means a lack of prejudice and bias. The ECtHR distinguishes objective and subjective criteria for judicial impartiality. The objective criterion relates to the assessment of whether the tribunal itself and, among other aspects, its composition offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality, and the subjective criterion is connected with a situation regarding the personal conviction of a behaviour or of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case.⁵⁵ The concepts of independence and objective impartiality are closely linked.⁵⁶ However, there is no watertight division between subjective and objective impartiality since the conduct of judges may not only prompt objectively held misgivings about impartiality from the point of view of the external observer (objective criteria) but may also be examined with respect to their personal conviction (subjective criteria).⁵⁷ In later decisions, the ECtHR seems to use other terminology, ‘personal beliefs’, ‘personal behaviour’, ‘personal impartiality’ of the judge, or ‘objectively based apprehension’.⁵⁸ The ECtHR uses another criterion when the question of a lack of judicial impartiality may arise. Functional impartiality is questioned when a judge a) exercises several distinct judicial functions in the same case (either in the same instance or later on appeal)⁵⁹, b) previously gave an advisory opinion on (future) legal provisions and then has to decide on a case where the provision shall be applied, or c) previously served as a member of the Parliament or a

⁵⁴ *Stafford v the United Kingdom*, Case 46295/99 (ECtHR), Judgment 28 May 2002 [ECLI:CE:ECHR:2002:0528JUD004629599] para 78.

⁵⁵ *Piersack v Belgium*, Case 8692/79 (ECtHR), Judgment 1 October 1982 [ECLI:CE:ECHR:1982:1001JUD000869279] para 30; *Findlay v the United Kingdom*, Case 22107/93 (ECtHR), Judgment 25 February 1997 [ECLI:CE:ECHR:1997:0225JUD002210793] para 73; *Micallef v Malta*, Case 17056/06 (ECtHR) Judgment 15 October 2009 [ECLI:CE:ECHR:2009:1005JUD001705606] paras 93-101; *Morice v France*, Case 29369/10 (ECtHR), Judgment 23 April 2015, [ECLI:CE:ECHR:2015:0423JUD002936910] paras 73-78; *Denisov v Ukraine*, Case 76639/11 (ECtHR), Judgment 25 September 2018 [ECLI:CE:ECHR:2018:0925JUD007663911] paras 61-65.

⁵⁶ *Findlay v the United Kingdom*, Case 22107/93 (ECtHR), Judgment 25 February 1997 [ECLI:CE:ECHR:1997:0225JUD002210793]; *Denisov v Ukraine*, Case 76639/11 (ECtHR), Judgment 25 September 2018 [ECLI:CE:ECHR:2018:0925JUD007663911] para 64.

⁵⁷ *Micallef v Malta*, Case 17056/06 (ECtHR), Judgment 15 October 2009 [ECLI:CE:ECHR:2009:1015JUD001705606] para 95; *Denisov v Ukraine*, Case 76639/11 (ECtHR), Judgment 25 September 2018 [ECLI:CE:ECHR:2018:0925JUD007663911] para 62; *Ramos Nunes de Carvalho e Sá v Portugal*, Cases 55391/13, 55728/13 and 74041/13 (ECtHR), Judgment 6 November 2018 [ECLI:CE:ECHR:2018:1106JUD005539113] para 146.

⁵⁸ *Morel v France*, Case 34130/96 (ECtHR), Judgment 6 June 2000 [ECLI:CE:ECHR:2000:0606JUD003413096] para 40-42.

⁵⁹ The consecutive exercise of advisory and judicial functions within one body, *Procola v Luxembourg*, Case 14570/89 (ECtHR), Judgment 28 September 1995 [ECLI:CE:ECHR:1995:0928JUD001457089] para 45; an exercise of judicial and advisory functions concerning ‘the same case’, ‘the same decision’, or ‘analogous issues’, *Kleyn and Others v the Netherlands*, Cases 39343/98, 39651/98, 43147/98 and 46664/99 (ECtHR), Judgment 6 May 2003 [ECLI:CE:ECHR:2003:0506JUD003934398] para 200; *Sacilor Lormines v France*, Case 65411/01 (ECtHR), 9 November 2006 [ECLI:CE:ECHR:2006:1109JUD006541101] para 74.

politician who supported a Draft bill and then as a (often constitutional) judge has to decide on the constitutionality or applicability of the same provisions.⁶⁰

- 28 Regarding the relation of independence and impartiality of judges, the recently issued ECtHR judgment⁶¹ holds as follows:

“Independence” refers to the necessary personal and institutional independence that is required for impartial decision making, and it is thus a prerequisite for “impartiality”. It characterizes both (i) a state of mind which denotes a judge’s imperviousness to external pressure as a matter of moral integrity, and (ii) a set of institutional and operational arrangements – involving both a procedure by which judges can be appointed in a manner that ensures their independence and selection criteria based on merit – which must provide safeguards against undue influence and/or unfettered discretion of the other State powers, both at the initial stage of the appointment of judges and during the performance of their duties.

2.1.2.2.2 Court of Justice of the European Union (CJEU)

- 29 The CJEU held the requirement that courts be independent and impartial forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, as provided for by Art 47 of the CFREU.⁶² As regards the substance of the

⁶⁰ *McGonnell v the United Kingdom*, Case 28488/95 (ECtHR) Judgment 8 February 2000 [ECLI:CE:ECHR:2000:0208JUD002848895] para 52-58; *Wettstein v Switzerland*, Case 33958/96 (ECtHR) Judgment 21 December 2000 [ECLI:CE:ECHR:2000:1221JUD003395896] para 44-47; *Mežnarić v Croatia*, Case 71615/01 (ECtHR) Judgment 15 July 2005 [ECLI:CE:ECHR:2005:0715JUD007161501] para 36.

⁶¹ *Guðmundur Andri Ástráðsson v Iceland*, Case 26374/18 (ECtHR) Judgment 1 December 2020 [ECLI:CE:ECHR:2020:1201JUD002637418] para 234.

⁶² *Review Simpson v Council* Cases C-542/18 RX-II and C-543/18 RX-II (CJEU) Judgment 26 March 2020, [ECLI:EU:C:2020:232] para 71; *Repubblika v Il-Prim Ministru*, Case C-896/19 (CJEU) Judgment 20 April 2021, [ECLI:EU:C:2021:311] para 51; *Commission v Poland (Disciplinary regime for judges)*, Case C-791/19 (CJEU) Judgment 15 July 2021 [ECLI:EU:C:2021:596] para 58; *W. Ż. () and des affaires publiques de la Cour suprême – nomination*, Case C-487/19 (CJEU) Judgment 6 October 2021, [ECLI:EU:C:2021:798] para 108.

second subparagraph of Art 47 of the CFREU, the recent CJEU judgments stated that the independence of the court has two aspects, and the court held as follows: ⁶³

The first aspect, which is external in nature, requires that the court concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions. The second aspect, which is internal in nature, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests about the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.

- 30 The court has stressed that the guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service, and grounds for abstention, rejection, and dismissal of its members, to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality concerning the interests before it. ⁶⁴ The court has pointed out that, by the principle of the separation of powers which characterizes the

⁶³ *A. K. and Others v Sąd Najwyższy*, Case C 585/18, C- 624/18 and C-625/18 (CJEU) Judgment 19 November 2019 [ECLI:EU:C:2019:982] para 121-122; *Commission v Poland*, Case C-619/18 (CJEU) Judgment 24 June 2019 [ECLI:EU:C:2019:531] para 73-74; *Minister for Justice and Equality*, Case C-216/18 PPU (CJEU) Judgment of 25 July 2018 [ECLI:EU:C:2018:586] para 63-65; some judgments were issued regarding the independence of the judiciary in Poland. On 24 June 2019, the CJEU ruled that the Polish reform lowering the retirement age of the Supreme Court judges was contrary to EU law. On 5 November 2019, the CJEU confirmed that Poland failed to fulfil its obligations under EU law by establishing a different retirement age for men and women and by lowering the retirement age of judges of the ordinary courts while conferring the Minister of Justice the power to extend the period of active service of those judges. This judgment concerns the retirement age of judges and public prosecutors following the rules adopted by Poland in 2017. A law adopted by Polish authorities in July 2017 lowered the retirement age of judges of the ordinary courts and public prosecutors. In addition, that law conferred the Minister for Justice the power to extend the period of active service of judges of the ordinary courts beyond the new retirement ages thus set, which differ according to sex. The European Commission took the view that those rules were contrary to EU law and decided to refer Poland to the Court of Justice in May 2018 over failure to fulfil obligations (*Commission v Poland*, Case C-192/18 (CJEU), Judgment 5 November 2019 [ECLI:EU:C:2019:924]). On 6 October 2021 the CJEU stated that transfers, without consent of a judge, to another court or between two divisions of the same court are potentially capable of undermining the principles of the irremovability of judges and judicial independence (*W. Ż. () and des affaires publiques de la Cour suprême – nomination*), Case C-487/19 (CJEU) Judgment 6 October 2021 [ECLI:EU:C:2021:798]).

⁶⁴ *Minister for Justice and Equality (Deficiencies in the system of justice)*, Case C-216/18 PPU (CJEU) Judgment 25 July 2018 [ECLI:EU:C:2018:586] para 66; *Commission v Poland*, Case C-619/18 (CJEU) Judgment 24 June 2019 [ECLI:EU:C:2019:531] para 74; *A. K. and Others v Sąd Najwyższy*, Case C 585/18, C- 624/18 and C-625/18 (CJEU) Judgment 19 November 2019 [ECLI:EU:C:2019:982] para 123; *Repubblika*, Case C-896/19 (CJEU) Judgment 20 April 2021 [ECLI:EU:C:2021:311] para 51; *Commission v Poland (Disciplinary regime for judges)*, Case C-791/19 (CJEU) Judgment 15 July 2021 [ECLI:EU:C:2021:596] para 59; *W. Ż. () and des affaires publiques de la Cour suprême – nomination*), Case C-487/19 (CJEU) Judgment 6 October 2021 [ECLI:EU:C:2021:798] para 109.

operation of the rule of law, the independence of the judiciary must be ensured by the legislature and the executive.⁶⁵

2.1.2.2.3 Inter-American Court of Human Rights (IACtHR)⁶⁶

- 31 The IACtHR, in its judgment on the Constitutional Court (Peru) case, said that one of the principal purposes of the separation of public powers is to guarantee the independence of judges, and, to this end, different political systems have conceived strict procedures for both their appointment and removal. The court, therefore, considered that ‘under the rule of law, the independence of all judges must be guaranteed’, and the independence of any judge presumes that there is an appropriate appointment process, a fixed term in the position, and a guarantee against external pressures.⁶⁷

2.1.3 Requirement of Independence and Impartiality of Persons Other than Judges

2.1.3.1 Lay judges

- 32 According to ECtHR, the participation of lay judges in a case is not, as such, contrary to Art 6 (1) of the ECHR. The existence of a panel with mixed membership comprising, under the presidency of a judge, civil servants and representatives of interested bodies does not in itself constitute evidence of bias,⁶⁸ nor is there any objection per se to expert lay members participating in the decision-making in a court.⁶⁹ The principles established in the case law concerning independence and impartiality are to be applied to lay judges as to professional judges.⁷⁰
- 33 In France, the independence of *Conseils de prud’hommes* (labour courts) has been questioned since they are composed of employee and employer judges, all of whom are union members. According to the French Supreme Court (Court of Cassation), the labour courts are independent and in compliance with the requirement of impartiality in labour matters by the very composition of labour courts, which include an equal number of elected employees and employers; by the prohibition of any mandatory mandate; by the possibility of having recourse (in the event of a tie vote) with a judge who is not an

⁶⁵ *A. K. and Others v Sqd Najwyższy*, Case C 585/18, C- 624/18 and C-625/18 (CJEU) Judgment 19 November 2019 [ECLI:EU:C:2019:982] para 124.

⁶⁶ The IACtHR is an international court based in San José, Costa Rica. Together with the Inter-American Commission on Human Rights, it was formed by the American Convention on Human Rights, a human rights treaty ratified by members of the Organization of American States (OAS).

⁶⁷ *Constitutional Court Case (Aguirre Roca, Rey Terry and Revoredo Marsano v Peru)* (IACtHR) Judgment of 31 January 2001 [Series C No 55] para 73, 75.

⁶⁸ *Le Compte, Van Leuven and De Meyere v Belgium*, Case 6878/75; 7238/75 (ECtHR) Judgment 23 June 1981 [ECLI:CE:ECHR:1981:0623JUD000687875] para 57-58.

⁶⁹ *Pabla Ky v Finland*, Case 47221/99 (ECtHR) Judgment 22 June 2004 [ECLI:CE:ECHR:2004:0622JUD004722199] para 32.

⁷⁰ *Langborger v Sweden*, Case 11179/84 (ECtHR) Judgment 22 June 1989 [ECLI:CE:ECHR:1989:0622JUD001117984] para 34-35; *Cooper v the United Kingdom*, Case 48843/99 (ECtHR) Judgment 16 December 2003 [ECLI:CE:ECHR:2003:1216JUD004884399] para 123.

elected member; and by the possibility, depending on the case, of appealing to the supreme court. The court said that the mere fact that one or more members of a labour court belong to the same trade union organization as one of the parties to the proceedings is not such as to affect the balance of interests inherent in the functioning of the labour court or to call into question the impartiality of its members.⁷¹

2.1.3.2 The Jury

- 34 Regarding the independence and impartiality of juries in criminal cases, the UN Human Rights Committee expressed the following views:⁷²

Similar considerations apply to the alleged attempts at jury tampering by the investigating officer in the case. In a trial by jury, the necessity to evaluate facts and evidence independently and impartially also applies to the jury; all the jurors must be placed in a position in which they may assess the facts and the evidence objectively, to be able to return a just verdict. On the other hand, the Committee observes that where alleged improprieties in the behaviour of jurors or attempts at jury tampering come to the knowledge of either of the parties, these alleged improprieties should have been challenged before the court.

- 35 The ECtHR has regard to the principles established in its own case law, which apply to jurors as they do to professional judges and lay judges in determining whether the court could be considered 'independent and impartial'. The Court held in *Holm v Sweden* that the affiliation of both the defendants and the five jurors with the same political party could legitimately give rise to misgivings as to the jurors' independence and impartiality.⁷³
- 36 In the US, the Seventh Amendment of the Constitution provides the right to a trial by jury in civil cases, and Rule 38 of the Federal Rules of Civil Procedure for the United States

⁷¹ Case 11-23.246 (Court of Cassation, France), Judgment 16 May 2013 [ECLI:EN:CCASS:2013:SO00867]; The judgment of the ECtHR on the composition of the Labour Court is *Kurt Kellermann AB v Sweden*, Case 41579/98 (ECtHR) Judgment 26 October 2004 [ECLI:CE:ECHR:2004:1026JUD004157998] para 61; since 2016, labour judges are not elected but appointed (*Ordonnance n° 2016-388 du 31 mars 2016 relative à la désignation des conseillers prud'hommes*).

⁷² *Collins v Jamaica*, Communication No 240 /1987 UN Doc. CCPR/C/43/D/240/1987, para 8.4.

⁷³ *Holm v Sweden*, Case 14191/88 (ECtHR), Judgment 25 November 1993 [ECLI:CE:ECHR:1993:1125JUD001419188] para 30-33; in order to guarantee the freedom of the press, the 1949 Freedom of the Press Act requires a jury trial in cases of civil or criminal liability related to the freedom of the press. Mr Holm, the applicant, had brought forward a book against the author and the publishing house as an action of libel. In the case, there were connections between the defendants and the jurors in question; five out of nine jurors were active members of the Swedish Social Democratic Workers Party (SAP), who held or had held offices in or on behalf of the SAP. One of the defendants, a publishing house, was indirectly owned by the SAP, and the other defendant was employed by that company and had served as an ideological adviser to the SAP. The impugned passages of the book were clearly of a political nature and undoubtedly raised matters of concern to the SAP, and the applicant's fears regarding the independence and impartiality of the District Court were, therefore, objectively justified. This defect could not have been cured by an appeal.

District Courts (hereinafter referred to as USFRCP) stipulates that a party may demand the right to a jury trial. The Sixth Amendment guarantees that everyone accused of committing a crime is entitled to a trial before ‘an impartial jury’, and the right to an impartial jury was extended to civil proceedings by *Thiel v Southern Pacific Co.* The court held that a federal court jury panel from which persons who work for a daily wage were intentionally and systematically excluded was unlawfully constituted, stated as follows:⁷⁴

The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political, and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups.

2.1.3.3 Arbitrators

- 37 In arbitration, it is generally accepted that the appointed persons must be independent and impartial, although the parties are free to individually agree on the appointment process. Independence generally refers to private, professional, or business-related relationships between the arbitrator and the parties or counsels involved in the arbitration. The requirement of impartiality concerns the subjective stance of an arbitrator towards the parties, their counsels, or the dispute in question.⁷⁵ According to the ECtHR, the arbitral tribunal must provide the safeguards required by Art 6 (1) of the ECHR, unless parties agree to dispute freely, lawfully, and unequivocally expressly under certain rights guaranteed by Art 6 (1) of the ECHR. The court has acknowledged that, where commercial or sports arbitration to which consent has been given freely, lawfully, and unequivocally, the notions of independence and impartiality may be construed flexibly insofar as the very essence of the arbitration system is based on the appointment of the decision-making bodies, or at least part of them, by the parties to the dispute.⁷⁶ The court considers that there is a legitimate reason to doubt the independence and impartiality of the members of the arbitration committee established by law when the board of directors have vast powers over its organization and operation.⁷⁷ A decision of

⁷⁴ *Thiel v Southern Pacific Co.*, Case 349 (Supreme Court, US), Judgment 20 May 1946 [328 US 217 (220)].

⁷⁵ B M Bastida, ‘The Independence and Impartiality of Arbitrators in International Commercial Arbitration from a Theoretical and Practical Perspective (La Independencia E Imparcialidad De Los Árbitros En El Arbitraje Comercial Internacional Desde Una Perspectiva Teórica Y Práctica)’ (2007) 6 *Revist@ e-mercatoria*, 4; Concerning this issue ‘IBA Guidelines on Conflicts of Interest in International Arbitration’ adopted by resolution of the IBA Council on Thursday 23 October 2014 are worth referencing.

⁷⁶ *Mutu and Pechstein v Switzerland*, Case 40575/10 and 67474/10 (ECtHR) Judgment 2 October 2018 [ECLI:CE:ECHR:2018:1002JUD004057510] para 146.

⁷⁷ *Ali Rıza and Others v Turkey*, Case 30226/10 and 4 others (ECtHR) Judgment 28 January 2020, [ECLI:CE:ECHR:2020:0128JUD003022610] para 201-223.

the US Supreme Court even extended the requirement of impartiality in a specific ADR case⁷⁸ and to those who function in a quasi-judicial capacity.⁷⁹ Impartiality is not only an attribute of a judge but is also a dispute settlement principle (due process of law) connected with decision-making or substantive provisions upon which basis decisions are issued.⁸⁰

2.2 Manifestations of the Right to an Independent and Impartial Judge

2.2.1 Initiative of the Proceedings

- 38 The parties' exclusive right to initiate an action and to determine its subject matter (*Nemo iudex sine actore, ne eat iudex ultra petita et allegata a partibus*) is included in the ancient principles of civil procedure.⁸¹ The civil or commercial court may not act on its initiative. This is the dispositive principle that the parties are (generally) free to dispose of their rights and that it is not just for a judge to readjust the terms of the litigation to make it conform to his or her view of the substance of the dispute between the parties.⁸² In a country such as Brazil, this principle is explicitly stipulated in the Civil Procedure Law (Art 2 of the Brazilian Code of Civil Procedure).⁸³ The parties have the fundamental right to present their case, and this right of the parties will be dealt with in the next subchapter.
- 39 The proceeding should be initiated through the claim or claims of the plaintiff, not by the court acting on its motion.⁸⁴ Otherwise, a judge or court acting on its motion could be suspected of partiality. In *Svetlana Naumenko v Ukraine*, the ECtHR had to determine whether judges' impartiality was affected by the fact that they lodged a 'protest' that was dealt with by a tribunal of which they were a member. In the opinion of the court, that practice was incompatible with the 'subjective impartiality' of a judge, since no one can be both a plaintiff and a judge in his or her case and, therefore, was a violation of the applicant's right to a fair trial by an impartial tribunal.⁸⁵ In France, the case law of the Court of Cassation changed in this respect since the CC ruled in several decisions that

⁷⁸ *Concrete pipe and products of California Inc. v Construction Labourers Pension Trust for Southern Cal.*, Case 91-904 (Supreme Court, US), Judgment 14 June 1993 [508 US 602(617)].

⁷⁹ *Schweiker v McClure*, Case 81-212 (Supreme Court, US), Judgment 20 April 1982 [456 US 188(195-196)].

⁸⁰ P Mikuli (n 9).

⁸¹ M Cappelletti (n 19) 652.

⁸² J A Jolowicz, 'Adversarial and Inquisitorial Models of Civil Procedure' (2003) 52 *International & Comparative Law Quarterly* 281, 289.

⁸³ Hereinafter, each country's Code of Civil Procedure is abbreviated as CCP.

⁸⁴ Art 10.1 of the PTCP stipulates 'All modern legal systems recognise the principle of party initiative concerning the scope and particulars of the dispute. It is within the framework of party initiative that the court carries out its responsibility for just adjudication'; Rule 21 of the ERCP stipulates '(1) Proceedings may only be instituted by a party. The court cannot institute proceedings on its own motion. (2) Parties may terminate proceedings in whole or in part by withdrawal, admission of the claim or settlement'.

⁸⁵ *Svetlana Naumenko v Ukraine*, Case 41984/98 (ECtHR) Judgment 9 November 2004 [ECLI:CE:ECHR:2004:1109JUD004198498] para 97.

the *ex officio* referral in insolvency matters conforms to the Constitution only when it is based on considerations of general interest and the law guarantees the respect of the principle of impartiality.⁸⁶

- 40 In domestic litigation, there are some exceptions to the parties' exclusive right to initiate an action. The Supreme Court of Korea stated that, in divorce cases, the court should determine the legal and physical custodian of minors for the welfare of children even if there is no application from the parties.⁸⁷

2.2.2 Independence and Impartiality During the Proceedings

2.2.2.1 Composition of the Court Panel (*Nemo iudex in re sua*)

- 41 The fundamental rule relates to the composition of the court panel. The purpose of the rule is to prevent either the appearance or possibility of judicial bias. The rule applies not only to cases in which a judge is a party to the proceedings but also to those in which a judge has a personal or pecuniary interest in the outcome.⁸⁸ In many countries, civil procedure law or the court organization act stipulates the grounds of disqualifications that exclude judges from adjudicating a particular case, and cases decided by a judge who should have been excluded are usually treated as formal defects in the process.

2.2.2.2 Behaviour of the Judge During the Proceedings

- 42 Inappropriate behaviour or comments from the judge during a hearing can lead to suspicions of partiality. The issues relating to judicial conduct during civil proceedings are directly related to the principle of equality of arms of the parties.
- 43 In Brazil, Art 6, 139 of the BRCCP command judges to observe a duty of dialogue with the parties (before every decision to be taken); a duty of clarifying parties about their behaviour and possible consequences; a duty of prevention, which imposes permanent surveillance to avoid any kind of procedural misconduct; and a duty of aiding, which imposes judges to help parties, eliminating any obstacles that may prevent or hinder them from exercising their procedural faculties.⁸⁹

⁸⁶ Case 2012-286 QPC (CC, France), Decision 7 December 2012 [ECLI:FR:CC:2012:2012.286.QPC]; Case 2013-352 QPC (CC, France), Decision 15 November 2013 [ECLI:FR:CC:2013:2013.352.QPC]; Case 2013-368 and 2013-372 QPC (CC, France), Decision 7 March 2014 [ECLI:FR:CC:2014:2013.368.QPC]; The CC held that the referral of a case to a court of its own motion could only be justified, where the purpose of the procedure is not to impose a sanction in the nature of a punishment, if it is based on a reason of public interest and if the law establishes guarantees to ensure respect for the principle of impartiality. A court could only act on its own motion to remedy an objective situation, not to decide on a dispute between parties.

⁸⁷ Case 2013Meu2397 (Supreme Court, Korea), Judgment 23 June 2015.

⁸⁸ P Mikuli (n 9).

⁸⁹ Cf D Mitidiero, *Colaboração No Processo Civil* (4th edn, passim 2019); F Didier Jr, 'O Princípio Da Cooperação: Uma Apresentação', (2005) 30 (127) *Revista de processo* 75-79.

- 44 In France, the Court of Cassation said that the Court of Appeal violated Art 6 (1) of the ECHR and Art 455, 458 of the FCCP by setting out the parties' pleas and claims in different ways that could give rise to a legitimate doubt as to the impartiality of the court for cases where the judge had repeated the submissions of some of the parties instead of giving reasons for their decision.⁹⁰
- 45 In Germany, the BVerfG has held that the judges' duty to be neutral and distant, which is laid down in Art 101 (1) of the Basic Law and in procedural law, sets corresponding limits on their process management in civil proceedings.⁹¹ Regarding process management, the BGH said as follows in Art 139 of the GCCP:⁹²

The presiding judge has the discretion permitted by law in the proceedings but should not treat the parties unequally without reasonable ground. If he gives up equidistance with the parties and makes himself an advisor to one side, he damages them. The court must respect the parties' right of disposal over the dispute and their sole authority to produce the material in the proceedings.

- 46 In Korea, Art 1 (1) of the CCP stipulates that a court shall endeavour to have the procedures progress fairly, swiftly, and economically. The presiding judge is obliged to conduct the proceedings impartially and to treat the parties equally during proceedings.⁹³
- 47 In the US, the Code of Conduct for United States Judges was adopted by the Judicial Conference on 5 April 1973, and since then, some changes have been made to the code. According to Canon 3 A (3) of the code, a judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. A judge should require similar conduct by those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.

2.2.2.3 Institutions to Guarantee the Independence and Impartiality of Judges During the Proceedings

- 48 When problems regarding the independence or impartiality of judges are raised during proceedings, the cases can be reassigned. One way to avoid the appearance of bias is

⁹⁰ Case 17-22.056 (Court of Cassation, France), Judgment 19 December 2018 [ECLI:FR:CCASS:2018:C101217].

⁹¹ Case 1 BvR 2228/06 (BVerfG, Germany), Decision 20 July 2007 [NJW 2007, 3771 (3773)]; Case 2 BvR 878/74 (BVerfG, Germany), Decision 25 July 1979 [BVerfGE 52, 131 = NJW 1979, 1925 (1927)]; Case 2 BvR 235/64 (BVerfG, Germany), Decision 8 February 1967 [BVerfGE 21, 139 (145 f) = NJW 1967, 1123(1123)].

⁹² Case V ZB 22/03 (BGH, Germany), Decision 2 October 2003 [BGHZ 156, 269 (270) = NJW 2004, 164]; the BGH found that the plaintiff's motion to challenge the judge, who stated that the claim had expired against the defendant arguing only over the existence of the claim, was justified.

⁹³ M Ho, *Civil Procedure Law* (14th edn, Bobmunsa 2020), 40.

judicial self-recusal. The concept of impartiality creates a correlative duty for judges to step down from cases in which they think they will not be able to impart justice impartially or when their actual impartiality may be compromised. Principle 2.5 of the Bangalore Principles of Judicial Conduct provides detailed guidelines as to the cases in which judges should disqualify themselves from a case. The ECtHR has established the principle that any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw.⁹⁴

- 49 Another way to avoid the appearance of bias is for parties to challenge a judge whose independence or impartiality can be doubted. If the party's application for the recusal of a judge is accepted by the court, the judge will be disqualified and excluded from the case.
- 50 Apart from regulation concerning recusal, judges are not free to exclude themselves from cases that are not to their liking; this is called the 'duty to sit'. Decisions on disqualification should not be made lightly, as litigants may exploit it to choose their judges.⁹⁵ The pernicious version of the duty to sit concept may push judges in exactly the wrong direction, suggesting that they should decline to preside only if the grounds for disqualification are undeniably clear. The doctrine has also been used to justify the continued participation of judges in cases where their disqualifications were required.⁹⁶
- 51 In Brazil, Art 144 and 145 of the CCP stipulate the grounds of disqualification. The parties are guaranteed the right to file a motion for the recusal of judges on the grounds of disqualification, and if the judge acknowledges the disqualification, the case is passed on to another judge. Otherwise, the court decides whether the motion to recuse is granted (Art 146 (1) BRCCP).
- 52 In England and Wales, the Guide to Judicial Conduct of the United Kingdom Supreme Court was first prepared by and for the Justices of the Supreme Court when the court was established in 2009 and has been revised to coincide with the court's tenth anniversary in 2019. This guide includes the grounds for not sitting on a case, namely personal relationship or business association as a professional adviser with a party or counsel for a party. It has been traditionally recognized for parties to challenge the judges on the grounds of actual or apparent bias since the seventeenth century in England. If judges or members of a tribunal have interests in the outcome of a case or if the conduct or behaviour of judges or tribunal members gives rise to an appearance of bias, then they are disqualified. In any case, as per automatic disqualification, the judges

⁹⁴ *Indra v Slovakia*, Case 46845/99 (ECtHR), Judgment 1 February 2005 [ECLI:CE:ECHR:2005:0201JUD004684599] para 49.

⁹⁵ P Mikuli (n 9) para 19.

⁹⁶ J W Stempel, 'Chief William's Ghost: The Problematic Persistence of the Duty to Sit' (2009) 57 Buff. L. Rev. 813, 232.

should recuse themselves from the case before any objection is raised.⁹⁷ The involvement of the judges in an earlier stage of the proceedings requires them to recuse themselves because of the appearance of bias as a result of pre-determination or pre-judgment.⁹⁸

- 53 In France, Art 339 and 340 of the FCCP stipulate the disclaimer (self-recusal), Art 341 regulates the grounds for recusal by referring to Art L. 111-6 COJ (Code of Judicial Organisation, *Code de l'organisation judiciaire*), and the following provisions stipulate the procedure for parties to challenge judges. The grounds for recusal can be divided into personal and family-related reasons (Art L. 111-6, No 1-4, 6-8 COJ) and previous involvement in the case (Art L. 111-6 No 5 COJ); a new ground was added in 2016⁹⁹: the existence of a conflict of interests (Art L. 111-6 No 9 COJ).¹⁰⁰ On the basis of Art 6 (1) of the ECHR, the French Court of cassation has ruled since 1998 that the enumeration of grounds contained in Art L. 111-6 COJ 'does not necessarily exhaust the requirement of impartiality required of any court'.¹⁰¹ This means that other grounds could be considered to violate the requirement of impartiality. When judges have reasons to believe they may be biased toward one of the parties, they must refrain from taking part in the decision and ask to be replaced by another judge (Art 339 FCCP). Parties have a right to challenge their judge, provided they show evidence of bias and comply with certain procedural requirements (Art 342 FCCP). The judge can have the recusal proceedings reviewed by an appellate court (Art 349 FCCP). If the recusal application is dismissed, the applicant may be ordered to pay a civil fine from EUR 15 to 1,500, in addition to any claim for damages (Art 353 FCCP).¹⁰² The Court of Cassation holds that an application for the recusal of a judge must be made as early as possible; otherwise, the party is mostly deemed to have waived his/her right.¹⁰³
- 54 In Germany, Art 41 of the GCCP stipulates the grounds for disqualification, and Art 42 GCCP stipulates that a judge may be recused from a case if there are grounds for disqualification in Art 41 or if there is a fear of bias. Regarding the grounds for disqualification, a distinction can be made here between personal and family-related reasons (No 1–3) on the one hand and factual grounds or previous involvements in the

⁹⁷ R Clayton and H Tomlinson, *Fair Trial Rights* (2nd edn, Oxford University Press 2010) para 11.142-11.145.

⁹⁸ *Stubbs v The Queen* (Privy Council Appeals, Bahamas), Judgment 18 Oct 2018 [(JCPC 2016/0098)] para 14.

⁹⁹ Law Act No 2016-1547 of 18 November 2016 '*de modernisation de la justice du XXI^{ème} siècle*'.

¹⁰⁰ In the meaning of Art 7-1 of Ordinance No 58-1270 of 22 December 1958 regarding the status of the judiciary. According to this provision, a conflict of interests is 'any situation of interference between a public interest and public or private interests which is likely to influence or appear to influence the independent, impartial and objective exercise of a function'.

¹⁰¹ Case 96-11.637 (Court of Cassation, France), Judgement 28 April 1998 [ECLI:FR:CC:1998:96:11.637]

¹⁰² A Garapon and H Epineuse, 'Judicial Independence in France,' in A Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012) 288.

¹⁰³ Case 14-10.817 (Court of Cassation, France), Judgement 8 April 2015 [ECLI:EN:CCASS:2015:CO00378].

matters (No 4–8) on the other.¹⁰⁴ The reasons for recusal can arise from the judges' relationships with those involved in the process and the subject matter of the dispute, as well as their conduct in the specific legal dispute. For reasons due to the equality of arms and the guarantee of the right to a legal judge, the right of recusal is fundamentally available to both parties.¹⁰⁵ The court of which the judge is a member shall rule on a motion to recuse him without that judge being involved in the decision. No decision needs to be handed down when the judge regarding whom a motion for recusal has been filed believes this motion to be justified (Art 45 (1)(2) GCCP). The BGH held that the presiding judge has the discretion permitted by law in the proceedings; however, if the judge violates the required equidistance to the parties, issues of bias, as outlined in Art 42 (2) of the GCCP, can be raised.¹⁰⁶ Regarding Art 41 No 6 of the GCCP, the BGH held that the provision of recusal grounds is to be interpreted narrowly about Art 101 (1) s 2 of the Basic Law so that the mere participation in preparatory procedural acts or interim decisions is not sufficient grounds for recusal,¹⁰⁷ and the BVerfG stated that it is not constitutionally objectionable even though there is no reason for the exclusion of a judge's participation in the appeal proceedings that issue an injunction in first-instance proceedings within the meaning of Art 41 No 6 of the GCCP.¹⁰⁸ The ECtHR also said that the judge's participation in their own appeal proceedings was not against Art 6 (1) of the ECHR.¹⁰⁹ The participation of disqualified judges does not lead to the nullity of the decision made but only to its contestability according to Art 547 No 2, 579 (1) No 2, and 576 (3) of the GCCP.¹¹⁰

- 55 In Korea, Art 41 of the CCP stipulates the grounds for disqualification, which can be divided into personal and family-related reasons (No 1, 2) and previous involvement in the case (No 3-5). Art 42 of the CCP stipulates that when there exist any circumstances under which it is difficult to expect a fair trial by the judges, any concerned party may challenge them, and the subsequent provisions stipulate the procedures for the challenge of judges. The right to the recusal of judges is available to both parties. When a disqualified judge participates in a trial and intervenes in violation of the Act, it then serves as a ground for appeal and retrial (Art 424 (1) No 2, 451 (1) No 2 CCP). It is still extremely rare in Korea to adopt a party's motion to recuse a judge. In a recent ruling on 4 January 2019, the Korean Supreme Court adopted a motion to recuse an appellate court judge in divorce litigation based on the right to a fair trial guaranteed under the

¹⁰⁴ Vossler in V Vorwerk and C Wolf (ed), *BeckOK ZPO* (53rd edn, C.H.BECK München 2024), § 41, para 1-14.

¹⁰⁵ Vossler in V Vorwerk and C Wolf (ed), *BeckOK ZPO* (53rd edn, C.H.BECK München 2024), § 42, para 1-33.

¹⁰⁶ Case V ZB 22/03 (BGH, Germany), Decision 2 October 2003 [BGHZ 156, 269 (270) = NJW 2004, 164].

¹⁰⁷ Case XII ZB 602/15 (BGH, Germany), Decision 18 January 2017 (NJW-RR 2017, 454).

¹⁰⁸ Case 1 BvR 730/01 (BVerfG, Germany), Decision 4 July 2001 (NJW 2001, 3533).

¹⁰⁹ *Jürgen Binder v Deutschland*, Case 44455/07 (ECtHR), Judgement 20 September 2011 (NJW 2012, 3019).

¹¹⁰ Vossler (n 104) para 14.

Constitution.¹¹¹ On the other hand, concerning the provisions of the Code of Criminal Procedure whereby the court is entitled to dismiss a motion for the recusal of a judge to the extent that the motion is filed to delay the litigation (akin to Art 45 (1) CCP), the Korean Constitutional Court has held that doing so does not violate the constitutional right to a fair trial for the following reasons: (i) the dismissal is an appropriate method to prevent any abuse of the right solely to cause delay, (ii) it is limited to cases where the purpose of delaying the proceedings is obvious, and (iii) it provides an opportunity for re-examination via an appeal.¹¹² In Korea, Art 46 (1) of the CCP stipulates that a decision on the motion for recusal of judges shall be rendered by the court of which the judge is a member, against whom the motion has been filed. The Korean Constitutional Court held that the provision does not infringe on the applicant's right to a fair trial under the Constitution for the following reasons: the right to a fair trial of the applicant and the right to a speedy trial of the other party must be harmoniously guaranteed; in any case, the judge against whom the motion has been filed cannot participate in the process for the recusal trial; an opportunity to file an appeal is provided against the decision to dismiss the application.¹¹³ Art 45 (2) of the CCP stipulates that the judges against whom the motion has been filed shall promptly present their opinion on the motion in writing, and Art 46 (2) stipulates that judges against whom the motion has been filed may state their opinion in the recusal trial. The Korean Constitutional Court held that the provision is not unconstitutional on the grounds that it could prevent the parties from using the right to recuse as a means of subjective complaints against judges in the course of a proceeding or as a tool to delay litigation.¹¹⁴

- 56 In Spain, Art 219 of the LOPJ stipulates the grounds of recusal related to kinship or tutelary ties (No 1, 2, 3, and 15), labour ties (No 6, 12, 13, and 16), cases in which the judge has been a plaintiff or defendant, or a complainant from any of the parties (No 4, 5, 7, and 8). It is obligatory for judges under any legal disqualifying circumstances to abstain from hearing the suit without waiting for a formal recusal (Art 217 LOPJ). In civil, labour, and contentious-administrative proceedings, judges may be challenged not only by the parties but also by the state prosecutor, provided that intervention would be desirable or mandatory in view of the nature of the rights being discussed in the judicial proceedings (Art 218 (1) LOPJ). An application for recusal must be filed as soon as the circumstances are known (Art 223 (1) LOPJ). An order issued about the application of recusal may lead to a fine between EUR 180 and 1,600 provided that the party had filed it in bad faith (Art 228 (1) LOPJ).

¹¹¹ Case 2018Sue563 (Supreme Court, Korea) Decision 4 January 2019; the case was a divorce case filed by the daughter of the president of a conglomerate, and the judge sent a text message to the president of the conglomerate about his brother's personnel matters before taking the case. That fact was reported in the media.

¹¹² Case 2005Hun-Ba58 (Constitutional Court, Korea), Decision 27 July 2005.

¹¹³ Case 2011Hun-Ba219 (Constitutional Court, Korea), Decision 21 March 2013.

¹¹⁴ Case 2017Hun-Ba516 (Constitutional Court, Korea), Decision 25 June 2020.

- 57 In the US, 28 US Code (hereinafter referred to as USC) § 47, 144, and 455 are provisions to ensure the independence and impartiality of federal judges. § 455 applies to all justices, judges, or magistrate judges; § 47 is applicable to appeal court judges; and § 144 applies to district court judges. § 455 is a provision for judges themselves to withdraw from trials, and § 144 is a provision for a party to exclude a judge from a trial. 28 USC § 455 (a) stipulates that federal judges shall disqualify themselves in the proceedings if their impartiality is questionable by reasonable standards of the general public, and § 455 (b) lists five reasons for disqualification, including the presence of a specific conflict of interest and the appearance of prejudice. Under § 455 (b), the judge must recuse himself if the statutory criteria exist, even if no motion has been introduced, no affidavit filed, and even if a reasonable person would not question the judge's impartiality. § 455 covers the appearance of bias and a specific list of conditions already deemed as resulting from bias or prejudice.¹¹⁵ 28 USC § 144 allows for disqualification based on bias or prejudice alleged in an affidavit filed by a party, a reason that is not found on the list outlined in § 455. The US Supreme Court supported the idea that a district judge may not pass judgment upon the truth of the facts alleged in the disqualification affidavit (the judge must accept the party's allegations to be true) but decided that the challenged judge could still consider whether the alleged facts (accepted as true) were legally sufficient for disqualification.¹¹⁶ Thus, the advantage of § 144 is that the factual allegations will be deemed true, while the major disadvantage is that the challenged judge will decide if those facts are legally sufficient. Because of the courts' strict construction of the statute's procedural requirements, disqualification under § 144 has been rare.¹¹⁷ According to the US Supreme Court, the objective standards that require recusal of judges are met when 'the probability of actual bias on the part of the judge decision-maker is too high to be constitutionally tolerable'.¹¹⁸ In *Caperton v A. T. Massey Coal Co., Inc.*¹¹⁹, where the question presented is whether the Due Process Clause of the Fourteenth Amendment was violated when one of the justices of the state supreme court in the majority denied a recusal motion, and the basis for the motion was that the justice had received campaign contributions in an extraordinary amount from, and through the efforts of, the board chairman and principal officer of the corporation found liable for the damages, the US Supreme Court held that in all the circumstances of this case, due process required recusal. The court stated that most matters relating to judicial disqualification do not rise to a constitutional level and that matters of kinship, personal bias, state policy, and remoteness of interest would

¹¹⁵ G D Serbulea, 'Due Process and Judicial Disqualification: The Need for Reform' (2010) 38 Pepp. L. Rev. 1109, 1124.

¹¹⁶ *Berger v United States*, Case 460 (Supreme Court, US), Judgment 31 January 1921 [255 US 22].

¹¹⁷ G D Serbulea (n 115) 1125; the author expressed the following views on 1126, 'due to the variety and strength of the disqualification options present in federal statutes, and due to the Supreme Court's direct appellate power over the lower federal courts, the Due Process clause will rarely (if at all) be invoked in the federal system'.

¹¹⁸ *Withrow v Larkin*, Case 73-1573 (Supreme Court, US), Judgment 16 April 1975 [421 US 35(47)].

¹¹⁹ *Caperton v A. T. Massey Coal Co.*, Case 08-22 (Supreme Court, US), Judgment 3 March 2009 [556 US 868].

generally seem to be matters merely of legislative discretion. However, the Due Process Clause, which incorporated the common-law rule, states that judges must recuse themselves when they have ‘a direct, personal, substantial, pecuniary interest’ in a case. The Court asks not whether the judge is subjectively biased but whether the average judge in his position is ‘likely’ to be neutral and whether there is an unconstitutional ‘potential for bias’.

- 58 In China, judges should recuse themselves from the trial if their spouse, parents or children serve within the jurisdiction of the court, where judges serve, as a partner or founder in a law firm or as an agent ad litem or defender as lawyer or provide other paid legal services for the parties to legal proceedings (Art 24 of the Judges Law in 2019). According to the Chinese Civil Procedure Law (CNCPL) amended on 4 December 2021 and effective from 1 January 2022 judges should voluntarily disqualify themselves and can be disqualified with the request of a party, i) if they are a party to a case or are a close relative of a party or a litigation representative thereof, ii) if they are an interested person to the case, iii) judges have any other relationship with a party to a case or a litigation representative thereof, which may affect the impartial trial of the case and where judges accept any treat or gift from a party to a case or a litigation representative thereof or meet with a party to a case in violation of legal provisions (Art 47 CNCPL). The disqualification of the presiding judge or single judge who is the president of a court shall be decided by the judicial committee of the court; the disqualification of judges shall be decided by the president of a court (Art 49 CNCPL).

2.2.3 The Specialization of Courts and Judges

- 59 In many jurisdictions, there is a strong tendency towards the specialization of courts and judges, and the controversial pros and cons are often discussed. When it comes to the specialization of judges and courts, efficiency, expertise, and uniformity are usually labelled as the benefits of specialization.¹²⁰ However, three other possible effects of a judge’s immersion in a particular type of case are assertiveness, insularity, and stereotyping.¹²¹ Subject matter specialization enables judges to acquire detailed knowledge of a given area of law and of the issues that may arise in related disputes. Furthermore, it favours a more efficient organization of the work and is likely to guarantee better consistency of decisions. However, it may reduce the potential for judges to benefit from knowledge across different areas and may introduce rigidity in the use of resources, limiting the possibility to reallocate judges from one area to another.¹²²

¹²⁰ L Baum, ‘Probing the Effects of Judicial Specialisation’ (2008) 58 Duke LJ 1667, 1675.

¹²¹ Ibid 1677 ff.

¹²² Nonetheless, based on OECD data, specialization in commercial matters – as measured by the presence of specialized commercial courts or sections covering at least three commercial matters – appears to have some association with shorter trial length (OECD (2013), ‘What makes civil justice effective?’, OECD Economics Department Policy Notes, No 18 June 2013, para 12).

- 60 The negative effects of judicial specialization fall into two categories: first, effects relating to a judge's immersion in a particular field and judicial expertise, and second, effects relating to the influence of interest groups in the specialized field.¹²³ Specialized judges may be captured vulnerably by special interest groups.¹²⁴ Because specialized courts concentrate judicial power in a small subset of judges, interest groups become more invested in the appointment process and are effectively or legitimately entitled to participate. Specialized courts are susceptible to other forms of politicization branches as well. The political branches of government can more effectively control specialized courts through monitoring, budgeting, and other forms of pressure.¹²⁵ These negative effects of the specialization of judges or courts may consequently undermine the independence and impartiality of judges.¹²⁶

3 THE ROLE AND INVOLVEMENT OF THE PARTIES

- 61 Issues regarding the reciprocal roles of the judge and the parties in civil litigation may be the central problem of any system of civil procedure, and it is closely linked to the solutions to some of the most crucial political and ideological issues of human history. The initiation of action is a crucial element of the civil procedure. The judges cannot replace the parties but only can assist them in presenting their cases, even if the purpose of the civil procedure is to elucidate objective truth.¹²⁷ The role of the parties in the civil proceedings is to present their arguments and proofs on which the judgment will be based. In an adversary system,¹²⁸ the plaintiffs and defendants ought to be treated equally and provided equal opportunities to participate in the proceedings. The court ought to hear seriously and sincerely the materials from all parties for accurate judgment. The right to a fair hearing of parties is most appropriately understood as a right to proper participation in court proceedings. In an adversary system, litigants must be able to make their cases effectively, and there must be procedural rules to provide equal opportunities to the competing parties to present their proofs and arguments.¹²⁹ This subchapter describes the constitutionalization and fundamentalization of the rights of parties in civil proceedings, which relates to the role or involvement of the parties. The figures of the rights of the parties guaranteed in national constitutions or supranational

¹²³ L Baum (n 120) 1677 ff.

¹²⁴ S V Damle, 'Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court' (2005) *Virginia Law Review* 1267, 1282.

¹²⁵ E K Cheng, 'The Myth of the Generalist Judge' (2009) *Revista Forumul Judecatorilor* 519, 551 ff.

¹²⁶ H Fleischer, 'Spezialisierte Gerichte: Eine Einführung (Specialized Courts: An Introduction)' (2017) 81 *Rabel Journal of Comparative and International Private Law (RabelsZ)* 497, 506.

¹²⁷ M Cappelletti (n 19) 700-702.

¹²⁸ The distinction between adversarial and inquisitorial systems in civil litigation became meaningless. It can be said that some systems are more adversarial or more inquisitorial than others. The judges in continental systems are more responsible for fact-gathering or seeking the truth than judges in the common law system. Cf J A Jolowicz, 'Adversarial and Inquisitorial Models of Civil Procedure' (2003) 52 *International & Comparative Law Quarterly* 281, 284; J H Langbein, 'The German Advantage in Civil Procedure' (1985) 52 *The University of Chicago Law Review* 823, 842.

¹²⁹ WB Rubenstein, 'The Concept of Equality in Civil Procedure' (2001) 23 *Cardozo L. Rev.* 1865, 1884.

norms include the right to equal treatment, namely the principle of equality of arms, and the right to be heard.

3.1 The Right of the Parties to Equal Treatment

- 62 In adjudicatory procedures, a widely recognized aspect of procedural fairness is equality regarding the opportunity to be heard. The degree to which procedures facilitate equal opportunities for the adversaries to influence the decision may be the most important criterion by which fairness is evaluated. Equality of opportunity is not, however, an exhaustive measure of procedural due process, and the measure of procedural due process should include not only unbiased decision-makers and equal opportunity for evidence and arguments to be presented but also a consideration of how evidence and arguments are presented.¹³⁰ The right to equality before courts stipulated in national constitutions or supranational norms ensures the right to equal treatment of the parties and the principle of equality of arms in the course of proceedings.

3.1.1 Sources of the Principle of Procedural Equality

3.1.1.1 National Constitutional Sources

3.1.1.1.1 Brazil

- 63 Art 5 of the Brazilian Constitution declares that all persons are equal before the law, and Art 5 LV guarantees the adversary system and full defence with the means and resources inherent to it for the litigants in judicial processes. This guarantees that the plaintiff and the defendant have the right to challenge each other, presenting their point of view with the reply, and are still aware of the process to participate in defence concerning decisive evidence in the verdict.¹³¹ Art 7 of the BRCCP stipulates equal treatment in the exercising of procedural rights, the means of defence, the burdens, the duties, and the application of procedural sanctions, and the judge is responsible for the contradictory effectiveness.

3.1.1.1.2 England and Wales

- 64 Common law requires that a body determining a dispute must give each party a fair opportunity to put their case. However, the standard of the right of parties to a fair hearing or the duty of judges to act fairly has been applied flexibly, and the common law obligation of fairness was supplemented by Art 6 (1) of the ECHR.¹³² In *McLean & Anor v Procurator Fiscal (Scotland)*, it was said that the principle that there must be an equality

¹³⁰ J L Mashaw, 'The Supreme Court's Due Process Calculus for Administrative Adjudication in *Mathews v Eldridge*: Three Factors in Search of a Theory of Value' (1976) *The University of Chicago Law Review* 28, 52.

¹³¹ É Frighetto and M C R Souza, 'The Importance of Constitutional Principles in Civil Proceedings in the Face of Computerization of Data for the Optimization of the Legal-Procedural Relationship' (2021) 12 *Revista Científica Multidisciplinar Núcleo do Conhecimento* 77.

¹³² R Clayton and H Tomlinson, *Fair Trial Rights* (2nd edn, Oxford University Press 2010) para 11.158.

of arms on both sides is clearly established in the jurisprudence of the Strasbourg Court, and the principle of equality of arms requires that there must be a fair balance between the parties: in civil cases, the accused must be afforded an opportunity to present his case under conditions which do not place him at a substantial disadvantage as compared with his opponent; in criminal cases, the essential question is whether the alleged inequality of arms is such as to deprive the accused of his right to a fair trial.¹³³

3.1.1.1.3 France

- 65 The principle of equality before the law and justice is based on Art 6 and 16 of the DDH. Moreover, the CC has referred to the *principe général d'égalité* (general principle of equality) since 1980, before which it could not base its decision on a specific provision.¹³⁴ The CC held that the principle of equality prevents persons in similar situations from being judged by courts composed according to different rules.¹³⁵ The CC has stated the equal guarantees of the parties as follows:¹³⁶

According to Art 6 of the DDH, the law is “the same for all, whether it protects or punishes”. If the legislator can provide for different rules of procedure depending on the facts, the situations, and the persons to whom they apply, it is on the condition that these differences do not result from unjustified distinctions and that equal guarantees are provided to those who are subject to trial, in particular about respect for the principle of the rights of the defence.

The CC held that there was no breach of equality between citizens (litigants) in the possibility offered to *juge de proximité* (the local judge) to relinquish jurisdiction in favour of the court of the first instance in the event of serious legal difficulty (former Art L. 231-5, COJ, ex-Art L. 331-4).¹³⁷ The CC held in the decision of 30 June 2017 that the contested provisions providing for a time limit for appealing against judgments of labour courts, applicable only in certain overseas territories including Mayotte, infringe on the principle of equality before the courts because the exclusion from the ordinary time limit is not justified by a difference in the situation of litigants in one territory compared with those

¹³³ *McLean and Another v Buchanan, Procurator Fiscal and Another*, Case 4 of 2000 (Privy Council, UK), Judgment 24 May 2001 [2001 UKPC D3, 2001 SCCR 475], para 39.

¹³⁴ Eg, Case 82-132 DC (CC, France), Judgment 16 January 1982 [ECLI:FR:CC:1982:81.132.DC] para 28-34.

¹³⁵ Case 75-56 DC (CC, France), Judgment 4 May 2012 [ECLI:FR:CC:1975:75.56.DC] para 4-5.

¹³⁶ Case 2004-510 DC (CC, France), Judgment 20 January 2015 [ECLI:FR:CC:2005:2004.510.DC] para 9; Case 2010-15/23 QPC (CC, France), Decision 23 July 2010 [ECLI:FR:CC:2010:2010.15.QPC] para 4; Case 2019-778 DC (CC, France) 21 March 2019 [ECLI:FR:CC:2019:2019.778.DC] para 21; Case 2019-801 QPC (CC, France), Decision 20 September 2019 [ECLI:FR:CC:2019:2019.801.QPC] para 8.

¹³⁷ Case 2002-461 DC (CC, France), Judgment 29 August 2002 [ECLI:FR:CC:2002:2002.461.DC] para 21-24.

in other territories nor by the jurisdictional organization, characteristics, nor specific constraints of the department of Mayotte.¹³⁸

3.1.1.1.4 Germany

- 66 Art 3 (1) of the Basic Law stipulates equality before the law. The BVerfG noticed that the equality of arms of the parties in a civil proceeding is acknowledged as a right equivalent to a fundamental right resulting from the general principle of equality in Art 3 (1) of the Basic Law and the principle of the rule of law in Art 20 (3) of the Basic Law, and it is also seen as an element of a fair trial. The court characterized it as the constitutionally guaranteed equivalence of the procedural position of the parties before the judge and equal distribution of the risk at the outcome of the proceedings.¹³⁹ Furthermore, the court held their consensus regarding the relationship between the equality of arms and the right to be heard from Art 103 (1) of the Basic Law as follows:¹⁴⁰

It corresponds to the judge's duty to maintain this equality of the parties through an objective, fair conduct of proceedings, through an impartial readiness to evaluate mutual submissions, through the impartial application of law and through correct fulfilment of his other procedural obligations towards those involved in the process. The procedural equality of arms is related to the principle of hearing from Art 103 (1) of the Basic Law, which is a special expression of equality of arms. As a procedural original law, this requires the opposing party to be heard before a decision is made in court proceedings and thus to be allowed to influence an upcoming court decision.

The guarantee of the equality of arms entails not only formal equality regarding the parties' legal position but also a substantive parity – *prozessuale Chancengleichheit* (procedural equality of opportunities) – which should be accomplished by the court. In the case of disparities related to the evidence, the disadvantaged party may be entitled to a reduction in the burden of proof, for instance, in medical malpractice litigation.¹⁴¹

3.1.1.1.5 Korea

- 67 The principle of the parties' equality or the equality of arms in civil proceedings is derived from '*equality before the law*', as stipulated in Art 11 (1), along with the right to a trial under Art 27 (1) of the Korean Constitution.¹⁴² Art 1 (1) of the Korean CCP stipulates that a court shall endeavour to have the procedures progress fairly, swiftly, and economically. The principle of equality of arms obliges judges to give equal opportunities to the parties

¹³⁸ Case 2017-641 QPC (CC, France), Decision 30 June 2017 [ECLI:FR:CC:2017:2017.641.QPC] para 4-7.

¹³⁹ Case 2 BvR 878/74 (BVerfG, Germany), Decision 25 July 1979 [NJW 1979, 1925(1927)].

¹⁴⁰ Case 1 BvR 1783/17 (BVerfG, Germany), Decision 30 September 2018 [NJW 2018, 3632] para 14- 15.

¹⁴¹ Vollkommer in Zöller (ed), *ZPO* (28th edn, Verlag Dr. Otto Schmidt Köln 2010), Einleitung, para 102.

¹⁴² S Lee, *New Civil Procedure Law* (14th edn, Parkyoungsa 2020) 312.

and to treat them equally in the course of proceedings.¹⁴³ Art 26 of the *Act on Press Arbitration and Remedies, etc. for Damage Caused by Press Reports* stipulates the procedure for requesting rectification of media reports. Clause 6 of the Article also provides that a trial on the request to rectify the media report should comply with the provisions relating to the application for injunctive relief under the *Civil Execution Act*. The Constitutional Court held that the legislation infringed on the media's constitutional right to defence and a fair trial as parties in the civil proceedings because it allowed the request to rectify a media report to be granted based on the probability of false information in media reports, not on the proof, and therefore the media was disadvantaged.¹⁴⁴

3.1.1.1.6 Spain

- 68 In Spain, no express right to equal treatment is provided in the Constitution (1978), but the Spanish Constitutional Court held that the right to a trial with all guarantees encompasses the right to equal treatment of the parties.¹⁴⁵ The court held that the right to defence and legal assistance stipulated in Art 24 (2) of the Spanish Constitution is to ensure the effective realization of the principles of equality of the parties, which imposes on the judicial bodies the positive duty to avoid imbalances between the respective procedural positions of the parties or limitations in the defence that may infer to any of them a result of defencelessness, prohibited in any case by Art 24 (1) of the Spanish Constitution. The court has considered the right to defence and legal assistance, as well as effective judicial protection, to be violated in cases where the intervention of a lawyer is mandatory and his appointment was requested, but the request was not met, or the procedure was not suspended, thus generating material defencelessness for the appellant.¹⁴⁶

3.1.1.1.7 The US

- 69 The Fourteenth Amendment to the Constitution, which was ratified on 7 September 1868, stipulates the equal protection of the laws. A primary purpose of the Fourteenth Amendment was to constitutionalize the Civil Rights Act of 1866, which guarantees the right to make and enforce contracts, to sue, to be parties, to give evidence, and to enjoy the full and equal benefit of all laws and proceedings for the security of person and property for all persons.¹⁴⁷ In 1927, the US Supreme Court held that a state law, where

¹⁴³ M Ho, *Civil Procedure Law* (14th edn, Bobmunsa 2020) 40.

¹⁴⁴ Case 2005Hun-Ma165,314,807,2006Hun-Ga3 (Constitutional Court, Korea), Decision 29 June 2006.

¹⁴⁵ In the criminal case, the court stated as follows: 'The principle of equality of arms, a logical corollary of the adversarial principle, also derives from the need for the parties to have the same means of attack and defence and identical possibilities and loads of allegation, evidence and challenge to avoid imbalances between their respective procedural positions without admissible limitations to the principle'. Case STC 178/2001 (Constitutional Court, Spain), Decision 17 September 2001 [ECLI:ES:TC:2001:178].

¹⁴⁶ Case STC 174/2009 (Constitutional Court, Spain), Decision 16 July 2009 [ECLI:ES:TC:2009:174].

¹⁴⁷ J Leubsdorf, 'Constitutional Civil Procedure' (1984) 63 Tex. L. Rev. 579, 588 ff.

foreign corporations may be classified separately from both individuals and domestic corporations and dealt with differently in respect of the venue transitory actions, was unreasonable, arbitrary, and in violation of the equal protection clause of the Fourteenth Amendment.¹⁴⁸ However, thousands of cases in which a constitutional claim of equal protection have been made against some civil procedure since then, but almost all challenges were rejected.¹⁴⁹ A scholar analysed the reasons as follows: The concept of equality employed in American constitutional law is one with a particular historical meaning, some variety of an anti-discrimination principle. Constitutional equality is generally a different form of equality than procedural equalities. The type of equality required in an adversary system may not be protected by the history and tradition of the Fourteenth Amendment's Equal Protection Clause.¹⁵⁰

3.1.1.1.8 China

- 70 The second sentence of Art 33 of the Constitution guarantees the equality of all citizens before the law and Art 8 of the CNCPL stipulates the equal procedural rights of the parties in litigation and the obligation of the courts to safeguard and facilitate the parties' exercise of their procedural rights, and to treat the parties equally in the application of law.

3.1.1.1.9 Russia

- 71 Art 19 of the Constitution guarantees the equality of all people before law and courts and Art 123 (3) of the Constitution stipulates that judicial proceedings shall be held based on competitiveness and equality of the parties. The adversarial principle is understood as one of the most important guarantees of civil procedure enshrined in the Constitution. Constitutional Court of Russian Federation stated equal procedural

¹⁴⁸ *Power Manufacturing Company v Saunders.*, Case 258 (Supreme Court, US), Judgment 31 May 1927 [274 US 490(493, 494)].

¹⁴⁹ W B Rubenstein, 'The Concept of Equality in Civil Procedure' (2001) 23 Cardozo L. Rev. 1865, 1912-1915.

¹⁵⁰ Ibid 1869-1870; W Rubenstein explains the three different forms of procedural equalities as follows: They are the equipage equality, the rule equality, and the outcome equality. The equipage equality is the principle that the parties should be equally equipped to engage in adversarial adjudicatory procedures. The concept of adversarial equality strives to ensure accurate and acceptable adjudicative outcomes by creating a relatively level playing field among litigation opponents. Rule equality is the principle that like cases should be processed according to like procedural rules across case types. The concept of rule equality strives to ensure efficient and acceptable adjudicative outcomes by applying similar procedural rules to similarly situated parties and cases. Outcome equality is the principle that like cases should reach consistent results. The concept of outcome equality strives to ensure consistent and acceptable adjudicative outcomes. He argues that the Constitution has had little effect on procedural equalities, and constitutional equality is generally a different form of equality than these procedural equalities.

opportunities granted to the parties (the principle of equality) shall be supported by equal opportunities to convey to the court their position (the adversarial principle).¹⁵¹

3.1.1.2 Supranational Sources

3.1.1.2.1 Norms

- 72 Art 10 of the Universal Declaration of Human Rights (1948) stipulates the right to equal treatment before an independent and impartial tribunal, and Art 14 (1) of the ICCPR stipulates that all persons shall be equal before the courts and tribunals.¹⁵² The Human Rights Committee of the United Nations expressed the following in its General Comment 32 of 23 August 2007 on the right to equality before the courts and tribunals:¹⁵³

The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant. The principle demands that each side be allowed to contest all the arguments and evidence adduced by the other party (para 13).

- 73 Art 3 of the PTCP stipulates the duty of the court to ensure equal treatment and reasonable opportunity for litigants to assert or defend their rights, and Rule 4 of the ERCP lists one of the roles of the court as ensuring that the parties enjoy equal treatment.

3.1.1.2.2 Cases

3.1.1.2.2.1 ECtHR

- 74 The principle of equality of arms declared since 1959 by the ECtHR is as follows: ¹⁵⁴

The principle of equality of arms is inherent in the broader concept of a fair trial and is closely linked to the adversarial principle. The requirement of equality of arms, in the sense of a fair balance between the parties, applies in principle to civil as well as to criminal cases. Equality of arms implies that each

¹⁵¹ Resolution of the Constitutional Court of Russian Federation on 4 November 2004 № 430-O. Reference Legal System 'Consultant Plus'.

¹⁵² Art 14 (1) of the ICCPR explicitly established 'the right to be equal before the courts and tribunals', while such a right is not explicitly referred to by Art 6 (1) of the ECHR.

¹⁵³ General Comment No 32 available at <https://www.refworld.org/docid/478b2b2f2.html> accessed 1 February 2023.

¹⁵⁴ *Feldbrugge v the Netherlands*, Case 8562/79 (ECtHR), Judgment 26 May 1986 [ECLI:CE:ECHR:1986:0526JUD000856279] para 44.; *Dombo Beheer B.V. v the Netherlands*, Case 14448/88 (ECtHR), Judgment 27 October 1993 [ECLI:CE:ECHR:1993:1027JUD001444888] para 33; *Regner v the Czech Republic*, Case 35289/11 (ECtHR), Judgment 19 September 2017 [ECLI:CE:ECHR:2017:0919JUD003528911] para 146.

party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place her or him at a substantial disadvantage vis-à-vis the other party.

According to the ECtHR, one of the parties was placed at a clear disadvantage where the opposing party enjoyed significant advantages regarding access to relevant information, occupied a dominant position in the proceedings, and wielded considerable influence with regard to the court's assessment.¹⁵⁵ The state counsel's position before the court of the audit was imbalanced and detrimental to the litigants because he was present at the hearing, was informed beforehand of the reporting judge's point of view, heard the latter's submissions at the hearing, fully participated in the proceedings, and could express his point of view orally without being contradicted by the other party, and that imbalance was accentuated by the fact that the hearing was not public.¹⁵⁶ When a prosecutor intervened to support one party even though a recognisable aim or public interest was neither specified nor well-founded, it undermined the appearances of a fair trial and the principle of equality of arms.¹⁵⁷ The ECtHR held that the principle of equality of arms, along with the adversarial principle, covers all aspects of civil procedural law.¹⁵⁸

3.1.1.2.2.2 CJEU

- 75 The CJEU has stated that the principle of equality of arms is a corollary of the very concept of a fair hearing, and the aim of the principle is to ensure a balance between the parties to proceedings, guaranteeing that any document submitted to the court may be examined and challenged by any party to the proceedings, and borrowed the jurisprudence of case laws in the ECtHR regarding the implication of the principle.¹⁵⁹ The court held that the principle of equality of arms is available not only to individuals but also to a public institution as regards the exercise of the right of access to the documents.¹⁶⁰ Regarding the appeal alleging that the principle of equality of arms was violated by allowing the consideration of letters submitted by the other party only three days before the hearing, the court rejected the appeal on the ground that such a period could not be considered excessively short because of the nature and content of that

¹⁵⁵ *Yvon v France*, Case 44962/98 (ECtHR), Judgment 24 April 2003 [ECLI:CE:ECHR:2003:0424 JUD004496298] para 37.

¹⁵⁶ *Martinie v France*, Case 58675/00 (ECtHR), Judgment 12 April 2006 [ECLI:CE:ECHR:2006:0412 JUD005867500] para 50.

¹⁵⁷ *Menchinskaya v Russia*, Case 42454/02 (ECtHR), Judgment 15 January 2009 [ECLI:CE:ECHR:2009:0115JUD004245402] para 35-39.

¹⁵⁸ *Avotiņš v Latvia*, Case 17502/07 (ECtHR), Judgment 23 May 2016 [ECLI:CE:ECHR:2016:0523 JUD001750207] para 119.

¹⁵⁹ *Ordre des barreaux francophones and germanophone and Others*, Case C-305/05 (CJEU), Judgment 26 June 2007 [ECLI:EU:C:2007:383] para 31; *Otis and Others*, Case C-199/11 (CJEU), Judgment 6 November 2012 [ECLI:EU:C:2012:684] para 71; *Guardian Industries and Guardian Europe v Commission*, Case C-580/12 (CJEU), Judgment 12 November 2014 [ECLI:EU:C:2014:2363] para 31.

¹⁶⁰ *Sweden v API and Commission*, Case C-514/07 (CJEU), Judgment 21 September 2010 [ECLI:EU:C:2010:541] para 84-90.

letter, and the appellant neither asked the court for an opportunity to comment on that letter in writing nor requested that the hearing be postponed.¹⁶¹

3.1.2 Manifestations of Equal Procedural Treatment

- 76 Parties must be equally treated in the entire course of civil proceedings. Equal opportunities to present their arguments and proofs; to contest all the arguments and evidence adduced by the other party; and equal possibilities to be advised, represented, and interpreted¹⁶² must be provided. Whenever possible, venue rules should not impose an unreasonable burden of access to court on a person who is not a habitual resident of the forum.¹⁶³ In transnational litigation, there should be a balance of interests between the parties with respect to the rules of jurisdiction. The national civil procedure laws have regulations considering the principle of equality of arms in the sphere of service of judicial documents on the parties, suspension of the procedure, and the application of the rules on the burden of proof. This section will be focused on the right of parties to participate fairly in civil proceedings, that is, the right to be provided with information from the court or the other party and the right to provide the information on which a judgment is based.

3.1.2.1 Equal Right to be Informed

- 77 The principle of equality of arms is also applicable in the specific sphere of service of judicial documents on the parties, even though a specific form of service of documents differs from country to country.¹⁶⁴ It is inadmissible for one party to make submissions to a court without the knowledge of the other and on which the latter has no opportunity to comment, whether or not submissions deserve a reaction.¹⁶⁵ However, if observations submitted to the court are not communicated to either of the parties, there will be no infringement of equality of arms as such.¹⁶⁶ The principle was breached when a party's appeal was not served on the other party, who could, therefore, not respond.¹⁶⁷

¹⁶¹ *Guardian Industries and Guardian Europe v Commission*, Case C-580/12 (CJEU), Judgment 12 November 2014 [ECLI:EU:C:2014:2363] para 32-36.

¹⁶² The third sentence of Art 47 of the CFREU stipulates that 'everyone shall have the possibility of being advised, defended and represented'.

¹⁶³ Art 3.4 of the PTCR.

¹⁶⁴ *Avotiņš v Latvia*, Case 17502/07 (ECtHR), Judgment 23 May 2016 [ECLI:CE:ECHR:2016:0523 JUD001750207] para 119.

¹⁶⁵ *Apeh Üldözötteinek Szövetsége and Others v Hungary*, Case 32367/96 (ECtHR), Judgment 5 October 2000 [ECLI:CE:ECHR:2000:1005JUD003236796] para 42.

¹⁶⁶ *Kress v France*, Case 39594/98 (ECtHR), Judgment 7 June 2001 [ECLI:CE:ECHR:2001:0607 JUD003959498] para 73.

¹⁶⁷ *Beer v Austria*, Case 30428/96 (ECtHR), Judgment 6 February 2001 [ECLI:CE:ECHR:2001:0206 JUD003042896] para 19.

3.1.2.2 Equal Right to Present One's Case and to Provide Evidence

3.1.2.2.1 Equal Opportunity to be Represented

- 78 In Brazil, as a general rule, it is mandatory to be represented by an attorney in any judicial proceedings. Nevertheless, if the parties are under legal incapacity (and have no legal representative) or are absent (and so is their attorney), depending on how they were notified to participate, judges are obliged to appoint a public defender that will stand for their rights (Art 72 BRCCP). It is also a duty imposed to the *Ministério Público* (Public Ministry or District Attorney) to participate in every cause that may involve incapables' interests or present some public or social interest to assure the correct and adequate application of the law.
- 79 In France, the right to effective assistance by a lawyer is based on Art 16 of the DDH.¹⁶⁸ In the context of representation, an issue was raised regarding the 'trade union advocates (*défenseurs syndicaux*)'.¹⁶⁹ In labour matters, the employee who brings an appeal or is a defendant at an appellate instance can be represented either by *avocat* (a lawyer) or by a *défenseur syndical*. The latter, however, was restricted to a specific administrative region; therefore, if the seat of the court of appeal was in a different administrative region than the labour court of the first instance, the employee had to change his representative (which was not the case if the representative was a lawyer). Regarding the equality before justice, the CC held that, in itself, the fact of being obliged to choose a trade union defender registered on the list of the region to which the court belongs 'does not create any distinction between litigants', since 'all litigants have the same option of being represented before the industrial tribunal, *inter alia*, by a lawyer or a trade union defender registered on the list of the region in which the court is located'. But there can be differences when the labour court (eg, in this case, Nantes) is not in the same region as the court of appeal (Rennes); the litigant is then obliged by the rule of geographical delimitation to change the trade union defender, whereas the one who has chosen to be defended by a lawyer will be able to keep the same representative. According to the CC, this difference in treatment is justified neither by the constraints resulting from the public financing of the trade union defender, by the specificity of the status of trade union defenders, nor by any other reason; therefore, the CC neutralized the effect with a reservation of interpretation. The contested provisions cannot, without

¹⁶⁸ Case 2010-14/22 QPC (CC, France), Decision 30 July 2010 [ECLI:FR:CC:2010:2010.14.QPC] para 24; The CC also ruled that a law that provides that disputes relating to certain matters may be exempted from representation by a lawyer because of their nature or in considering the value of the dispute does not infringe on the constitution. The legislator intended to avoid that, for disputes of small amounts, disputes of protection and assistance, or disputes presenting a low legal technicality, the litigant is dissuaded from going to court. In doing so, the legislator, who has not disregarded his competence, has based himself on objective and rational criteria. Consequently, it has not disregarded the right to an effective judicial remedy. Case 2019-778 DC (CC, France), Judgment 21 March 2019 [ECLI:FR:CC:2019:2019.778.DC] para 32.

¹⁶⁹ Who are not advocates but union delegates: Case 2019-831 QPC (CC, France), Decision 12 March 2020 [ECLI:FR:CC:2020:2019.831.QPC] para 8-9.

disregarding the principle of equality before the courts, deprive a party who has chosen to be assisted by a trade union defender before the industrial tribunal of continuing to be represented, in all cases, by that same defender before the competent court of appeal.

- 80 In Germany, Art 57 of the GCCP stipulates a special representative for a party under legal disability without a legal representative.
- 81 In Korea, Art 62 and 62-2 of the CCP stipulate a special representative for a party under legal disability without a legal representative or with a legal representative who cannot exercise his or her power as a representative in the litigation procedures.
- 82 In Spain, as seen earlier, the Spanish Constitutional Court held that the main way to restore a potential inequality of parties is to assist the litigant in opposing someone who is an expert in the legal system.¹⁷⁰

3.1.2.2.2 Equal Opportunity at the Hearing

- 83 When only one of the two key witnesses was permitted to be heard, there was a failure to observe the principle of equality of arms.¹⁷¹ A party was treated in a clearly disadvantageous manner with regard to the simplified procedures outlining where he was allowed to appear personally at the hearing, and he was prevented from presenting his case orally or questioning witnesses on the grounds of appearance without a lawyer, especially when he was faced with the opposing party enjoying all these rights.¹⁷² Even though a party had informed the court that he could not attend the hearing by attaching a medical certificate two days before the hearing date, the court decided to proceed with the hearing in the absence of one party. Only the other party was present at the hearing and made oral submissions in a case in which the judges did not have before them crucial elements of written evidence; thus, the absent party was placed at a substantial disadvantage.¹⁷³

3.1.2.2.3 Equal Application of Time Limitation

- 84 If time ceases to run against one of the parties only in the course of proceedings, and, accordingly, it places the other party at a substantial disadvantage, there is a failure to

¹⁷⁰ Case STC 174/2009 (Constitutional Court, Spain), Decision 16 July 2009 [ECLI:ES:TC:2009:174]

¹⁷¹ *Dombo Beheer v The Netherlands*, Case 14448/88 (ECtHR), Judgment 27 October 1993 [ECLI:CE:ECHR:1993:1027JUD001444888] para 34-35.

¹⁷² *Cruz de Carvalho v Portugal*, Case 18223/04 (ECtHR), Judgment 10 July 2007 [ECLI:CE:ECHR:2007:0710JUD001822304] para 26-27.

¹⁷³ *Ternovskis v Latvia*, Case 33637/02 (ECtHR), Judgment 29 April 2014 [ECLI:CE:ECHR:2014:0429JUD003363702] para 71-74.

comply with the principle of equality of arms.¹⁷⁴ In France, regarding time limits for the submission of evidence, the Court of Cassation made a recent decision. The case was about torts (action for health damages due to asbestos exposure). The claimant brought an appeal against the compensation fund. Specific provisions require the claimant to submit evidence within a very short time limit (one month from the submission of the statement of appeal), whereas the compensation fund is not subject to the same short time limits. In its previous case law, the Court of Cassation did not see any difficulty in imposing such strict deadlines on the victim (appellant). In this decision, however, it decided to reverse its case law and referred *ex officio* to the principles of equality of arms and the adversarial principle inherent in the right to a fair trial guaranteed by Art 6 (1) of the ECHR.¹⁷⁵

3.1.2.2.4 Equal Opportunity to Contest with the Opponent

- 85 When the opposing party held positions or functions that put them at an advantage, and the court made it difficult for the one party to challenge them seriously by not allowing them to adduce relevant documentary or witness evidence, the outright rejection of the application put it at a substantial disadvantage *vis-à-vis* the opposing party.¹⁷⁶ The judge refused to adjourn a hearing even though a party had been taken to hospital in an emergency, and his lawyer had been unable to represent him at the hearing, thus, irretrievably depriving them of the right to respond adequately to his opponent's submissions.¹⁷⁷

3.1.2.2.5 The Independence and Impartiality of Experts

- 86 When an expert is simultaneously a party to the proceedings, occupies a dominant position in the proceedings, and wields considerable influence concerning the court's assessment¹⁷⁸ and a lack of neutrality on the part of experts, together with their position and role in the proceedings, could tip the balance of the proceedings in favour of one party to the detriment of the other, there may be a violation of the equality of arms principle.¹⁷⁹

¹⁷⁴ *Platakou v Greece*, Case 38460/97 (ECtHR) Judgment 11 January 2001 [ECLI:CE:ECHR:2001:0111JUD003846097] para 48; *Wynen and Centre hospitalier interrégional Edith-Cavell v Belgium*, Case 32576/96 (ECtHR), Judgment 5 November 2002 [ECLI:CE:ECHR:2002:1105JUD003257696] para 32.

¹⁷⁵ Case 18-22.069 (Court of Cassation, France), Judgment 26 November 2020 [ECLI:FR:CCAS:2020:C201269] para 5.

¹⁷⁶ *De Haes and Gijssels v Belgium*, Case 19983/92 (ECtHR), Judgment 24 February 1997 [ECLI:CE:ECHR:1997:0224JUD001998392] para 54 and 58.

¹⁷⁷ *Vardanyan and Nanushyan v Armenia*, Case 8001/07 (ECtHR), Judgment 27 October 2016 [ECLI:CE:ECHR:2016:1027JUD00800107] para 88-90.

¹⁷⁸ *Yvon v France*, Case 44962/98 (ECtHR), Judgment 24 April 2003 [ECLI:CE:ECHR:2003:0424JUD004496298] para 37.

¹⁷⁹ *Sara Lind Eggertsdóttir v Iceland*, Case 31930/04 (ECtHR), Judgment 5 July 2007 [ECLI:CE:ECHR:2007:0705JUD003193004] para 53.

3.1.2.2.6 The Burden of Proof

- 87 According to Art 373 of the BRCCP, the judge may modify the burden of proof when, due to the circumstances of the case, it is impossible or extremely difficult for a party to produce some evidence or if this evidence can be easily presented by the other party. This should be done in a reasoned decision; in which case the party must be allowed to carry out the assigned charge. The BVerfG noticed that the obligation to regularly allocate the burden of proof results directly from the constitutional requirement of proper, fair court proceedings, in particular, from the requirement of ‘the equality of arms in the proceedings’ and the requirement of ‘the equality in the application of the law’.¹⁸⁰

3.1.2.3 The Restrictions on the Principle of Equality of Arms

- 88 The adversarial principle and the principle of equality of arms are not absolute in civil procedures as well as in criminal procedures. The ECtHR has stated that the rights deriving from these principles can be restricted on the grounds of national or public interests; however, the restrictions should be offset in such a manner that the fair balance between the parties is not affected to such an extent as to impair the very essence of the right to a fair trial.¹⁸¹

3.1.3 Self-represented Litigants (SRLs) in Civil Proceedings

- 89 Common law provides that everyone has the right to represent themselves in court in both civil and criminal matters. However, the presence of self-represented litigants (SRLs)¹⁸² in civil proceedings is often regarded as a problem.¹⁸³ SRLs need assistance with legal points, procedural issues, evidential matters, and presentational matters. The question of how much advice or information judges should give an SRL to ensure a fair

¹⁸⁰ Case 2 BvR 878/74 (BVerfG, Germany), Decision 25 July 1979, [NJW 1979, 1925(1926)].

¹⁸¹ *Regner v the Czech Republic*, Case 35289/11 (ECtHR), Judgment 19 September 2017 [ECLI:CE:ECHR:2017:0919JUD003528911] para 147-162; in this case, the classified documents and information were available neither to the applicant nor to his lawyer, and insofar as the decision revoking security clearance was based on those documents, the grounds for the decision were not disclosed to him. The court held that there had been no violation of Art 6 (1) of the Convention because the very essence of the applicant’s right to a fair trial was not affected by the restriction as a whole.

¹⁸² Unrepresented parties are called ‘litigants in person’, ‘self-represented parties’, ‘self-represented litigants’, or ‘pro se litigants’.

¹⁸³ N Ingwer and V Wormer, ‘Help at Your Fingertips: A Twenty-First Century Response to the pro Se Phenomenon’ (2007) 60 Vand. L. Rev. 983, 993; the authors present the following four problems. The pro se litigants’ unfamiliarity with court rules and customs can result in delays detrimental to judicial efficiency. Judges’ and court officials’ inability to compromise their impartiality by aiding the pro se litigants can further exacerbate this problem. There is a great deal of judicial uncertainty and inconsistency regarding the proper standards to which pro se should be held at various stages of litigation. Pro se litigants, in general, often face obstacles from the public, which may perceive them as ignorant or wasteful of judicial resources.

trial concerns the tension between the right of an individual to be self-represented, the right to equal treatment, and the duty of judges to be impartial.¹⁸⁴

- 90 In England and Wales, a ‘McKenzie friend’ assists a litigant in a court of law by prompting, taking notes, and quietly giving advice. They are not legally trained and do not have any professional legal qualifications. The right to a McKenzie friend was established in the 1970 case of *McKenzie v McKenzie*¹⁸⁵ and made clear through a decision of the Court of Appeal case in 2005. The court has legitimized the use of McKenzie friends in the family court and allowed the litigant to disclose confidential court papers to the McKenzie friend.¹⁸⁶ In 2010, the senior courts issued Practice Guidance (McKenzie Friends: Civil and Family Courts).¹⁸⁷ On 11 March 2013, the Master of the Rolls¹⁸⁸ issued a practice guidance that determined that the term ‘Litigant in Person’ should continue to be the sole term used to describe individuals who exercise their right to conduct legal proceedings on their own behalf.¹⁸⁹ On 24 October 2013, the judiciary produced and published a handbook for ‘Litigants in Person’ in civil proceedings, which gives the reader a general overview of the whole process and advice on how to best approach each stage of the litigation process.
- 91 In the US, the Supreme Court in *Faretta v California* noted the following on the right of self-representation:¹⁹⁰

In the federal courts, the right of self-representation has been protected by statute since the beginnings of our Nation. Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92, enacted by the First Congress and signed by President Washington one day before the Sixth Amendment was proposed, provided that, “in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of [...] counsel [...]” The right is currently codified in 28 USC. § 1654. [...] The right of self-representation finds

¹⁸⁴ N Cambrell, ‘Self-Represented Litigants-Balancing Impartiality and the Right to a Fair Trial’ (2019) 39 C.J.Q. 232, 232 ff.

¹⁸⁵ *McKenzie v McKenzie*, Case 8496 of 1965 (England and Wales Court of Appeal, UK), Judgment 12 July 1970 ([1970] 3 All ER 1034, CA).

¹⁸⁶ *O’Connel & Ors (Children) Rev 2*, Case B4/2004/2341&2693, B4/2005/0341 (England and Wales Court of Appeal, UK), Judgment 22 June 2005 ([2005] EWCA Civ 759) para 128-135.

¹⁸⁷ Practice Guidance: McKenzie Friends (Civil and Family Courts) available at <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/mckenzie-friends-practice-guidance-july-2010.pdf> accessed 1 February 2023.

¹⁸⁸ The President of the Civil Division of the Court of Appeal of England and Wales and Head of Civil Justice.

¹⁸⁹ According to the guidance, the term SRL (self-represented litigant) is unclear in its scope, as it can variously be understood to suggest that individuals are conducting the entirety of legal proceedings on their own behalf; that they are only conducting court advocacy on their own behalf; or that they have themselves obtained representation, ie, secured the service of an advocate.

¹⁹⁰ *Faretta v California*, Case 73-5772 (Supreme Court, US), Judgment 30 June 1975 [422 US 806 (813)].

support in the structure of the Sixth Amendment as well as in the English and colonial jurisprudence from which the Amendment emerged.

The US Supreme Court held that prisoners' *pro se* complaints seeking to recover damages for claimed physical injuries and the deprivation of rights in imposing disciplinary confinement should not have been dismissed without affording them the opportunity to present evidence on their claims.¹⁹¹ In the late 1990s, in response to rising rates of *pro se* litigation, courts first began to consider ways of improving the fairness of the legal process for SRLs.¹⁹² In 2013, the US Supreme Court adopted a rule, Rule 28.8¹⁹³, that all persons arguing orally must be attorneys, arguing that it was simply codifying a long-standing practice of the court.¹⁹⁴ In the US, some commentators have advocated for the relaxation of certain rules regarding evidence for *pro se* litigants in certain situations. Proponents of such an idea have argued that strict adherence to the rules of admissibility can result in unnecessary complexity, delay, and cost within the judicial process and restrict *pro se* litigants in presenting their cases. In particular, rules regarding hearsay, character evidence, authentication, and originality should not be applicable in such situations, as judges can easily filter the relevant information from the body of evidence presented.¹⁹⁵

3.2 The Right of Parties to be Heard by the Court

- 92 The right to be heard is expressed as *audiatur et altera pars* (*audi alteram partem*) and is implicated with the adversarial system. *Audiatur et altera pars* is an ancient basic rule of the proper administration of civil and criminal justice, and it is expressly stated in the constitutions or incorporated in more general clauses, such as the Due Process Clause of the United States, and supranational norms. Traditionally, fundamental principles of procedure prohibit judges from utilizing their private knowledge of the facts pertinent to an issue, that is, knowledge acquired out of court, without the parties' control, and without the guarantees established for the taking of testimony. The basic rules include the parties' right to have notice of the proceedings against them and of various other procedural events, to be present, to rebut evidence, to be present at proof-taking, not to be bound by *res inter alios judicata*, and so forth.¹⁹⁶ The right to be heard obligates

¹⁹¹ *Haines v Kerner*, Case 70-5025 (Supreme Court, US), Judgment 13 January 1972 [404 US 519 (520)]; federal civil litigants have a statutory right to pursue their claims either individually or with the assistance of counsel on the ground of 8 USC § 1654. However, since state court civil litigants are not guaranteed the right to counsel - or to refuse counsel - by the US Constitution, states widely recognize civil litigants' right to proceed *pro se* with various mechanisms to do so. Cf N Ingwer and V Wormer, 'Help at Your Fingertips: A Twenty-First Century Response to the *pro Se* Phenomenon' (2007) 60 Vand. L. Rev. 983, 987 ff.

¹⁹² J Goldschmidt, 'Judicial Ethics and Assistance to Self-Represented Litigants' (2007) 28 Justice System Journal 324, 324.

¹⁹³ Rules of the Supreme Court of the United States.

¹⁹⁴ J Gresko, 'Only Lawyers Now Can Argue before Supreme Court' (1 July 2013) <https://apnews.com/article/510b60138a644992a14406ab16e31a90> accessed 1 February 2023.

¹⁹⁵ N Ingwer and V Wormer (n 191) 1012; P L Murray and J C Sheldon, 'Should the Rules of Evidence Be Modified for Civil Non-Jury Trials?' (2002) 17 ME. BJ 30, 35.

¹⁹⁶ M Cappelletti (n 19) 697 ff.

the court to inform the parties of everything essential for the proceedings. The parties may present the facts and their legal views broadly and challenge the factual and legal arguments of the opponents. The court must base its decision on the materials in the proceedings on which all parties involved had the opportunity to comment.¹⁹⁷

3.2.1 Sources of the Right to be Heard by the Court

3.2.1.1 National Constitutional Sources

3.2.1.1.1 Brazil

- 93 The right to be heard is also understood as the right to participate and influence the judgment. Hence, Art 9 of the BRCCP stipulates that a decision cannot be rendered against a party who has not been previously heard, and Art 489 § 1st, IV of the BRCCP states that a judgment is not motivated if it does not face all the arguments, which could be able to rebut the conclusion adopted, presented to the judge.

3.2.1.1.2 England and Wales

- 94 The common law has long recognized the fair trial principles, known as the principles of 'natural justice', and several aspects of procedural fairness have been developed over the years in all forms of decision-making. The elements of procedural fairness may include the following: prior notice of the case, adequate time to prepare, disclosure of the material on which the decision is to be based, a hearing, legal representation, calling and cross-examination of witnesses, consideration of evidence and submissions, and an obligation to give reasons for the decision.¹⁹⁸ In *Kanda v Government of Malaya*, the Lord of the Judicial Committee of the Privy Council stated the following:¹⁹⁹

The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: *Nemo iudex in causa sua*; and *Audi alteram partem*. They have recently been put in the two words Impartiality and Fairness. But they are separate concepts and are governed by separate considerations. In the present Inspector Kanda complained of a breach of the second. [...] If the right to be heard is to be a real right that is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him, and then he must be given a fair opportunity to correct or contradict

¹⁹⁷ Case 1 PBvU 1/02 (BVerfG, Germany), Decision 30 April 2003 [ECLI:DE:BVerfG:2003:up20030430.1pbvu000102] [NJW 2003, 1924(1926)], para 38.

¹⁹⁸ R Clayton and H Tomlinson, *Fair Trial Rights* (2nd edn, Oxford University Press 2010), para 11.156.

¹⁹⁹ *Kanda v Government of Malaya*, Case 9 of 1961 (Lord of the Judicial Committee of the Privy Council, UK), Judgment 2 April 1962 ([1962] AC 322).

them. It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other.

3.2.1.1.3 France

- 95 *Principe des droits de la défense* (the principle of respect for the rights of the defence) is also based on Art 16 of the DDH.²⁰⁰ The CC stated that *principe contradictoire* (the adversarial principle) is a ‘corollary’ of the rights of the defence.²⁰¹ In some decisions, the CC distinguishes the right to an effective judicial remedy, the right to a fair trial, and the rights of the defence.²⁰² *Droit à un procès équitable* (the right to a fair trial) results from the general principle of the rights of the defence. The CC held in 2010 that Art 16 of the DDH guarantees the right of the persons concerned to an effective judicial remedy, as well as respect for the rights of the defence, which implies, in particular, the existence of a fair and equitable procedure guaranteeing the balance of the rights of the parties.²⁰³ The French Court of cassation also refers to the ‘*principe des droits de la défense*’ and ruled that ‘the right to defence is a fundamental constitutional right for all persons; its effective exercise requires that everyone be guaranteed access, with the assistance of a defender,²⁰⁴ to the judge responsible for ruling on his or her claim’.²⁰⁵

3.2.1.1.4 Germany

- 96 The right to be heard in a civil procedure is among the relatively few procedural guarantees explicitly put forth by the German Constitution. Although it is currently regulated by Art 103 (1) of the Basic Law, the right to be heard was a governing principle even before the Constitution came into power.²⁰⁶ Nonetheless, National Socialism has profoundly influenced the right to be heard. It became evident that procedural law could be readily changed to undermine the right to be heard, which led to the constitutionalization in Art 103 (1) s 1 of the Basic Law and to an increase of the scope of the right to be heard.²⁰⁷ It is influenced by the principle of the rule of law guaranteed by Art 20 (3), Art 1 (3) of the Basic Law and contains elements of the fundamental

²⁰⁰ Case 2006-535 DC (CC, France), Judgment 30 March 2006 [ECLI:FR:CC:2006:2006.535.DC] para 24; Case 2019-801 QPC (CC, France), Decision 20 September 2019 [ECLI:FR:CC:2019:2019.801.QPC] para 4.

²⁰¹ Case 84-184 DC (CC, France), Judgment 29 December 1984 [ECLI:FR:CC:1984:84.184.DC] para 35.

²⁰² Case 2006-540 DC (CC, France), Judgment 27 July 2006 [ECLI:FR:CC:2006:2006.540.DC] para 11.

²⁰³ Case 2010-62 QPC (CC, France), Decision 17 December 2010 [ECLI:FR:CC:2010:2010.62.QPC] para 3.

²⁰⁴ Meaning a lawyer or another person if allowed by Statutes.

²⁰⁵ Case 94-20.302 (CC, France), Judgment 30 June 1995 [ECLI:FR:CC:1995:94.20.302]

²⁰⁶ Case VIII ZR 145/66 (BGH, Germany), Judgment 18 October 1967 [BGHZ 48, 327 (329 ff)].

²⁰⁷ For an overview of the history of the right to be heard, F L Knemeyer, in J Isensee and P Kirchhof (ed), *Handbuch des Staatsrechts der Bundesrepublik Deutschland, Band VIII: Grundrechte: Wirtschaft, Verfahren, Gleichheit* (3rd edn, CF Müller Juristischer Verlag 2010), § 178, para 7-12.

guarantee of human dignity, prohibiting that the individual is rendered a mere object of a trial.²⁰⁸

The right to be heard is understood either with Art 6 (1) of the ECHR as a partial aspect of a fair trial or as its indispensable prerequisite and is particularly emphasized in Art 103 (1) of the Basic Law.²⁰⁹ The right to be heard is incumbent on the court to inform the parties involved of everything essential to the proceedings. The parties are to be allowed to extensively present the facts and their legal views and to assert themselves with factual and legal arguments. The court only needs to base its decision on the materials in the proceedings on which all parties involved had the opportunity to comment.²¹⁰ It includes a right to provide evidence.²¹¹ The material content of Art 103 (1) of the Basic Law can be categorized into the right to information, the right to speak at all before the court, and the right for one's statement to be considered with appropriate diligence.²¹² Art 103 (1) of the Basic Law conflicts with procedural deadlines and the refusal to accept tardy submissions (*Präklusion*/preclusion). Procedural deadlines must be such that they allow for sufficient preparation according to the complexity of the matter, and sanctions can only apply if the failure to comply with the deadline was the party's fault.²¹³ On 30 April 2003, the BVerfG obliged the legislature to expand legal protection in the event of a violation of fundamental procedural rights, and it decided that the rule of law in conjunction with Art 103 (1) of the Basic Law is violated if the procedural rules do not provide for a professional judicial remedy when the right to be heard is violated.²¹⁴ *Gesetz über die Rechtshilfe bei Verletzung des Anspruch auf rechtliches Gehör: Anhörungsrügensgesetz* (the Law on the Legal Aid in Case of Violation of the Right to be heard) announced on 14 December 2004 came into force from 1 January 2005. It is now possible in all legal proceedings to complain about a violation of the right to be heard. Art 321a of the GCCP provides a remedy in cases where the right to be heard is violated.

3.2.1.1.5 Korea

- 97 The right to be heard is not explicitly provided for in the Korean Constitution. However, the Constitutional Court held that Art 27 (1) of the Constitution guarantees the right to

²⁰⁸ Case 1 BvR 986/91 (BVerfG, Germany), Decision 19 May 1992 [BVerfGE 86, 133 (144)]; L Rosenberg, K H Schwab and P Gottwald, *Zivilprozessrecht* (18th edn, Verlag CH Beck 2018), § 82, para 1; A Uhle, in D Merten and H J Papier (ed), *Handbuch der Grundrechte in Deutschland und Europa* (CF Müller Heidelberg 2013), § 129, para 44.

²⁰⁹ Rauscher in *Münchener Kommentar zur ZPO* (6th edn, 2020), Einleitung, 239.

²¹⁰ Case 1 PBvU 1/02 (BVerfG, Germany), Decision 30 April 2003 [ECLI:DE:BVerfG:2003:up20030430.1pbvu000102] para 38, [NJW 2003, 1924(1926)]; Rauscher (n 209) 264-266.

²¹¹ Case 1 BvR 670/91 (BVerfG, Germany), Decision 26 June 2002 [BVerfGE 105, 279 (311)]; Rauscher (n 209) para 275.

²¹² F L Knemeyer (n 207) para 28; A Uhle (n 208) para 44-49.

²¹³ Case 1 BvR 726/78 (BVerfG, Germany), Decision 3 October 1979 [BVerfGE 52, 203 = NJW 1980, 580]; Rauscher (n 209) para 275.

²¹⁴ Case 1 PBvU 1/02 (BVerfG, Germany), Decision 30 April 2003 [ECLI:DE:BVerfG:2003:up20030430.1pbvu000102] [NJW 2003, 1924].

a fair trial, which represents the right of parties to present arguments and evidence to a judge and receive a decision based on them.²¹⁵

3.2.1.1.6 Spain

- 98 Art 24 (2) of the Spanish Constitution guarantees the right of defence. However, the Constitution does not correctly describe the right of defence. The sub-rights of the right of defence recognized by the Spanish Constitutional Court are as follows: right to free access to the courts of parties, right to make statements, right to evidence, right to contradiction, right to motivation, right to a remedy, and the right to enforcement. For a litigant who tries to defend himself, the first thing to do is to access the courts, that is, to come into contact with them and with their work and to have the opportunity to correct a mistake that he has made without encountering instantaneous inadmissibility. Free access is not achieved if the litigant is not informed of the pending process that affects him or if he is not allowed full knowledge of the proceedings. The right to contradiction implies the possibility of refuting the statements and evidence of the opposing party, allowing the process to have a dialectical structure. It is the counterpoint to the rights of statement and evidence because it indicates how to procedurally structure those rights following the aforementioned structure. The right to motivation consists of the right to obtain a judicial resolution that responds fully to what is requested by the litigants. This obliges the judge to consider the statements of the parties and the presented evidence, which means that a decision is made consistent with those statements, duly reasoning it with the evidence and with the law. The sub-rights mentioned above may be included in the contents of the right to be heard.

3.2.1.1.7 The US

- 99 In *Windsor v McVeigh* (1876), the US Supreme Court found the right to be heard as follows:²¹⁶

Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him or allowing him to be heard is not a judicial determination of his rights and is not entitled to respect in any other tribunal.

In the US, the same requirement of notice and opportunity to be heard applies to the state courts under the Due Process Clause of the Fourteenth Amendment to the Constitution as applies to the federal courts under the Fifth Amendment. The uniformly applicable test for constitutional notice is the following: For adjudication that will significantly affect a

²¹⁵ Case 94Hun-Ba1 (Constitutional Court, Korea), Decision 26 December 1996.

²¹⁶ *Windsor v McVeigh* (Supreme Court, US), [93 US 274, 277 (1876)].

person's property or liberty interests, due process requires fair notice of the pendency of the action to the affected person or that person's representative. The notice need not be perfect, but the fair notice must include a suitable formality in tenor and information in content, an actual notice or a reasonable calculation to a result in the actual notice, and affordability of a reasonable opportunity to be heard.²¹⁷

In 1900, the US Supreme Court held, in the case where service of process was made upon a defendant residing in Virginia, requiring him to appear and answer a suit in Texas within five days, that such a notice was not a reasonable one; was not 'due process of law', as outlined within the Fourteenth Amendment to the Constitution of the US; and that a judgment obtained upon such notice was not binding upon the defendant.²¹⁸ The leading case on notice is *Mullane v Central Hanover Bank & Trust Co.*²¹⁹ According to the court, the notice must be reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and allow them to present their objections. Due diligence must be used in identifying and locating affected persons, and in these circumstances, they then must be informed at least by ordinary mail. Notice by publication is not reasonably calculated to inform interested parties who can be notified by more effective means, such as personal service or mailed notice. The Supreme Court held in *Boddie v Connecticut* that the Connecticut statute requiring plaintiffs in divorce actions to pay in advance a sum for filing fees and costs of service of process must be regarded as the equivalent of denying them an opportunity to be heard upon their claimed right to a dissolution of their marriages and a denial of due process.²²⁰

3.2.1.1.8 Russia

- 100 The Russian Constitution provides for judicial protection in Art 46, but not directly for the right to be heard. However, the Constitutional Court of Russian Federation noted that the right to judicial protection implies not only the right to sue in a court but also the right to be heard during the proceedings.²²¹ In the Resolution of 14 April 1999 № 6-P, Art 325 of the CCP of the RSFSR 1964, which gave the court of supervisory authority discretion on the issue of notification of the parties or other persons participating in the case, the Court concluded that the constitutional right to judicial protection was violated, by limiting its element of the right to be heard. In the same case, the Court stated that the right to be heard is a part of the principle of equality before the law and court.

²¹⁷ K Clermont, *Principle of Civil Procedure* (2nd edn, Thomson West 2009) 282 ff.

²¹⁸ *Roller v Holly*, Case 104 (Supreme Court, US), Judgment 26 February 1900 [176 US 398, 413(1900)].

²¹⁹ *Mullane v Central Hanover Bank & Trust Co.*, Case 378 (Supreme Court, US), Judgment 24 April 1950 [339 US 306, 314-15 (1950)].

²²⁰ *Boddie v Connecticut*, Case 27 (Supreme Court, US), Judgment 2 March 1971 [401 US 371, 380-381(1971)].

²²¹ Resolution of the Constitutional Court of Russian Federation on 19 July 2011 № 17-P.

3.2.1.2 Supranational Sources

- 101 There is no international norm that explicitly guarantees the right to be heard. However, since it is the content of the principles of ‘natural justice’ in common law and is based on the adversary system of civil procedure, the rights that constitute the content of the right to be heard, such as the right to be present at an adversarial oral hearing, the right to present his case to the court, the right to the fair presentation of evidence, and the right to be provided with reasons for judgment, have been recognized as the implied right for a fair hearing stipulated in Art 6(1) of the ECHR within the judgments of ECtHR.²²² The ECtHR has recognized the right of parties to have the opportunity in a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed to influence the court’s decision on the right to adversarial proceedings.²²³
- 102 The CFREU stipulated the right to be heard in a sub-clause to the Article entitled ‘Right to good administration’. The CJEU has consistently supported the application of the right to be heard to the decisions with individual character in its case law and recognized the right to be heard as a general principle of Community law, regardless of whether it is sanctioned in the provisions of a treaty, regulation, directive, or decision.²²⁴ According to the CJEU, the purpose of the right to be heard has been interpreted in case law to imply, in substance, that the person concerned should have the possibility to influence the decision-making process in question, which is conducive to ensuring that the decision to be adopted is not vitiated by material errors and is the outcome of an appropriate balancing of the public interests and the individual interests of the person concerned.²²⁵ The right to be heard can therefore be conceptualized for analytical purposes as consisting of two constituent sub-rights — a right to obtain information (notice requirement) and a right to impart information (hearing requirement) — and their correlative obligations to the competent authority. First, the right to be heard requires the competent authority to ensure the persons concerned be placed in a position in which they may effectively make known their views on the grounds advanced

²²² R Clayton and H Tomlinson, *Fair Trial Rights* (2nd edn, Oxford University Press 2010) para 11.425.

²²³ *Ruiz-Mateos v Spain*, Case 12952/87 (ECtHR), Judgment 23 June 1993 [ECLI:CE:ECHR:1993:0623JUD001295287] para 63; *McMichael v the United Kingdom*, Case 16424/90 (ECtHR) Judgment 24 February 1995 [ECLI:CE:ECHR:1995:0224JUD001642490] para 80; *Vermeulen v Belgium*, Case 19075/91 (ECtHR), Judgment 20 February 1996 [ECLI:CE:ECHR:1996:0220JUD001907591] para. 33; *Lobo Machado v Portugal*, Case 15764/89 (ECtHR), Judgment 20 February 1996 [ECLI:CE:ECHR:1996:0220JUD001576489] para 31; *Mantovanelli v France*, Case 21497/93 (ECtHR), Judgment 18 March 1997 [ECLI:CE:ECHR:1997:0318JUD002149793] para 33; *Kress v France*, Case 39594/98 (ECtHR), Judgment 7 June 2001 [ECLI:CE:ECHR:2001:0607JUD003959498] para 74; *Pellegrini v Italy*, Case 30882/96 (ECtHR), Judgment 20 July 2001 [ECLI:CE:ECHR:2001:0720JUD003088296] para 44.

²²⁴ P Beqiraj, ‘The Right to Be Heard in the European Union—Case Law of the Court of Justice of the European Union,’ (2016) 1 European Journal of Multidisciplinary Studies 264, 264.

²²⁵ *Marcuccio v Commission*, Case T-236/02 (CJEU), Judgment 14 September 2011 [EU:T:2011:465] para 115.

against them.²²⁶ In other words, the persons concerned must be appropriately informed to be able to make meaningful comments. This could be thought of as the notice requirement. Second, the right requires the competent authority to receive those comments and to examine carefully and impartially, whether the alleged reasons are well-founded in the light of those comments and any exculpatory evidence provided with those comments.^{227 228}

- 103 PTCP stipulates on ‘due notice’ and ‘the right to be heard’ in Art 5. The ERCP regulates ‘the right to be heard’ in Rules 11 (Fair opportunity to present claim and defence), 12 (Basis of Court Decisions), and 13 (Communications with the Court) and the service and due notice of proceedings and the right to be heard in Rules 68, 69.

3.2.2 Contents

3.2.2.1 The Right to be Informed

- 104 Parties must be given the opportunity to participate in the proceedings against them and to defend their interests. It is meant to allow for the preparation of a statement and to prevent the parties from being completely surprised by the judgment. Many countries stipulate the systems of a summons and a service in the civil procedure law to inform the parties of the hearings, the materials submitted by the opposite party, and the decision of the court in the civil proceedings.
- 105 In Brazil, the Constitution provides the right to receive, from the public agencies, information of private interest to such persons (Art 5 XXXIII of the Constitution).
- 106 In England, one of the principles of natural justice is that parties are entitled to adequate notice and opportunity to be heard before any judicial order is pronounced against them so that they or someone acting on their behalf may make such representations. Parties are entitled to a proper notice of material that is to be submitted before the court for their consideration. In ordinary civil litigation, this is done by the process of disclosure and the exchange of witness statements according to the UKCPR 1998 Parts 31 and

²²⁶ *Commission v Lisrestal*, Case C-32/95 P (CJEU), Judgment 24 October 1996 [EU:C:1996:402] para 21; *Mediocurso v Commission*, Case C-462/98 P (CJEU), Judgment 21 September 2000 [EU:C:2000:480] para 36.

²²⁷ *Technische Universität München v Hauptzollamt München-Mitte*, Case C-269/90 (CJEU), Judgment 21 November 1991 [EU:C:1991:438] para 14; *Spain v Commission*, Case C-525/04 P (CJEU), Judgment 22 November 2007 [EU:C:2007:698] para 58.

²²⁸ J H Pohl, ‘The Right to Be Heard in European Union Law and the International Minimum Standard-Due Process, Transparency and the Rule of Law’ (2018) *Transparency and the Rule of Law* (8 June 2018).

32.²²⁹ Parties must be allowed sufficient time to prepare a case and must not be taken by surprise. Where an adjournment is reasonably needed, it must be granted.²³⁰

107 In France, the right to be informed is part of the ‘principe de la contradiction’, which itself is part of the ‘rights of the defence’. The FCCP contains *principes directeurs* (Guiding principles) in Art 14, 15, and 16.²³¹ The defendant must receive notice of the action brought by the claimant in due time. According to the CC, the adversarial nature of the proceeding is a ‘principe general du droit’ (general principle of law) in civil proceedings and can only be adjusted or amended by Statutes (not by governmental decrees).²³²

108 In Germany, the right to information contains the right to be informed of the existence of the trial²³³, relevant information concerning the proceeding of the trial²³⁴, and the right to access court files²³⁵. There is a right to oblige the court to make use of specific methods of delivering documents and monitoring whether the parties have come into their possession by formal service or by enclosing a receipt that must be returned.²³⁶ The procedural regulations on the summons (Art 214 and the following provisions of the GCCP) and notification by service providers (Art 166 and the following provisions of the GCCP) also serve to implement the rights to information.²³⁷ In the case of rejecting the plaintiff’s claim in the absence of confirmation that the plaintiff received the defendant’s statement, the BVerfG held that the decision of the local court was not in accordance with Art 3 (1) of the Basic Law because the judge based the dismissal of the action solely on the content of the statement of the defence with which the defendant would have contested the plaintiff’s submissions on which the claim was based.²³⁸ The BGH decided that an expert judicial opinion is fundamentally unusable as evidence if it is based on

²²⁹ R Clayton and H Tomlinson, *Fair Trial Rights* (2nd edn, Oxford University Press 2010) para 11.160-11.161.

²³⁰ *R v Thames Magistrates’ Court*, (High Court Queen’s Bench Division, UK), Judgment 23 September 2010 ([1974] 1 WLR 1371).

²³¹ Art 14 No party may be tried without having been heard or called.

Art 15 The parties must inform each other in good time of the factual grounds on which they base their claims, the evidence they present and the legal grounds on which they rely, so that each party is in a position to organize their defence.

Art 16 The judge must, in all circumstances, require the parties to respect and respect himself the principle of contradiction. He/she may not retain, in his/her decision, the pleas, explanations and documents invoked or produced by the parties unless they have been able to debate them in adversarial proceedings. He/she may not base their decision on the pleas in law which he/she has raised of his/her own motion without first inviting the parties to present their observations.

²³² Case 85-142 L (CC, France), Judgment 13 November 1985 [ECLI:FR:CC:1985:85.142.L].

²³³ L Rosenberg, K H Schwab and P Gottwald, *Zivilprozessrecht* (18th edn, Verlag CH Beck 2018), § 82, para 9.

²³⁴ F L Knemeyer (n 207) § 178 para 29.

²³⁵ Ibid; C Degenhart in J Isensee and P Kirchhof (ed), *Handbuch des Staatsrechts der Bundesrepublik Deutschland, Band V: Grundrechte: Wirtschaft, Verfahren, Gleichheit* (3rd edn, CF Müller Juristischer Verlag 2007), § 115, para 30.

²³⁶ Case 2 BvR 482/72 (BVerfG, Germany), Decision 9 October 1973 [NJW 1974, 133(133)].

²³⁷ H Schulze-Fielitz in H Dreier (ed), *Grundgesetz Kommentar* Band III (Mohr Siebeck, 2008), Art 103 I, para 38.

²³⁸ Case 2 BvR 1104/05 (BVerfG, Germany), Decision 21 March 2006, para 15-18.

business documents that one of the parties has only made available to the expert, not also to the court and the opposing party, and which are not disclosed in the proceedings.²³⁹

- 109 In Korea, Art 174 and the following provisions of the CCP provide a system of service. The Korean CCP imposes an obligation on the party to report the change of the place of service to the court after the commencement of the lawsuit. If the parties do not report, documents may be served by mail to the previous place of service (Art 184 Korean CCP). The Korean Constitutional Court recognized that the right to a fair trial guaranteed by Art 27 (1) of the Constitution is limited since the provision is deemed to have been served when the registered mail is sent regardless of whether the document has arrived at the person to be served. However, the court held that the provision is not unconstitutional because a speedy trial, which is the purpose of the provision, is also one that possesses the contents of a fair trial, and the parties can check the progress of the lawsuit at any time with the court.²⁴⁰ The court decided with the same reasons on the provision of service by leaving,²⁴¹ which means that documents may be left at the place to be served when a recipient of the service of a document or a person to whom the document is to be transferred refuses to accept such service without any justifiable reason (Art 186 (3) Korean CCP). The Korean Supreme Court held on the service by registered mail that it was illegal to serve the summons to a hearing by registered mail only because it was not served at the place of the previous service even though the new address of the party was shown in court files.²⁴²
- 110 In Spain, the guarantee of access to judicial information has traditionally been studied as a simple principle of the procedure under the heading of the ‘principle of publicity’ because the lack of publicity causes the litigants to be unable to learn the data of the process, so they cannot know which facts are going to be judged. When they are not even notified of the start of the proceedings and access is deprived, as long as they could not have extra-procedural knowledge of the proceedings, the passivity of the litigant is not protected. Art 234 (1) of the LOPJ and Art 140 (1) of the SCCP regulate the obligation of the court officers to provide any person legitimately interested with any information about the state of judicial procedure.
- 111 In the US, after the case of *Mullane v Central Hanover Bank & Trust Co*, the Supreme Court held that a failure to give the petitioner a notice of the pending adoption proceedings deprived him of his rights without due process of law, and the hearing subsequently granted to petitioner did not remove the constitutional infirmity since the petitioner was forced to assume burdens of proof which, had he been accorded the

²³⁹ Case KZR 18/90 (BGH, Germany), Judgment 12 November 1991, [NJW 1992, 1817(1819)].

²⁴⁰ Case 2001Hun-Ba53 (Constitutional Court, Korea), Decision 18 July 2002.

²⁴¹ Case 2006Hun-Ba159 (Constitutional Court, Korea), Decision 26 July 2018.

²⁴² Case 2017Da53623 (Supreme Court, Korea), Judgment 12 April 2018.

notice of the adoption proceedings, would have rested upon the moving parties.²⁴³ The court stated, regarding the forcible entry and detainer actions, that the notice posted on the doors failed to afford the tenants the notice of proceedings initiated against them required by the Due Process Clause of the Fourteenth Amendment.²⁴⁴ The jurisprudence of case law on the timely notice of proceedings has been firmly maintained in subsequent cases.²⁴⁵

- 112 According to the ECtHR, the submissions in a civil case must be communicated in advance to the parties so as not to deprive them of an opportunity to reply.²⁴⁶ Parties should be put on the notice of the documentary evidence relied on by the courts and be allowed to comment on it.²⁴⁷ Parties should be able to comment on the observations submitted by the court to the appellate court manifestly aimed at influencing its decision irrespective of their actual effect on the court, and even if the observations do not present any fact or argument which has not already appeared in the impugned decision in the opinion of the appellate court.²⁴⁸ The ECtHR held that there had been a violation of Art 6 (1) of the ECHR in the case, where the requisite steps were not taken to inform the applicant of the proceedings against him, and the applicant was not given an opportunity to appear at a new trial even though he had not waived his right to be present.²⁴⁹

3.2.2.2 The Right to Inform

- 113 It is the general picture of civil proceedings that the parties present the facts and their legal views and contest the factual and legal arguments of the opponents, which will be the basis of the court's decision. The national rules on the civil procedure guarantee, more specifically, the rights of parties to participate in the proceedings.

3.2.2.2.1 The Right to In-person Presence During Oral and Public Hearings

- 114 The common law requires that a body determining a dispute must give each party a fair opportunity to put their case. The obligation to conduct a hearing does not necessarily mean there should be an oral hearing. In *Lloyd(A.P.) and others(A.P.) v McMahon*, the

²⁴³ *Armstrong v Manzo*, Case 149 (Supreme Court, US), Judgment 27 April 1965 [380 US 545, 550, 551 (1965)].

²⁴⁴ *Greene v Lindsey*, Case 81341 (Supreme Court, US), Judgment 17 May 1982 [456 US 444, 456(1982)].

²⁴⁵ *Peralta v Heights Med. Ctr., Inc.*, Case 86-1430 (Supreme Court, US), Judgment 24 February 1988, [485 US 80, 84 (1988)].

²⁴⁶ *Göç v Turkey*, Case 36590/97 (ECtHR), Judgment 11 July 2002 [ECLI:CE:ECHR:2002:0711 JUD003659097] para 55-57; *Lobo Machado v Portugal*, Case 15764/89 (ECtHR), Judgment 20 February 1996 [ECLI:CE:ECHR:1996:0220JUD001576489] para 31.

²⁴⁷ *Colloredo Mannsfeld v The Czech Republic*, Case 15725/11 and 76058/12 (ECtHR), Judgment 15 December 2016 [ECLI:CE:ECHR:2016:1215JUD001572511] para 33-34.

²⁴⁸ *Nideröst-Huber v Switzerland*, Case 18990/91 (ECtHR), Judgment 18 February 1997 [ECLI:CE:ECHR:1997:0218JUD001899091] para 23-32.

²⁴⁹ *Dilipak and Karakaya v Turkey*, Case 7942/05 and 24838/05 (ECtHR) 4 March 2014 [ECLI:CE:ECHR:2014:0304JUD000794205] para 85-95.

House of Lords decided that the procedure that offered the applicants the opportunity to make written representations was fair and suitable in all the circumstances.²⁵⁰ The US Supreme Court also stated that a state could, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance and, without justifiable excuse, violates a procedural rule requiring the production of evidence necessary for orderly adjudication.²⁵¹ According to the court, 'within the limits of practicability', a state must afford all individuals a meaningful opportunity to be heard if it is to fulfil the promise of the Due Process Clause.²⁵² Art 615 of the Federal Rules of Evidence provides that parties are not excluded from formal trials even if they are excluded from the procedure so that witnesses do not hear the cross-examination of other witnesses.

- 115 The ECtHR reiterated that Art 6 (1) of the Convention does not guarantee the right to be heard in person or a party's presence in an oral and public hearing at a civil court but rather a more general right to present one's case effectively before the court and to enjoy equality of arms with the opposing side.²⁵³ The right can only be seen to be effective if the particular observations are actually heard.²⁵⁴

3.2.2.2.2 The Right to Present One's Case and to Argue Before the Court

- 116 In Brazil, parties have the right to participate throughout the proceedings and even to be consulted before each decision (including those during procedural matters). Therefore, judges are not allowed to justify their decisions on an argument that was not previously submitted to the parties' debate (Art 10 BRCCP).
- 117 In England and Wales, a person who is entitled to be heard orally will normally be allowed to put his own case, particularly where there are important factual disputes or where the oral argument will assist the decision-maker.²⁵⁵
- 118 In Germany, the right to speak before the court does not necessitate an oral hearing, but it does grant the right to address the court exhaustively regarding both the factual basis

²⁵⁰ *Lloyd (A.P.) and others (A.P.) v McMahon* (House of Lords, UK) Judgment 12 March 1987 ([1987] UKHL 5, [1987] AC 625); R Clayton and H Tomlinson, *Fair Trial Rights* (2nd edn, Oxford University Press 2010) para 11.166.

²⁵¹ *Windsor v McVeigh*, (Supreme Court, US) [93 US 274, 278 (1876)]; *Hammond Packing Co. v Arkansas*, Case 54 (Supreme Court, US), Judgment 23 February 1909 [212 US 322, 351(1909)].

²⁵² *Boddie v Connecticut*, Case 27 (Supreme Court, US), Judgment 2 March 1971 [401 US 371, 379(1971)].

²⁵³ *Vladimir Vasilyev v Russia*, Case 28370/05 (ECtHR), Judgment 10 January 2012 [ECLI:CE:ECHR:2012:0110JUD002837005] para 76.

²⁵⁴ *Göç v Turkey*, Case 36590/97 (ECtHR), Judgment 11 July 2002 [ECLI:CE:ECHR:2002:0711JUD003659097] para 48.

²⁵⁵ *R v Criminal Injuries Compensation Board, ex parte Dickson* (Queen's Bench Division, UK), Judgment 5 December 1995 ([1997] 1 WLR 58); *Regina v Secretary of State for Wales Ex Parte Emery* (England and Wales Court of Appeal Civil Division, UK), Judgment 9 July 1997 ([1997] EWCA Civ 2064).

of the procedure and legal questions.²⁵⁶ To allow the party to address relevant aspects of the procedure, Art 103 (1) of the Basic Law can oblige the court to indicate its own legal opinion before arriving at a judgment or to point out that a party's position lacks substantiation or is not conclusive.²⁵⁷ This is representative of the typical relationship between Art 103 (1) of the Basic Law and civil procedural law. Art 139 of the GCCP contains substantially greater obligations in this respect, but only insofar as they coincide with Art 103 (1) of the Basic Law can an infringement of the CCP be equated with an infringement of constitutional law.²⁵⁸ It is much less common that a procedural right would be derived directly from Art 103 (1) of the Basic Law because it is not already granted by the GCCP.²⁵⁹ Recently, the BGH held that the surprise decision violates the right to be heard if the court consciously deviates from the case law of the BGH without giving the parties a specific reference or giving the parties sufficient opportunity to comment.²⁶⁰

- 119 In Korea, the right of parties to present their cases and evidence is guaranteed by the Constitution and the Korean CCP.²⁶¹ The Korean Supreme Court held that if parties are without fault of their own deprived of an opportunity to appear in the hearing and present attack and defence methods, and a judgment is, therefore, rendered unfavourably, the judgment must be re-examined because the rights as parties have been infringed upon.²⁶²
- 120 In the US, the Supreme Court has held that the states' pre-judgment procedure for the garnishment of wages or bank account balance violates the due process required by the Fourteenth Amendment in that notice and an opportunity to be heard are not given before the in-rem seizure of the wages.²⁶³

3.2.2.2.3 The Right to Present Evidence

- 121 In England and Wales, parties are entitled to proper notice of the material that is to be put before the tribunal for their consideration. In ordinary civil litigation, this is done by the process of disclosure and the exchange of witness statements.²⁶⁴ In *R (Wilkinson) v The Responsible Medical Officer Broadmoor Hospital*, the Court of Appeal held that the administrative court hearing for a challenge brought by a detained mental health patient

²⁵⁶ Rauscher (n 209) para 268.

²⁵⁷ Rauscher (n 209) 266.

²⁵⁸ A Uhle (n 208) § 129, para 11-12.

²⁵⁹ F L Knemeyer (n 207) para 53.

²⁶⁰ Case VIII ZR 171/19 (BGH, Germany), Decision 12 May 2020, [NJW 2020,2730(2731)].

²⁶¹ S Lee, *New Civil Procedure Law* (14th edn, Parkyoungsa 2020) 134.

²⁶² Case 2013Da39551 (Supreme Court, Korea), Judgment 27 April 2014.

²⁶³ *Snidach v Family Finance Corp.*, Case 130 (Supreme Court, US), Judgment 9 June 1969 [395 US 337, 340-342 (1969)]; *North Georgia Finishing, Inc. v Di-Chem, Inc.*, Case 73-1121 (Supreme Court, US), Judgment 22 January 1975 [419 US 601, 606 (1975)].

²⁶⁴ Part 31 (Disclosure and Inspection of Documents) and Part 32(Evidence) UKCPR; R Clayton and H Tomlinson, *Fair Trial Rights* (2nd edn, Oxford University Press 2010) para 11.162.

against a decision for compulsory treatment should conduct a merits review on the evidence through the cross-examination of doctors whose statements on the conditions of the patient did not agree.²⁶⁵ However, in *R (N) v M* 576, the Court of Appeal said that it should not often be necessary to adduce oral evidence with cross-examination when there are disputed issues of fact and opinion in cases where the need for forcible medical treatment of a patient is being challenged on the grounds of human rights.²⁶⁶

- 122 In France, the CCP does not expressly state a right to present evidence, but more a duty in Art 9.²⁶⁷ However, this right does exist. Since 2012 the Court of Cassation even accepts in some cases that illegally obtained evidence may be presented by a party if it is the only way to prove the fact on which he/she relies.²⁶⁸ The Court recently ruled explicitly on the right to evidence (le droit à la preuve) in a plenary assembly.²⁶⁹
- 123 In Germany, regarding the case in which the plaintiff's claim was dismissed by changing the judgment of the first instance after examining only the witnesses of the opposition in the appeals court, the BVerfG held that:²⁷⁰

The right to be heard and the right to guarantee effective legal protection can require the appellate court in civil proceedings on the content of a one-to-one conversation not only to examine the witness of the opposing party but also to examine the party under Art 141 or 448 of the GCCP again.

Art 103 of the Basic Law guarantees the parties to present their cases; however, it does not influence the form evidence is taken. The fundamental right to be heard does not include any specific rules regarding evidence.²⁷¹

- 124 In Korea, the parties are guaranteed the right to present evidence to support their arguments in civil proceedings by Art 27 (1) of the Korean Constitution. Art 290 of the Korean CCP provides the discretion of the court to accept parties' applications for evidence with an exception to those for the sole evidence of alleged facts. The Korean Constitutional Court held that the provision meets the constitutional request, which is for the realization of a fair trial consistent with the litigation economy and the

²⁶⁵ *R (Wilkinson) v The Responsible Medical Officer Broadmoor Hospita*, Case C/2000/2267 (England and Wales Court of Appeal Civil Division, UK), Judgment 22 October 2001 ([2001] EWCA Civ 1545).

²⁶⁶ *Regina (N) v Dr M and Others*, Case C/2002/2157 (England and Wales Court of Appeal Civil Division, UK), Judgment 06 December 2002 ([2002] EWCA Civ 1789), para 39.

²⁶⁷ Art 9 It is for each party to prove in accordance with the law the facts necessary for the success of their claim.

²⁶⁸ Case 2011-14.177 (CC, France), Judgment 5 April 2012 [ECLI:FR:CC:2012:2011.14.177].

²⁶⁹ Case 20-20.648 (CC, France), Judgment 22 December 2023 [ECLI:FR:CCASS:2023:AP00673].

²⁷⁰ Case 2 BvR 140/00 (BVerfG, Germany), Decision 21 February 2001 (NJW 2001 2531); Unlike the ECtHR, the BVerfG ruled that it was a matter of the violation of the right to be heard.

²⁷¹ Case 1 BvR 612/52 (BVerfG, Germany), Decision 18 September 1952 [BVerfGE 1, 418(429) = NJW 1953, 177(178)].

substantive truth of a speedy trial, because access to evidence that is unrelated to the finding of the truth may not be granted to the parties.²⁷²

125 In the US, the Supreme Court held in 1917 that it is a violation of the due process of law for a state supreme court to reverse a case and render judgment absolute against the party who succeeded in the trial court upon a proposition of fact that was ruled to be immaterial at the trial and concerning which he had, therefore, no occasion and no proper opportunity to introduce his evidence.²⁷³

126 The ECtHR held that if the respondent, without good cause, prevents appellants from gaining access to documents in their possession that would have assisted them in defending their case or falsely denies their existence, this would have the effect of denying them a fair hearing, in violation of Art 6(1) of the ECHR.²⁷⁴

3.2.2.3 The Right to Consideration

127 The judges must consider the material submitted by parties to them during the proceedings and must not rely on points not argued by parties or private inquiries.²⁷⁵

3.2.2.3.1 The Duty of the Court to Consider the Parties' Submissions

128 The BRCCP imposes a cooperative regime in the relation between judges and parties (Art 6) that commands judges to observe a duty of dialogue with the parties before every decision is made. The judges may not decide on the basis by which the parties have not been allowed to speak, even if it is a matter that must be decided *ex officio* (Art 10 BRCCP). Before rendering a decision without prejudice, the judge must grant the party the opportunity to, if possible, correct the defect (Art 317 BRCCP).

129 In England and Wales, the Court of Appeal held in *Stansbury v Datapulse* that the fact a member of an employment tribunal did not appear to concentrate on hearing the evidence may cause the hearing to be unfair.²⁷⁶

130 In France, Art 16 of the FCCP stipulates that the judges may take into consideration the grounds, explanations, and documents relied upon or produced by the parties only if the parties had an opportunity to discuss them in an adversarial manner. They should not

²⁷² Case 2002Hun-Ba46 (Constitutional Court, Korea), Decision 23 September 2004.

²⁷³ *Saunders v Shaw*, Case 472 (Supreme Court, US), Judgment 4 June 1917 [244 US 317, 319 (1917)].

²⁷⁴ *McGinley and Egan v The United Kingdom*, Case 10/1997/794/995-996 (ECtHR), Judgment 9 June 1998 [ECLI:CE:ECHR:1998:0609JUD002158593] para 86.

²⁷⁵ R Clayton and H Tomlinson, *Fair Trial Rights* (2nd edn, Oxford University Press 2010) para 11.180.

²⁷⁶ *Ames Michael Stansbury v Datapulse PLC & Another* (England and Wales Court of Appeal, UK), Judgment 15 December 2003 ([2003] EWCA Civ 1951), para 33.

base their decision on legal arguments that they have raised spontaneously without having first invited the parties to comment thereon.

- 131 Arts 136 (3) and 139 of the GCCP provide for the obligations of courts or judges regarding the right to be heard, and Art 321a provides a remedy in cases where the right to be heard is violated. Courts are obliged to take note of the submissions of the parties to the process and to consider factual and legal respect.²⁷⁷ Courts must, within certain limits, deal with the arguments on the grounds to implement the right to be heard. However, *Recht auf Berücksichtigung* (the right to consideration) only obliges the court to deal with the considerations underlying the decision, and the court, therefore, does not have to comment on every argument of the claimant in its decision.²⁷⁸ Art 233 of the GCCP, which allows filing a petition to be reinstated in the position that existed before the deadline was missed (*Wiedereinsetzung in den vorherigen Stand*), is, therefore, to an extent guaranteed by Art 103 (1) of the Basic Law. The BVerfG held that the right to reinstatement in the previous status directly serves to implement constitutionally guaranteed legal protection guarantees; therefore, in this context, when applying and interpreting the procedural provisions relevant to reinstatement, the requirements to obtain reinstatement after missing a deadline must not be exaggerated.²⁷⁹ Art 296 of the GCCP stipulates the preclusion of the submissions made late due to the party's fault. The BVerfG has consistently decided as follows:²⁸⁰

Art 103 (1) of the Basic Law does not hinder the legislator to promote an acceleration of procedures through preclusion, provided that the party concerned has had sufficient opportunity to comment on all points of importance to them [...]. The prerequisites for the application of the provision ensure the possibility of comprehensive submissions by all parties involved in the proceedings. Art 296 (1) of the GCCP is therefore compatible with Art 103 (1) of the Basic Law.

- 132 In Korea, Art 136 (4) of the Korean CCP stipulates the obligation of the court to give the parties an opportunity to state their opinions on legal matters deemed to have been evidently overlooked by them. Concerning the case in which the appellate court made a decision based on the agreement that the parties did not argue during the proceeding,

²⁷⁷ Case 1 BvR 426/77 (BVerfG, Germany), Decision 1 February 1978 [BVerfGE 47, 182(187) = NJW 1978, 989(989)].

²⁷⁸ Case 2 BvR 639/66 (BVerfG, Germany), Decision 19 July 1967 [BVerfGE 22, 267 = NJW 1967, 1955(1956)]; F L Knemeyer (n 207) para 32.

²⁷⁹ Case 2 BvR 32/74 (BVerfG, Germany), Decision 2 July 1974 [BVerfGE 38, 35 (38) = NJW 1974, 1902(1903)]; in this case, the court stated that a holiday during the general holiday season is a very obvious reason for omission that corresponds to life experience, and the notification by the defence counsel is sufficient to substantiate his credibility in the reinstatement proceedings.

²⁸⁰ Case 2 BvR 1441/79 (BVerfG, Germany), Decision 29 April 1980 [BVerfGE 54, 117 (NJW 1980, 1737)]; Cases 1 BvR 240/79, 1 BvL 50, 89/79 (BVerfG, Germany), Decision 7 October 1980 [BVerfGE 55, 72 = NJW 1981, 271]; Case 1 BvR 903/85 (BVerfG, Germany), Decision 5 May 1987 [BVerfGE 75, 302 (315, 316) = NJW 1987, 2733(2735)].

the Korean Supreme Court held as follows: It is an unexpected blow to one of the parties that the Court of Appeals, *ex officio*, decided that the lawsuit was not worthy of protection on the ground that it violated the agreement not to sue, even though the parties did not argue the legality of the lawsuit. It is a violation of the obligation of Art 136 (4) of the CCP and not proper conduct for a fair trial.²⁸¹

133 In Spain, the right to motivation consists of the right to obtain a judicial resolution that responds fully to what is requested by the litigants. This obliges the judge to consider the statements of the parties and the presented evidence, which means that it makes a decision consistent with those statements, duly reasoning it with the evidence and with the law. Therefore, there are two elements of consistency and reasonableness. Consistency or congruence is the perfect coherence between the statements of the litigants and the responses of the court. The judgment is the answer of the public power to the litigants. The judge must respond to the requirements that they have made during the process so that any question raised by the parties must find a coherent answer in the judgment. That is to say, the court cannot answer in any way but to give a yes or no answer to exactly what was raised by the litigant and not to something different. However, the lack of response to any trifle, or redundant or useless requests, does not necessarily affect the right of defence. Nor is it caused by the lack of response to requests made in a subsidiary manner if the main request has been met.²⁸² Reasonableness requires the court to state the reasons why it is inclined in favour of accepting a petition or not. To carry out these arguments, the court is obliged to adhere to the evidence carried out in the process because they are the ones that could have been the object of contradiction by the litigants. If the court was to resort to factual elements that were not discussed in the process, the parties would not have been able to rule on them, which would cause a violation of the right of defence.²⁸³

134 According to the ECtHR, it is the duty of the national courts to conduct a proper examination of the submissions, arguments, and evidence adduced by the parties.²⁸⁴ When courts refuse requests to have witnesses called, they must give sufficient reasons, and the refusal must not be tainted by arbitrariness: it must not amount to a disproportionate restriction of the litigant's ability to present arguments in support of his case.²⁸⁵ In the course of the proceedings, care must be taken to protect vulnerable

²⁸¹ Case 2011Da80449 (Supreme Court, Korea), Judgment 28 November 2013.

²⁸² Case STC 25/2012 (Constitutional Court, Spain), Judgment 27 February 2012 [ECLI:ES:TC:2012:25].

²⁸³ Case STC 164/2002 (Constitutional Court, Spain), Judgment 17 September 2002 [ECLI:ES:TC:2002:164].

²⁸⁴ *Van de Hurk v the Netherlands*, Case 16034/90 (ECtHR), Judgment 19 April 1994 [ECLI:CE:ECHR:1994:0419JUD001603490] para 59.

²⁸⁵ *Wierzbicki v Poland*, Case 24541/94 (ECtHR), Judgment 18 June 2002 [ECLI:CE:ECHR:2002:0618JUD2454194] para 45.

individuals, for example, those with a mental disability, and their dignity and interests in Art 8 ECHR.²⁸⁶

3.2.2.3.2 Right to a Reasoned Judgment

- 135 Within the reasoning of a judgment, it is important to check whether the court has considered the parties' submissions, arguments, and evidence. Giving reasons is said to have the following advantages: to promote good decision making, to demonstrate an absence of arbitrariness, to act as an important check on the exercise of judicial power, to encourage the acceptance of decisions, and to reinforce confidence in the administration of justice. It is described as essential to the operation of the common law, including the principle of stare decisis. Reasons are also said to perform an educative function, including for those operating outside the legal system, and to enable a losing party to determine whether to pursue an appeal.²⁸⁷ Some national constitutions require that all decisions must contain reasons.²⁸⁸ In 'Recommendation CM/Rec (2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities', the obligation to give clear reasons for their judgments in language that is clear and comprehensible is stipulated as one of the duties of judges.
- 136 The duty of judges or courts to provide public statements of reasons for their decisions is also considered a requirement of the principle of open justice.²⁸⁹
- 137 In Brazil, all decisions must be reasoned under the penalty of nullity (Art 11 BRCCP) and the reasons are not considered to have been given in any judicial ruling, if it could not fully support the decision by quoting or paraphrasing an act of law, employing indeterminate legal concepts, not confronting all the arguments put forward in the proceedings (Art 489 § 1o BRCCP).
- 138 In England, a judge determining an issue of law or fact is under a common law duty to provide reasons for his decision.²⁹⁰ The Court of Appeal stated the following on the judicial duty to give reasons: The duty is a function of due process and, therefore, of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties - especially the losing party - should be left in no doubt as to why they have won or lost. The second is that a requirement to give reasons concentrates the

²⁸⁶ *Evers v Germany*, Case 17895/14 (ECtHR), Judgment 28 May 2020 [ECLI:CE:ECHR:2020:0528 JUD001789514] para 82-84.

²⁸⁷ J Bosland and J Gill, 'The Principle of Open Justice and the Judicial Duty to Give Public Reasons' (2014) 38 Melbourne University Law Review 482, 488-489.

²⁸⁸ Eg, Art 95 of the Brazilian Constitution.

²⁸⁹ J Bosland and J Gill, 'The Principle of Open Justice and the Judicial Duty to Give Public Reasons' (2014) 38 Melbourne University Law Review 482, 486.

²⁹⁰ R Clayton and H Tomlinson, *Fair Trial Rights* (2nd edn, Oxford University Press 2010) para 11.205; the judicial duty to give reasons for findings of fact is relatively recent in the sense that as long as only jurors can act as factfinders, the problem could not have arisen. Cf H L Ho, 'The Judicial Duty to Give Reasons' (2000) 20 Legal Studies 42.

mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.²⁹¹

- 139 In France, Art 455 of the FCCP regulates that the judgment must be reasoned, under penalty of nullity of the judgment (Art 458 paragraph 1 of the CCP). If a court does not answer to the or to some party's contentions of law in the judgment's reasons, this is a cassation ground called 'défaut de réponse à conclusions', which is assimilated to a partial lack of reasoning. The Court of cassation has ruled several times on the foreign judgments which does not contain reasons that it is contrary to the French concept of international procedural *ordre public* to recognize a foreign decision lacking any statement of reasons when documents are not produced that could serve as equivalents to the missing statement of reasons.²⁹²
- 140 In Germany, Art 313 of the GCCP stipulates that the judgment must set out the reasons containing a summary of the considerations of the facts and circumstances of the case and the legal aspects on which the judgment is based. On the other hand, Art 313a stipulates the cases in which the reasons for the judgment may not be stated, provided the parties have waived the reasons for the judgment are set out, or their essential content has been included in the record of the hearing, or if parties waive appellate remedies against the judgment when the judgment is pronounced at the hearing at which the court proceedings are declared terminated. In addition, Art 313b, 525, 540, and 555 (1) of the GCCP stipulate that the reason for the judgment may be omitted. If the judgment is rendered without reasons, although the requirements of the clauses are not met, then this is a serious procedural violation that justifies the appeal (Art 538 (2) s 1 No 1 GCCP) or revision (Art 547 No 6 GCCP). If a court does not go into the essential core of the factual submissions of a party on a question that is of central importance to the proceedings in the reasons for the decision, this leads to the conclusion that the submissions have not been considered unless they are irrelevant or obviously unsubstantiated according to the legal position of the court. If the court fails to provide sufficient justification for this party's submissions, this constitutes a violation of the right to be heard (Art 103 (1) Basic Law), and the judgment is defective.²⁹³
- 141 In Korea, in a written judgment the reasons on arguments by the parties and on the crucial attack and defence methods must be stated to the extent that the legitimacy of the judgment is ascertainable (Art 208 (2) Korean CCP). However, in small claims, unlike in general civil litigation, the reasons for the judgment may not be stated, and the content of the reasons can be explained orally by sentencing (Art 11-2 (3) of the Small Claims Trial Act). Regarding the constitutionality of the provision, the dissenting opinion

²⁹¹ *Flannery v Halifax Estate Agencies*, (England and Wales Court of Appeal, UK), Judgment 18 February 1999 ([2000] 1 WLR 377).

²⁹² Case 2006-15.577 (CC, France), Judgement 22 October 2008 [ECLI:FR:CC:2008:2006.15.577]; Case 2014-13.641 (CC, France), Judgment 9 September 2015 [ECLI:FR:CC:2015:2014.13.641]

²⁹³ Musielak in *Münchener Kommentar zur ZPO* (6th edn, 2020), § 313, para 21.

of the Korean Constitutional Court held that the provision imposes on the court the duty to give reasons of judgments derived from the constitutional right to a trial, and, as such, it is required to explain the reasons at the time of pronouncing the judgment.²⁹⁴

142 According to the ECtHR, a court must give reasons for its judgment to ensure that any party with an interest in the case is informed of the basis of the decision so that the public in a democratic society may know the reasons for judicial decisions and to enable the accused in a criminal trial to exercise the right of appeal available to him.²⁹⁵ Courts in national jurisdictions are given a great deal of discretion as to the content and structure of their judgments, and a reasoned judgment does not have to deal with every argument raised, provided that it indicates the grounds on which the decision is based with 'sufficient clarity'.²⁹⁶ However, if a point would be decisive for the case if accepted, it should be addressed specifically and expressly by the court.²⁹⁷ Appellate courts (at second instance) with responsibility for filtering out unfounded appeals and with jurisdiction to deal with questions of fact and law in civil proceedings are required to give reasons for their refusal to accept an appeal for adjudication.²⁹⁸

143 The CJEU addressed that the observance of the right to a fair trial requires that all judgments be reasoned to enable the defendant to see why a judgment has been pronounced against him and to bring an appropriate and effective appeal against it.²⁹⁹

3.2.2.4 Admission of Illegally Obtained Evidence

144 There are separate views on the issue of illegally obtained evidence. It would be the traditional view that the evidence should not be excluded because of how it was obtained, whether illegal, improper, or unfair, for the objective truth. The view at the other extreme would be that illegally or improperly obtained evidence should always be excluded in the civil proceedings for the protection against unreasonable searches or seizures and the protection of dignity and the right to privacy. The problem of illegally obtained evidence is related to the concern of protecting fundamental rights from exposure to the threat of modern technology and the almost two-centuries-old trend to abolish rigid, formalistic, binding rules of both admission and evaluation in the civil

²⁹⁴ Case 2003Hun-Ma19 (Constitutional Court, Korea), Decision 23 September 2004.

²⁹⁵ *Hirvisaari v Finland*, Case 49684/99 (ECtHR), Judgment 27 September 2001 [ECLI:CE:ECHR:2001:0927JUD004968499] para 30-31.

²⁹⁶ *Van de Hurk v the Netherlands*, Case 16034/90 (ECtHR), Judgment 19 April 1994 [ECLI:CE:ECHR:1994:0419JUD001603490] para 61.

²⁹⁷ *Ruiz Tonja v Spain*, Case 18390/91 (ECtHR), Judgment 9 December 1994 [ECLI:CE:ECHR:1994:1209JUD001839091] para 29; *Hiro Balani v Spain*, Case 18064/91 (ECtHR), Judgment 9 December 1994 [ECLI:CE:ECHR:1994:1209JUD001806491] para 27.

²⁹⁸ *Hansen v Norway*, Case 15319/09 (ECtHR), Judgment 2 October 2014 [ECLI:CE:ECHR:2014:1002JUD001531909] para 73-83.

²⁹⁹ *Trade Agency Ltd v Seramico Investments*, Case C-619/10 (CJEU), Judgment 6 September 2012 [ECLI:EU:C:2012:531] para 53.

proceedings.³⁰⁰ Rule 90 of the ERCP regulates the exclusion of illegally obtained evidence except when it is the only way to establish the facts and provides for the duty of the court to take into account the behaviour of the other party or of non-parties and the gravity of the infringement when admitting such evidence.

- 145 In Brazil, the Constitution provides for the exclusion of illegally obtained evidence (Art 5, LVI Constitution). The inadmissibility of unlawful evidence disciplined in the Constitution means that any production of evidence that harms the dignity of the human person and will cause serious harm to those involved is not valid before courts.³⁰¹
- 146 In England and Wales, the courts normally consider any relevant evidence admissible. The judges are expected to allow a party to submit evidence that might help in retrieving an objective and truthful representation of the facts of the case. However, the introduction of UKCPR 1998 and the Human Rights Act have instead imposed a duty to exclude evidence that has been obtained as a result of an outrageous violation of rights, such as Art 8 of the ECHR and the functioning of the civil justice system. Under Rule 32.1. (2) UKCPR, the court may exclude evidence that would otherwise be admissible, therefore in appropriate circumstances the court may exercise the discretionary power to exclude evidence that, although relevant, has been obtained illegally or improperly.³⁰² In *Jones v University of Warwick*, a claim for damages for personal injuries, inquiry agents acting for the defendant's insurers had gained access to the claimant's home by deception and had filmed her without her knowledge. The Court of Appeal held that the conduct of the insurers was not so outrageous that the defence should be struck out and that it would be artificial and undesirable to exclude the evidence, which would involve the instruction of fresh medical experts from whom relevant evidence would have to be concealed. The court stated that the exclusion of evidence is the judge's discretion, which will depend on all circumstances considering conflicting public interests.³⁰³
- 147 In France, the Court of Cassation stated in 2012, for the first time, a new general principle, *le droit à la preuve* (the right to evidence) to allow, under some conditions, a party to present a piece of evidence that infringes upon the right of the opponent to respect for private life. The Court held in 2023 by a plenary assembly that in a civil trial, the illegality or disloyalty in obtaining or producing a means of evidence does not necessarily lead to its exclusion from the proceedings. It requires the judges' duty to assess whether such evidence undermines the fairness of the proceedings as a whole by balancing the right to evidence and the conflicting rights at stake. The right to evidence

³⁰⁰ M Cappelletti (n 19) 707-711.

³⁰¹ É Frighetto and M C R Souza, 'The Importance of Constitutional Principles in Civil Proceedings in the Face of Computerization of Data for the Optimization of the Legal-Procedural Relationship' (2021) 12 *Revista Científica Multidisciplinar Núcleo do Conhecimento* 77.

³⁰² A Keane, J Griffiths and P McKeown, *The Modern Law of Evidence* (8th edn, Oxford University Press, USA 2008) 54-55.

³⁰³ *Jones v University of Warwick*, Case B3/2002/1138 (England and Wales Court of Appeal Civil Division, UK) Judgment 4th February 2003, ([2003] EWCA Civ 151) para 28.

can be justified to produce proof that infringes other rights when such production is essential to its exercise and the infringement is strictly proportionate to the aim pursued.³⁰⁴

- 148 In Germany, even illegally obtained evidence can only be disregarded after weighing up the interest in evidence protected by Art 103 (1) of the Basic Law and possibly violated fundamental rights. In individual cases, the acquisition of unlawful evidence may be justified. This would mean that the prohibition on the use of evidence would no longer apply. A justification is to be affirmed by general civil law principles in self-defence and after weighing up the legal interests and interests concerned, also from the point of view of safeguarding legitimate interests. On the other hand, the breach of the obligation to be truthful (Art 138 GCCP) or the breach of an existing obligation to submit (documents in particular) does not constitute a case that can justify the unlawful acquisition of evidence. However, the fact that evidence has been illegally obtained does not in itself constitute a prohibition of evidence. A collection ban can result from how the evidence was produced or obtained, eg, in the case of illegally produced tape recordings or witnesses who secretly overheard a conversation.³⁰⁵

In the regard to the testimonies of witnesses that are based on the illegal eavesdropping on telephone conversations of third parties, the BVerfG held as follows:³⁰⁶

The general personal right is particularly affected if a telephone call or other conversation is recorded on a sound carrier without consent or is overheard by a third party. The protection of the right to the spoken word does not depend on whether the information exchanged is personal communication content or particularly personal data, nor does it depend on the agreement of special confidentiality of the conversations. Whether the interference with the general right of personality in the form of eavesdropping or recording without consent is justified, unless the content of the conversation relates to an absolutely protected core area of private life, depends on the result of the weighing between the general right of personality fighting against the exploitation on the one hand and one for the exploitation speaking legally protected interest on the other hand. However, the general interest in

³⁰⁴ Case 20-20.648 (CC, France), Judgment 22 December 2023 [ECLI:FR CCASS:2023:AP00673] para 5-12.

³⁰⁵ Prütting in *Münchener Kommentar zur ZPO* (6th edn, 2020), § 284, para 78; Bacher in V Vorwerk and C Wolf (ed), *BeckOK ZPO* (41 edn, C.H. BECK München 2021), § 284, para 19-33; Case VI ZR 104/57 (BGH, Germany), Judgment 20 May 1958, [NJW 1958, 1344(1345)]; Case VI ZR 164/79 (BGH, Germany), Judgment 24 November 1981, [NJW 1982, 277(277-278)]; Case - VI ZR 83/87 (BGH, Germany), Judgment 13 October 1987, [NJW 1988, 1016(1017)].

³⁰⁶ Case 1 BvR 1611/96, 1 BvR 805/98 (BVerfG, Germany), Decision 9 October 2002, [NJW 2002, 3619(3624)].

obtaining evidence or in a properly functioning criminal and civil justice system is not sufficient.

The use of private video recordings that are made by road users while driving (mostly with so-called dash cams or action cams), the BGH held that, even if the video recording violates the federal data protection law, it is not prohibited to submit the video recording to the court as evidence in the accident liability process and to use it for this purpose if the interest of a party enforcing his civil law claims outweighs the general personality rights of the opponent in the individual case.³⁰⁷

- 149 In Korea, regarding the recordings of private conversations made without the knowledge of his interlocutors, the Korean Supreme Court held that the recording tape or the transcript of the conversation made secretly without permission of the other side is not inadmissible as evidence because judges have discretion in the assessment of the evidence under the principle of free evaluation of evidence stipulated in Art 202 of the Korean CCP.³⁰⁸
- 150 In the US, the Fourth Amendment's guarantee of 'the right of the people to be secure [...] against unreasonable searches and seizures' provides the exclusion of evidence garnered by unlawful governmental action from admission into evidence in federal and state criminal prosecutions.³⁰⁹ However, these exclusionary rules are limited to governmental actors and, therefore, are not considered applicable to civil actions nor to criminal prosecutions in which the offered evidence has been unlawfully obtained by a private person. Traditionally all relevant evidence should be admitted as an aid in the search for the truth, no matter how it is obtained. Some scholars criticize the admissibility of illegally obtained evidence in civil proceedings for the following reasons: The first is that civil litigation is not as much a search for the truth as it is a means of reaching an acceptable resolution of a dispute. The second is that the public perception of the integrity of the judicial system is compromised by the acceptance of evidence obtained by unlawful means.³¹⁰
- 151 According to the ECtHR, the admissibility of evidence is primarily a matter of national laws, and the admission of illegally obtained evidence will not contravene Art 6 of the ECHR unless it was obtained by an abuse of police powers. It must examine whether the proceedings as a whole, including how the evidence was obtained, were fair. In the judgment of *López Ribalda and Others v Spain*, the court laid down criteria for determining whether the use of information obtained in violation of Art 8 of the ECHR

³⁰⁷ Case VI ZR 233/17 (BGH, Germany), Judgment 15 May 2018, para 39-57 [NJW 2018, 2883(2888-2891)].

³⁰⁸ Case 2009Da37138,37145 (Supreme Court, Korea), Judgment 10 September 2009.

³⁰⁹ *Mapp v Ohio*, Case 236 (Supreme Court, US), Judgment 19 June 1961 [367 US 643, 656-57 (1961)].

³¹⁰ D H Taylor, 'Should It Take a Thief: Rethinking the Admission of Illegally Obtained Evidence in Civil Cases' (2003) 22 Rev. Litig. 625, 626 ff.

or of domestic law as evidence rendered civil proceedings unfair.³¹¹ This must be determined considering all the circumstances of the case, including respect for the applicant's defence rights and the quality and importance of the evidence in question. In particular, it must be examined whether the applicant was allowed to challenge the authenticity of the evidence and oppose its use. In addition, the quality of the evidence must be taken into consideration, as must the question of whether the circumstances in which it was obtained cast doubt on its reliability or accuracy. The court stated in the judgment of *L.L. v France* that any unavoidable interference should be limited as far as possible to that which is rendered strictly necessary by the specific features of the proceedings and by the facts of the case. And the court stressed that the domestic law should afford sufficient safeguards in the respect of the use of the private life of parties even in the area of divorce, which are proceedings during which information on the intimacy of private and family life may be revealed and where it is in fact part of a court's duty to interfere in the couple's private sphere in order to weigh up the conflicting interests and settle the dispute before it.³¹²

4 RIGHT TO A TRIAL WITHOUT UNDUE DELAY

- 152 Late justice is bad justice; unreasonable court delay may be equal to a denial of justice.³¹³ The right to a trial within a reasonable time relates to the duration of the entire judicial procedure. The concept of 'reasonable time' is connected to the problem of equality because excessive delays are a major source of inequality, for example, between those who can afford, psychologically as well as financially, to await the outcome of a case and may even seek to delay it and those for whom any deferral of a hearing causes, as a result, unbearable difficulties.³¹⁴ The costs incurred due to undue delay are borne not only by the litigants, but also by the taxpayers.³¹⁵

4.1 Sources of the right to a trial without undue delay

4.1.1 National Constitutional Sources

- 153 The right to a trial without undue delay is not always explicitly guaranteed by the national Constitution. But often, the Constitution is interpreted in such a way to accommodate this right.

³¹¹ *López Ribalda and Others v Spain*, Case 1874/13 and 8567/13 (ECtHR), Judgment 17 October 2019, [ECLI:CE:ECHR:2019:1017JUD000187413] para 150.

³¹² *L.L. v France*, Case 7508/02 (ECtHR) Judgement 10 October 2006, [ECLI:CE:ECHR:2006:1010JUD000750802] para 45-47.

³¹³ M Cappelletti (n 19) 694.

³¹⁴ F Calvez and N Regis, *Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights* (3rd edn, European Commission for the Efficiency of Justice 2018) 9.

³¹⁵ K Economides, A A Haug and J McIntyre, 'Toward Timeliness in Civil Justice' (2015) 41 Monash University Law Review 414, 415.

4.1.1.1 Brazil

- 154 Art 5 LXXVIII of the Brazilian Constitution and Art 4 of the BRCCP guarantee ‘a reasonable length of proceedings’. The principle of cooperation embodied in Art 6 of the BRCCP alludes to the obligation that the parties and the judge must cooperate proportionately with what they entail with the plan to maintain the preserved balance. Law No 11, 419 inaugurated in the national law on 19 December 2006 describes the computerization of the judicial process. This law that instituted the Electronic Judicial Process (PJE) is the result of Constitutional Amendment No 45 of 30 December 2004, which dealt with the reforms of the judiciary. The reasonable duration of the process was an inducement to repel the slowness of the entire legal system.³¹⁶

4.1.1.2 England and Wales

- 155 The original version of the Magna Carta, where King John of England promised that ‘to none will we sell, to none will we deny or delay justice’, is cited as evidence of the fact that delays in civil litigation have been a problem. From at least 1278, the King’s justices promised on oath on their appointment that they would not ‘prevent or delay justice by any trick or device against the right or the laws of the land’.³¹⁷ The English civil justice system has changed the attitude of the English courts towards the conduct of litigation in the past three decades. There has been a progressive shift away from a ‘reactive’ system, moving at the pace of the parties, to a ‘proactive’ system of ‘case management’.³¹⁸ According to Rule 1.1. UKCPR, the ‘overriding objective’ of the UKCPR is to deal with cases justly, and it includes, so far as practicable, that cases are to be dealt with ‘expeditiously and fairly’ (Rule 1.1. (2)(d) UKCPR). Before the introduction of the new order in 2000, the courts were guided by the decision of the House of Lords in *Birkett v James*, which held that the power of the court to dismiss an action for want of prosecution should be exercised only where (a) there has been an inordinate and inexcusable delay, and (b) such delay had given rise to a substantial risk that it is not possible to hold a fair trial or likely to cause or to have caused prejudice to the defendants.³¹⁹ However, Lord M R Woolf indicated in *Biguzzi v Rank Leisure* as follows:³²⁰

³¹⁶ É Frighetto and M C R Souza, ‘The Importance of Constitutional Principles in Civil Proceedings in the Face of Computerization of Data for the Optimization of the Legal-Procedural Relationship’ (2021) 12 *Revista Científica Multidisciplinar Núcleo do Conhecimento* 77.

³¹⁷ C H van Rhee, ‘Introduction’ in CH van Rhee (ed), *Within a Reasonable Time-The History of Due and Undue Delay in Civil Litigation* (Comparative Studies in Continental and Anglo-American Legal History, 28, Duncker & Humblot, 2011) 7, 7.

³¹⁸ R Clayton and H Tomlinson, *Fair Trial Rights* (2nd edn, Oxford University Press 2010) para 11.193-11.195.

³¹⁹ *Birkett v James* (House of Lords, UK), Judgment 25 May 1977 ([1977] UKHL J0525-1).

³²⁰ *Biguzzi v Rank Leisure* (England and Wales Court of Appeal Civil Division, UK), Judgment 26 July 1999 ([1999] 1 WLR 1926, 1933); *Asianky Television v Bayer Rosin* (England and Wales Court of Appeal Civil Division, UK), Judgment 19 November 2001 ([2001] EWCA Civ 1792).

Under Rule 3.4. (2)(c) UKCPR³²¹ a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule. The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of the case. The advantage of the CPR over the previous rules is that the court's powers are much broader than they were. In many cases, there will be alternatives that enable a case to be dealt with justly without taking the draconian step of striking the case out.

4.1.1.3 France

- 156 'A reasonable time' does not appear in the FCCP, but following the enactment of the Presumption of Innocence Act of 15 June 2000, it was stipulated in the first article of the Code of Criminal Procedure and is also included in various subsequent provisions. Furthermore, it has had a symbolic place in Art L. 111-3 of the COJ since 2006. Art L. 141-1 of the COJ (formerly L. 781-1) provides for state liability in the event of serious negligence or denial of justice. In a judgment on 23 February 2001, the Plenary Assembly of the Court of Cassation extended the scope of serious state negligence, ruling that such negligence covers any shortcoming characterized by a fact or series of facts reflecting the inability of the judiciary to achieve the task assigned to it.³²² Based on the provision, the state was condemned several times to pay damages because the proceedings had lasted too long.³²³

4.1.1.4 Germany

- 157 The Basic Law does not explicitly state that a trial must be held in due time, but the Basic Law is interpreted in such a way as to accommodate this right by the BVerfG.³²⁴ Originally it was derived from Art 2 (1) of the Basic Law in connection with the rule of law [Art 20 (3) Basic Law] as a guarantee of effective legal protection for civil legal

³²¹ Power to strike out a statement of case.

3.4. (1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.

(2) The court may strike out a statement of case if it appears to the court—

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) that there has been a failure to comply with a rule, practice direction or court order.

³²² Case 99-16.165 (Court of Cassation, France), Judgment 23 February 2001. [EC:I:FR:CC:2001:99.16.165]

³²³ Eg, Case n° 14/15296 (Court of TGI Paris, France), Judgement 4 November 2015 in a divorce case or Case n° 18/17589 (Court of CA Paris), Judgement 30 Sept. 2020: 5 years and 7 months before rendering a judgment in a labour case.

³²⁴ Case 1 BvR 711/96 (BVerfG, Germany), Decision 6 May 1997 [NJW 1997, 2811(2812)]; Case 1 BvR 1708/99 (BVerfG, Germany), Decision 17 November 1999 [NJW 2000, 797(797)].

disputes in the material sense, and it results in the obligation of the normal courts to bring court proceedings to a conclusion in a reasonable time.³²⁵ The BVerfG held that:³²⁶

The citizen has a substantial right to the most effective judicial control possible about the acts or omission of public authority affecting him. Effective legal protection also means legal protection within a reasonable time. The appropriateness of the duration of a procedure is to be determined according to the particular circumstances of the individual case.

4.1.1.5 Korea

- 158 The right to a speedy trial is one of the fundamental rights stipulated in Art 27 (3) of the Korean Constitution. The Constitutional Court held the following on the meaning of the right to a speedy trial:³²⁷

The right to a speedy trial includes elements such as shortening the timeline for dispute resolution as well as the efficient operation of trial procedures. There is a stronger demand for the right to a speedy trial in compulsory enforcement proceedings aimed at the realization of confirmed rights than in the judicial proceedings to confirm rights or legal relationships.

Art 199 of the Korean CCP stipulates that judgment should be rendered within five months for each instance. The Constitutional Court has held that, whilst the court should endeavour to render a judgment within the period stipulated as above, there is no legal obligation for judges to render a judgment within this period.³²⁸ Some legal scholars have taken issue with this ruling by the court.³²⁹

4.1.1.6 Spain

- 159 Art 24 (2) of the Spanish Constitution guarantees the right to a public trial without undue delays. The Spanish Constitutional Court has affirmed that the Constitution has recognised the fundamental right to a trial without undue delays with an autonomous character as the right to effective judicial protection from the STC 24/1981 of 18 February 1981. The Court held that, although the connections between both rights are undeniable since the right to effective judicial protection contemplated in Art 24 (1) of

³²⁵ Case 1 BvR 2662/06 (BVerfG, Germany), Decision 30 July 2009 [NJW-RR 2010, 207(208)]; Rauscher (n 209) 290.

³²⁶ Case 2 BvR 419/80 (BVerfG, Germany), Decision 16 December 1980 [BVerfGE 55, 349(369) NJW 1981, 1499].

³²⁷ 2004Hun93 (Constitutional Court, Korea), Decision 29 March 2007.

³²⁸ 98Hun-Ma75 (Constitutional Court, Korea), Decision 16 September 1999; constitutional complaints against judgments are not permissible in Korea. Therefore, there is no case where the right to a speedy trial was infringed upon in a civil trial.

³²⁹ Si-yoon Lee, 'The Right to a Trial in a Civil Procedure' (2010) 21 *Commentary on the Constitution* 5, 64.

the Spanish Constitution cannot be understood apart from the time in which the judicial protection of subjective rights and legitimate interests must be provided, simple delay does not entail per se a denial of justice. The right to a trial without undue delay cannot be identified with a right to rigorous compliance with procedural deadlines and should be configured based on the temporal dimension of any process and its reasonableness. The prohibition of unjustified delays in judicial proceedings imposes on judges and courts the duty to act with the speed that allows them the normal or customary duration of litigation of the same nature and with due diligence while progressing through different phases of the process.³³⁰

4.1.1.7 The US

160 The Sixth Amendment to the US Constitution guarantees the right to a speedy trial for the accused in criminal trials, not for the litigants in the civil justice system. At the federal level, however, Rule 1 USFRCP stipulates the guarantee of speedy action and proceeding as one of its purposes.³³¹ The disposition time for civil cases is not ‘speedy’, and delays are often characterized as ‘ceaseless and unremitting’.³³² The problem of undue delay has prompted serious and successive reform efforts, particularly since the late 1950s.³³³ In 1983, the USFRCP was amended to institutionalize active judicial case management in the federal court system, which is a defining characteristic of the federal civil pretrial scheme. Rules 16 (Pretrial Conferences; Scheduling; Management) and 26 (Duty to Disclose; General Provisions Governing Discovery) USFRCP have provided the necessary framework for judges to shape and manage discovery to achieve efficiencies.³³⁴ In 1990, the Civil Justice Reform Act was enacted to restrict expense and delay in civil lawsuits through the application of numerous procedural measures.³³⁵ The assessment of judicial case management as the principal means for controlling excessive costs and delays in civil cases seems to be inconsistent.³³⁶

³³⁰ STC 58/1999 (Constitutional Court, Spain), Judgment 12 April 1999 [ECLI:ES:TC:1999:58]; STC 142/2010 (Constitutional Court, Spain), Judgment 21 December 2010 [ECLI:ES:TC:2010:142].

³³¹ These rules govern procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and employed to secure the just, speedy, and inexpensive determination of every action and proceeding.

³³² The average disposition time for a case that goes to trial in Cook County Illinois, for example, is over five years. M Heise, ‘Justice Delayed: An Empirical Analysis of Civil Case Disposition Time’ (1999) 50 Case W. Res. L. Rev. 813, 814.

³³³ M Heise (n 332) 818.

³³⁴ S S Gensler, ‘Judicial Case Management: Caught in the Crossfire’ (2010) 60 Duke LJ 669, 674.

³³⁵ C Tobias, ‘Civil Justice Delay and Empirical Data: A Response to Professor Heise’ (2000) 51 Case W. Res. L. Rev. 235, 243.

³³⁶ S S Gensler (n 334) 691 ff.

4.1.2 Supranational Sources

4.1.2.1 Norms

- 161 The Universal Declaration of Human Rights includes the notion of a fair trial or hearing but makes no explicit reference to ‘undue delay’ or a ‘reasonable time’. But Art 6 (1) of the ECHR explicitly set out the desire for the prompt administration of justice.³³⁷ The Council of Europe emphasized that civil procedure should be simplified and made more flexible and expeditious while, at the same time, maintaining the guarantees provided for litigants by the traditional rules of procedure and maintaining the high level of justice required in a democratic society.³³⁸ Art 47 of the CFREU expressly provides the right to a fair and public hearing within a reasonable time.
- 162 Art 8 (1) of the ACHR guarantees the right to a hearing within a reasonable time, and Art 7 (1)(d) of the ACHPR also guarantees the right to be tried within a reasonable time. Art 7 of the PTCP describes the duty of the court to resolve the dispute within a reasonable time, the duty of the parties to cooperate, and the right for reasonable consultation concerning scheduling. Rule 2 of the ERCP provides for the duty of parties, their lawyers, and the court to cooperate to promote the speedy resolution of the dispute, and Rule 4 of the ERCP regulates the courts’ general responsibility for the active case management and requires the courts to monitor parties’ and their lawyers’ compliance with their responsibilities throughout proceedings.

4.1.2.2 Cases

4.1.2.2.1 ECtHR

- 163 The ECtHR underlines the importance of administering justice without delays that might jeopardize its effectiveness and credibility. The court stated that Art 6 (1) of the ECHR obliges the contracting states to organize their judicial systems in such a way that their courts can guarantee the right of everyone to obtain a final decision on disputes concerning civil rights and obligations within a reasonable time.³³⁹ The court has established the following criteria for assessing whether the length of proceedings is reasonable: the complexity of the case, the conduct of the applicant, the conduct of the relevant national authorities, and what is at stake for the applicant. The complexity of

³³⁷ F Calvez and N Regis, *Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights*, (3rd edn, European Commission for the Efficiency of Justice 2018), 9. CEPEJ available at <https://rm.coe.int/cepej-2018-26-en-rapport-calvez-regis-en-length-of-court-proceedings-e/16808ffc7b> accessed 2 February 2023.

³³⁸ Recommendation No R (84) 5 of the Committee of Ministers to Member States on the principles of civil procedure designed to improve the functioning of justice, adopted on 28 February 1984. Recommendation No R (84) 5 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804e19b1> accessed 2 February 2023.

³³⁹ *Scordino v Italy*, Case 36813/97 (ECtHR), Judgment 29 March 2006 [ECLI:CE:ECHR:2006:0329JUD003681397], para 224-225; *Keany v Ireland*, Case 72060/17 (ECtHR), Judgment 30 April 2020 [ECLI:CE:ECHR:2020:0430JUD007206017] para 86-87.

the case includes matters such as the number of witnesses, the intervention of other parties, and the need to obtain expert evidence.³⁴⁰ Regarding the conduct of the applicant, procedural rules that allow the parties to take the initiative concerning the progress of civil proceedings do not excuse the courts from ensuring compliance with the requirements of Art 6 of the ECHR concerning time.³⁴¹ The applicants are not required to cooperate with the judicial authorities but are required only to show diligence in carrying out the procedural steps relating to them, to refrain from using delaying tactics, and to avail themselves of the scope afforded by domestic law for shortening the proceedings.³⁴² The conduct of the relevant authorities includes matters such as delays in commencing proceedings³⁴³ or in transferring proceedings. Regarding what is at stake for the applicant, the personal circumstances of an applicant in a civil case may be considered. Claims for compensation by HIV-infected haemophiliacs required the exceptional diligence of the authorities.³⁴⁴ Such diligence is also called for in family cases where the custody of a child is at stake³⁴⁵, in employment disputes³⁴⁶, in cases related to the right to education³⁴⁷, and in cases concerning civil status and capacity³⁴⁸. In European law, the requirement of a reasonable time has even been extended to the enforcement phase.³⁴⁹

4.1.2.2.2 CJEU

- 164 In *Baustahlgewebe v Commission*, the CJEU reviewed the adequacy of the proceedings before the trial court regarding the right to be heard in a reasonable time and carefully

³⁴⁰ *Manieri v Italy*, Case 12053/86 (ECtHR), Judgment 27 February 1992 [ECLI:CE:ECHR:1992:0227JUD1205386] para 18-19.

³⁴¹ *Scopelliti v Italy*, Case 41/1992/386/464 (ECtHR), Judgment 24 May and 27 October 1993 [ECLI:CE:ECHR:1993:0524JUD001551189] para 25; *Unión Alimentaria Sanders SA v Spain*, Case 11681/86 (ECtHR), Judgment 7 July 1989 [ECLI:CE:ECHR:1989:0707JUD001168186] para 35; *Sürmeli v Germany*, Case 75529/01 (ECtHR), Judgment 8 June 2006 [ECLI:CE:ECHR:2006:0608JUD007552901] para 129.

³⁴² *Unión Alimentaria Sanders S.A. v Spain*, Case 11681/86 (ECtHR), Judgment 7 July 1989 [ECLI:CE:ECHR:1989:0707JUD001168186] para 35.

³⁴³ *König v Germany*, Case 6232/73 (ECtHR), Judgment 28 June 1978 [ECLI:CE:ECHR:1978:0628JUD000623273] para 98; *Foti and Others v Italy*, Case 7604/76; 7719/76; 7781/77; 7913/77 (ECtHR), Judgment 10 December 1982 [ECLI:CE:ECHR:1982:1210JUD000760476] para 61.

³⁴⁴ *X v France*, Case 18020/91 (ECtHR), Judgment 31 March 1992 [ECLI:CE:ECHR:1992:0331JUD001802091] para 47.

³⁴⁵ *Nuutinen v Finland*, Case 32842/96 (ECtHR), Judgment 27 June 2000 [ECLI:CE:ECHR:2000:0627JUD003284296] para 110; *Siemianowski v Poland*, Case 45972/99 (ECtHR), Judgment 6 September 2005 [ECLI:CE:ECHR:2005:0906JUD004597299] para 78.

³⁴⁶ *Vocaturo v Italy*, Case 28/1990/219/281 (ECtHR), Judgment 25 January and 24 April 1991 [ECLI:CE:ECHR:1991:0125JUD001189185] para 17.

³⁴⁷ *ORŠUŠ AND OTHERS v CROATIA*, Case 15766/03 (ECtHR), Judgment 16 March 2010 [ECLI:CE:ECHR:2010:0316JUD001576603] para 109.

³⁴⁸ *Bock v Germany*, Case 1/1988/145/199 (ECtHR), Judgment 21 November 1988 and 21 February 1989 [ECLI:CE:ECHR:1988:1121JUD002205107] para 48-49.

³⁴⁹ *Hornsby v Greece*, Case 18357/91 (ECtHR), Judgment 19 March 1997 [ECLI:CE:ECHR:1997:0319JUD001835791] para 40.

applied all the criteria identified by the ECHR relating to ‘reasonable time’.³⁵⁰ In *Kendrion*, the court found, by ECtHR case law, that both the material damage and ‘any other type of harm sustained by the party affected’ should be suitably compensated in case of a breach of the reasonable time requirement.³⁵¹

4.1.2.2.3 IACHR

- 165 IACHR has stated that Art 8 (1) of the ACHR provides that compliance is obligatory within a reasonable time established to avoid unnecessary delays that may lead to the deprivation or denial of justice, and the court established three points that must be taken into account in determining ‘reasonable time:’ a) the complexity of the matter, b) the judicial activity of the interested party, and c) the behaviour of the judicial authorities.³⁵²

4.2 Criteria to be Considered to Assess Undue Delay

4.2.1 The Idea of a Reasonable Trial Length and the Tools Thereof

4.2.1.1 The Idea

- 166 The undue delay of trials is pointed out to be directly related to the efficient use of judicial resources, but in the long run, it affects the trust in judges, courts, and the judicial system, in addition to the respect for the rule of law, and it leads to an aggravation of the problem of inequality in civil society. Prolonged case disposition time causes an increase in litigation costs and threatens evidentiary quality as memories fade, evidence spoils, and witnesses and litigants die. Delayed results in the resolution of civil disputes erode public confidence in the civil justice system, disappoint and frustrate those seeking compensation through the legal system, and generate benefits for those with the financial ability to withstand delays. Such factors, individually and collectively, weaken public faith and confidence in the ability of the civil justice system to operate efficiently and, more importantly, equitably.³⁵³ OECD analyses on surveys of individuals in different countries suggest that a 10% increase in the average length of trials is associated with a decrease of around 2% in the probability of having confidence in the justice system.³⁵⁴ A reasonable trial length is an important characteristic of good judicial performance. What is intended to be achieved by reasonably long trials is the protection

³⁵⁰ *Baustahlgewebe v Commission*, Case C-185/95 P (CJEU), Judgment 17 December 1998 [ECLI:EU:C:1998:608] para 29.

³⁵¹ *Kendrion NV v European Commission*, Case C-50/12 P (CJEU), Judgment 26 November 2013 [ECLI:EU:C:2013:771] para 100.

³⁵² *MILTON GARCÍA FAJARDO ET AL. NICARAGUA*, CASE 11.381 (IACHR), Judgment 11 October 2000, para 48, 54.

³⁵³ M Heise, ‘Justice Delayed: An Empirical Analysis of Civil Case Disposition Time’ (1999) 50 Case W. Res. L. Rev. 813, 818.

³⁵⁴ OECD (2013), ‘What makes civil justice effective?’, OECD Economics Department Policy Notes, No 18 June 2013, para 2.

of the values, such as public confidence in the civil justice system and equality in civil society.³⁵⁵

4.2.1.2 The Tools

- 167 There are many reasons for delays in a trial, such as a tremendous increase in litigation (caseload of the courts), high complexity of the case, the conduct of the parties, and so on.³⁵⁶ Each country's civil procedure law stipulates the means for expediting the civil proceedings.

4.2.1.2.1 Exclusion of Delayed Attack and Defence Methods

- 168 In Germany and Korea, the principle of the concentrated trial is adopted as one of the civil procedural principles to guarantee a speedy trial, and the civil procedure rules provide the parties' obligation of submissions to the court made in due time and the court's rejection of delayed attack and defence methods as procedural sanctions.³⁵⁷ According to the BGH, the exclusion of delayed attack and defence methods is correlated with the right to be heard and implies *Verbot der Überbeschleunigung* (the prohibition of over-acceleration), which means that late submissions cannot be excluded when it is obvious that the same delay would have occurred if they had been timely submitted.³⁵⁸

4.2.1.2.2 Case Management

- 169 In England, the courts have a general duty of case management (Rule 1.4. UKCPR) and specific case management powers (Part 3 UKCPR), including the power to stay proceedings, to impose conditions and to revoke orders. Part 27 UKCPR guides how the courts are approaching case management decisions and dealing with non-compliance, including unless orders and relief from sanctions, as well as appeals against case management decisions. It also provides an overview of the main case management events in the life cycle of a case, including the allocation to a track, case management conference, listing questionnaire or pre-trial checklist, and the pre-trial review, and provides links to more detailed resources within these topics.
- 170 In the US, the USFRCP and rules of most states authorize the court to conduct a pretrial conference, which is a meeting with the attorneys or unrepresented parties and the

³⁵⁵ 'Time' was presented as one of the barriers to effective equality of arms to be overcome. B G Garth and M Cappelletti, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) Articles by Maurer Faculty. 1142, 189-190.

³⁵⁶ M M Belli, 'The Law's Delays: Reforming Unnecessary Delay in Civil Litigation' (1981) 8 J. Legis. 16, 17; the author cited the following four principal causes of trial delays: (1) the inefficient management of the court system by the judiciary, (2) a tremendous increase in litigation, (3) the philosophy of procrastination of many judges and lawyers, and (4) the priority of criminal over civil cases on the court calendar.

³⁵⁷ Eg, Arts 272 (1), 282, 296, 296a of the German CCP; Arts 272, 146, 149 of the Korean CCP.

³⁵⁸ Case VI ZR 120/11 (BGH, Germany), Judgment 3 July 2012, [NJW 2012, 2808(2809)].

judge held before trial and after the pleading and discovery stage.³⁵⁹ The purposes of pretrial conferences are (1) to expedite the disposition of the action, (2) to establish early and to continue control so that the case will not be protracted because of a lack of management, (3) to discourage wasteful pretrial activities, (4) to improve the quality of the trial through more thorough preparation, and (5) to facilitate settlement (Rule 16 (a) USFRCP). At the pretrial conference, the court may consider and take appropriate action on the claims, defences, pleadings, facts, and documents to avoid unnecessary proof and rule in advance on the admissibility of evidence, timing of summary adjudication, scheduling discovery, adopting special procedures for managing potentially difficult or protracted actions, establishing a reasonable limit on the time allowed to present evidence, and facilitating in other ways the just, speedy, and inexpensive disposition of the action (Rule 16 (c) (2) USFRCP).

- 171 The SATURN, a working group set up within CEPEJ (European Commission for the Efficiency of Justice) in 2007, has provided the member States the tools of judicial timeframes of proceedings since 2012. ‘The Saturn Guidelines for Judicial Time Management (4th Revision)’, adopted at its 37th meeting of CEPEJ on 8 and 9 December 2021, covers guidelines not only for court but also prosecutors, lawyers, experts appointed by the court, and enforcement agents.³⁶⁰ CEPEJ also adopted a new tool designed to help countries reduce the backlogs of court cases at its 40th plenary meeting on 15 and 16 June 2023. The ‘Backlog’ refers to pending cases at the court concerned which have not been resolved within an established timeframe.³⁶¹

4.2.1.2.3 The Cooperation of the Courts and Parties

- 172 Some national civil procedure laws provide the obligations of parties to assist the court and vice versa. The UKCPR of England and Wales stipulates the duty of the parties to help the court to further the overriding objective (Rule 1.3. UKCPR). The GCCP provides the courts’ duty to help parties (Art 139). The BRCCP obliges the participants to cooperate in obtaining a fair and effective judgment within a reasonable period of time (Art 6) and obliges the judges to ensure the reasonable length of proceedings (Art 139 (2)). The obligation of both parties and judges to cooperate towards an expeditious resolution to the conflict implies the duty to prevent undue delays.³⁶²

³⁵⁹ F James, G C Harzard and J Leubsdorf, *Civil Procedure* (5th edn, Foundation Press 2001), 352.

³⁶⁰ Revised SATURN Guidelines for Judicial Time Management (4th Revision) available at <https://rm.coe.int/cepej-2021-13-en-revised-saturn-guidelines-4th-revision/1680a4cf81> accessed 15 December 2023.

³⁶¹ Backlog Reduction Tool available at <https://rm.coe.int/cepej-2023-9final-backlog-reduction-tool-en-adopted/1680acf8ee> accessed 15 December 2023.

³⁶² W D H Asser, ‘Within a Reasonable Time: A Joint Responsibility’ in C H van Rhee (ed), *The law’s delay: essays on undue delay in civil litigation* (Intersentia 2004) 23, 27.

4.2.2 Criteria

- 173 The adage ‘justice delayed is justice denied’ is sometimes juxtaposed with ‘justice hurried is justice buried’. Some say that justice and procedural delay are, therefore, virtually synonymous because justice cannot be done without a proper investigation of the case at issue, and this takes time. Others say that the acceleration of the procedure is in tension with the right of the parties to be heard, and it can work unfairly for the defendant without time for adequate preparation and defence. To elaborate on the right of parties to a fair trial, the right to a trial within a reasonable time may conflict with other aspects of the right to a fair trial, for example, the right to a public hearing. The use of written procedures without an oral hearing would probably increase the speed of justice; however, it would also violate the right to a public hearing.³⁶³
- 174 Another voice criticizing the trial within a reasonable time is based on the fact that there is not a measure of ‘reasonableness’. The assumption that there is an objective, proper or ideal length of time to resolve a dispute seems naive. This position emphasizes that disputes are dynamic and unpredictable, and that parties’ interests and goals may change. And asserts that the litigants view ‘delay’ differently.³⁶⁴ However, even though delay is unavoidable, it is problematic when it can be recognized as ‘undue’.³⁶⁵ It should be noted that excessive case disposition time may cause as the disadvantages or injustice for the parties as well as undermine the productivity and efficiency of the economy as a whole.³⁶⁶ When discussing reform pertinent to delay in civil litigation, it is also sometimes necessary to point out that, besides acceleration, there are also other important goals of procedural legislation, especially the fairness of the proceedings and the quality of decisions.³⁶⁷

4.3 Consequences of the Violation

- 175 In *Kudla v Poland*, the ECtHR expressed the position that if the right to a trial within a reasonable period is violated, there is an excessive delay in the operation of the judicial system, and if there is no domestic remedy for this, it may urge the state to come up

³⁶³ Eg, *Göç v Turkey*, Case 36590/97 (ECtHR), Judgment 11 July 2002 [ECLI:CE:ECHR:2002:0711JUD003659097]; E Brems, ‘Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms’ [2005] Human Rights Quarterly 294, 307 ff.

³⁶⁴ K Economides, A A Haug and J McIntyre, ‘Toward Timeliness in Civil Justice’ (2015) 41 Monash University Law Review 414, 417.

³⁶⁵ C H van Rhee, ‘Introduction’, in C H van Rhee (ed), *Within a Reasonable Time-The History of Due and Undue Delay in Civil Litigation* (Comparative Studies in Continental and Anglo-American Legal History, 28, Duncker & Humblot, 2011) 7, 26.

³⁶⁶ K Economides, A A Haug and J McIntyre, ‘Toward Timeliness in Civil Justice’ (2015) 41 Monash University Law Review 414, 438.

³⁶⁷ C H van Rhee, ‘Introduction’, in C H van Rhee (ed), *Within a Reasonable Time-The History of Due and Undue Delay in Civil Litigation* (Comparative Studies in Continental and Anglo-American Legal History, 28, Duncker & Humblot, 2011) 7, 10.

with a remedy on the ground of a violation of Art 13 of the Convention.³⁶⁸ Reference can be made to the reports of CEPEJ for the overview of the domestic remedies in member states of the Council of Europe.³⁶⁹ According to the CEPEJ report published at the end of 2018, in 2014, 2015, and 2016, the number of cases due to excessive delay has sharply decreased compared to the total number of cases at the ECtHR. This can be explained primarily by an improvement in judicial procedures due to the reforms introduced by member states to comply with the case law of the court.³⁷⁰

- 176 In France, Art L. 141-1 of the COJ (formerly L. 781-1) provides for state liability in the event of serious negligence or denial of justice and the state has been compensating for damages in connection with excessive delay in litigation based on the provision. Since the *Zannouti v France* judgment on 31 July 2000³⁷¹ and the decisions in the *Giummarra v France*³⁷² and *Mifsud v France* cases,³⁷³ the ECtHR has acknowledged the effectiveness of the remedy. But in 2011 the court stated that this remedy could not be regarded as an effective remedy to be exhausted by the applicant because of the ‘serious negligence’ criterion required to adduce state liability impeded the finding of such liability.³⁷⁴
- 177 From 1959 to 2009, the ECtHR had delivered judgments in more than 40 cases against Germany finding repetitive violations of the Convention on account of the excessive length of civil proceedings. In *Sürmeli v Germany* of 2006, the court had already pointed out the lack of an effective remedy against excessively long court proceedings.³⁷⁵ In 2008, the BVerfG decided, in the case of custody rights for minors, that the clarification of disputed legal relationships within a reasonable time, a duration of two years and six months in the main and two years and five months in the interim injunction proceedings, within the right to effective legal protection in civil law disputes is unreasonably long.³⁷⁶ In *Rumpf v Germany* of 2010, the ECtHR required that Germany must introduce without delay and, at the latest, within one year from the date on which the judgment becomes final, a remedy, or a combination of remedies in the national legal system in line with the court’s conclusions regarding the present judgment and comply with the

³⁶⁸ *Kudła v Poland*, Case 30210/96 (ECtHR), Judgment 26 October 2000 [ECLI:CE:ECHR:2000:1026 JUD003021096] para 146-160.

³⁶⁹ F Calvez and N Regis, *Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights*, (3rd edn, European Commission for the Efficiency of Justice 2018) 68 ff.

³⁷⁰ *Ibid* 77.

³⁷¹ *Zannouti v France*, Case 42211/98 (ECtHR), Judgment 31 July 2001 [ECLI:CE:ECHR:2001:0731 JUD004221198].

³⁷² *Giummarra and Others v France*, Case 61166/00 (ECtHR), Judgment 12 June 2001 [ECLI:CE:ECHR:2001:0612JUD006116600].

³⁷³ *Mifsud v France*, Case 57220/00 (ECtHR), Judgment 11 September 2002 [ECLI:CE:ECHR:2002:0911 JUD005722000] para 15.

³⁷⁴ *Girard v France*, Case 22590/04 (ECtHR), Judgment 30 June 2011 [ECLI:CE:ECHR:2011:0630 JUD002259004] para 54.

³⁷⁵ *Sürmeli v Germany*, Case 75529/01 (ECtHR), Judgment 8 June 2006 [ECLI:CE:ECHR:2006:0608 JUD007552901] para 129.

³⁷⁶ Case 1 BvR 547/06 (BVerfG, Germany), Decision 24 July 2008, para 45.

requirements of Art 46 of the Convention.³⁷⁷ On 3 December 2011, *Gesetz über den Rechtsschutz bei überlangen Gerichtsverfahren und strafrechtlichen Ermittlungsverfahren* (Law on legal protection in excessively long court proceedings and criminal investigations, ÜGRG) entered into force in Germany. Art 198 (1) of the revised German Court Organization Act provides the following: Anyone who suffers a disadvantage as a party to the proceedings because of inadequate duration of legal proceedings will be adequately compensated. The appropriateness of the duration of the proceedings depends on the circumstances of the individual case, in particular on the difficulty and importance of the proceedings and the behaviour of those involved in the proceedings and third parties. The law established a state liability for material and immaterial damages caused by the excessive duration of proceedings. Whether the duration is excessive is to be evaluated by the criteria put forth by the ECtHR, in particular the complexity of the matter, the actions of the parties, and the implications of the procedure for them.³⁷⁸ Whoever suffers a disadvantage as a result of the unreasonable duration of a procedure before the BVerfG as a party shall be adequately compensated according to Art 97a – 97e of *Bundesverfassungsgerichtsgesetz* (the Federal Constitutional Court Act, BVerfGG).³⁷⁹

- 178 In Spain, Art 121 of the Constitution stipulates that, ‘Losses incurred as a result of judicial errors or a malfunctioning of the administration of justice shall be compensated by the State, in accordance with the law’. The *recurso di amparo* before the Constitutional Court offers plaintiffs two remedies for unreasonably lengthy proceedings, in which the pending proceedings are immediately set in train, either by an order to cease the period of inactivity or by setting aside the decision that is unjustifiably prolonging the proceedings. The aggrieved parties are entitled to apply to the ministry of justice for compensation for judicial malfunctioning according to Arts 292-296 of the LOPJ once proceedings are over and the minister’s decision is liable to appeal to the administrative courts. In *Gonzalez Marin v Spain*, the ECtHR held that unreasonable lengthy proceedings constitute a malfunctioning of the judicial system and considered that the remedy under Arts 292 f of the LOPJ is sufficiently accessible and effective for litigants.³⁸⁰ The court has also ruled in connection with excessively lengthy proceedings in the Constitutional Court in its admissibility decision of 28 January 2003 in the *Caldas Ramirez de Arellano* case.³⁸¹

³⁷⁷ *Rumpf v Germany*, Case 46344/06 (ECtHR), Judgment 2 September 2010 [ECLI:CE:ECHR:2010:0902JUD004634406] para 73.

³⁷⁸ R Hüßtege, in H Thomas and H Putzo (ed), *ZPO* (36th edn, CH BECK 2105), § 198 GVG, para 3-5.

³⁷⁹ Case 1 BvR 2781/13 (BVerfG, Germany), Decision 20 August 2015, (NJW 2015, 3361).

³⁸⁰ *Gonzalez Marin v Spain*, Case 39521/98 (ECtHR), Judgment 5 October 1999 [ECLI:CE:ECHR:1999:1005JUD003952198].

³⁸¹ *Caldas Ramirez de Arellano v Spain*, Case 68874/01 (ECtHR), Judgment 28 January 2003 [ECLI:CE:ECHR:2003:0128JUD006887401]; Regarding the contents, reference was made to F Calvez and N Regis, *Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights* (3rd edn, European Commission for the Efficiency of Justice 2018), 69 ff.

179 Since 2002, the ECtHR has issued over 80 judgments against the Russian Federation, finding a violation of the right to a trial within a reasonable time of Art 6 of the ECHR, forcing the Russian legislator to establish a corresponding mechanism at the national level. It is the Federal Law of 30 April 2010 № 68-FZ on Compensation for the violation of the right to a trial within a reasonable time or the right to execute a judicial act within a reasonable time.

5 RIGHT TO A PUBLIC PROCESS

180 ‘Publicity’ or ‘the principle of open justice’ has been the justified reaction against a system of secret justice that was used until the eighteenth century both in the common law system and the continental legal system.³⁸² Many international norms, including the UN Declaration of Human Rights, declare the right to a public hearing in civil and administrative litigation. Contrary to international norms, few countries have the fundamental right to a public hearing in their Constitutions.³⁸³ However, the principle of publicity is generally guaranteed in civil proceedings, and it is accepted as a common law principle in the common law system and seen as the derivative principle of the rule of law or democracy in the civil law system. Regarding publicity in civil litigation, not only public hearing but also access to court records, judgments, and courts by mass media are sub-subjects. The right to a public trial in criminal proceedings has historically played a role in the general oversight of the exercise of judicial power in political criminal trials, and, along with the principle of presumption of innocence, it has served as a tool to protect the accused. The issues of publicity in civil proceedings should be considered together with the view of the parties or the persons concerned in the proceedings and protecting the privacy or confidentiality of the parties. With the digitalization of the judicial system, the tension between the principle of publicity and the protection of privacy has entered a new phase. The clauses of the ECHR and ICCPR foresee that the right to a public hearing may enter into conflict with general interests or the parties’ right to the protection of their private life.³⁸⁴ In this subchapter, the content of the principle of publicity as a constitutional or fundamental value is examined along with the tension with other constitutional values.

³⁸² M Cappelletti (n 19) 706.

³⁸³ In some countries, the constitution provides for the right to a public criminal trial. Examples are the Sixth Amendment of the US Constitution, Art 27(3) of the Korean Constitution, and Art 37(1) of the Japanese Constitution.

³⁸⁴ E Brems, ‘Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms’ [2005] Human Rights Quarterly 294, 299.

5.1 Sources of the Right to a Public Process

5.1.1 National Constitutional Sources

5.1.1.1 Brazil

- 181 Art 5 LX and 93 IX of the Brazilian Constitution guarantee the publicity of procedural acts and all judgments. However, the law may restrict the publicity of procedural acts when the defence of privacy or the social interest require it and may limit attendance to the interested parties and their lawyers when preservation of the right to privacy of the party interested in confidentiality will not harm the right of the public interest to information.

5.1.1.2 England and Wales

- 182 The principle of a public process in civil lawsuits is recognised in common law. In the leading case, *Scott v Scott* in 1913, the House of Lords (Judge Haldane) declared the broad principle that requires the administration of justice to take place in open court and held that the exception of the principle must be based on the application of some other and overriding principle, not leaving its limits to the individual discretion of the judge.³⁸⁵ The Supreme Court of the UK stated as follows on the two-folded principal purposes of the open justice principle as follows in *Cape Intermediate Holdings Ltd v Dring* in 2019:³⁸⁶

The first is to enable public scrutiny of how courts decide cases - to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly. [...] But the second goes beyond the policing of individual courts and judges. It is to enable the public to understand how the justice system works and why decisions are taken. For this, they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases.

5.1.1.3 France

- 183 The right to a public hearing or the principle of publicity is not expressly stated in the Constitution, but it has constitutional value. First, the CC had acknowledged the existence of such constitutional principles only in criminal proceedings.³⁸⁷ In 2019, the CC extended this principle of publicity to civil proceedings based on Arts 6 and 16 of the DDH 1789. However, some limits may be decided by the legislator according to the

³⁸⁵ *Scott v Scott* (House of Lords, UK), Judgment 5 May 1913 ([1913] AC 417).

³⁸⁶ *Cape Intermediate Holdings Ltd v Dring*, Case UKSC 2018/0184 (Supreme Court, UK), Judgment 29 July 2019 ([2019] UKSC 38).

³⁸⁷ Case 2004-492 DC (CC, France), Decision 2 March 2004 [ECLI:FR:CC:2004:2004.492.DC]; Case 2017-645 QPC (CC, France), Decision 21 July 2017 [ECLI:FR:CC:2017:2017.645.QPC].

constitutional requirements justified by the general interest, nature of the proceedings, or specific features of the procedure, provided that this does not result in disproportionate harm to the objective pursued.³⁸⁸

5.1.1.4 Germany

- 184 The principle of publicity is not expressly mentioned in the Basic Law but derives from the principles of democracy and the rule of law (Art 20 (1) (2) (3) Basic Law). At first, the BVerfG denied the constitutional value of the right to a public process³⁸⁹ but changed its case law. In the decision of 24 January 2001, the court held as follows:³⁹⁰

The principle of that oral court hearings are open to the public is based on a long tradition in Germany that has its roots in the Enlightenment. The principle was developed in Germany in particular by Anselm v Feuerbach shaped. On the one hand, the publicity in the courts should protect those involved in the hearing, in particular the accused in criminal proceedings, against a secret justice system that has been withdrawn from public scrutiny in the form of a procedural guarantee. On the other hand, it was assumed that the people will be called to appear in court for the sake of their own rights. It was therefore perceived as the legal position of the people to take note of the events in the course of a court hearing and to subject the state authority acting through the courts to control in the form of public review. Both aspects are covered by the rule of law under the Basic Law and are also essential for democracy.

The principle is meanwhile considered essential in promoting trust between the courts and the public and in providing democratic legitimacy to judicial decisions.³⁹¹

5.1.1.5 Korea

- 185 The right to publicity is guaranteed explicitly in the Constitution. Art 109 of the Korean Constitution stipulates that trials and decisions of courts shall be open to the public. In cases where there is a danger of undermining national security, disturbing public safety and order or being harmful to good morals, trials may be closed to the public by court decision. There is controversy over the scope of the publicity of trials guaranteed by the

³⁸⁸ Case 2019-778 DC (CC, France), Decision 21 March 2019 [ECLI:FR:CC:2019:2019.778.DC] para 102.

³⁸⁹ Case 2 BvR 629 u. 637/62 (BVerfG, Germany), Decision 7 March 1963 (NJW 1963, 757).

³⁹⁰ Case 1 BvR 2623/95 (BVerfG, Germany), Judgment 24 January 2001 [ECLI:DE:BVerfG:2001:rs20010124.1bvr262395] [NJW 2001, 1633].

³⁹¹ C Degenhart, in J Isensee and P Kirchhof (ed), *Handbuch des Staatsrechts der Bundesrepublik Deutschland, Band V: Grundrechte: Wirtschaft, Verfahren, Gleichheit* (3rd edn, CF Müller Juristischer Verlag 2007), § 115, para 42; L Rosenberg, K H Schwab and P Gottwald, *Zivilprozessrecht* (18th edn, Verlag CH Beck 2018), § 21, para 16.

Constitution. In a narrow interpretation, it means only access to the oral hearings, and in a broader interpretation, it means including access to court records and judgments.³⁹²

5.1.1.6 Spain

- 186 Art 24 (2) of the Spanish Constitution guarantees the right to a public trial, and Arts 232-236 of the LOPJ regulate this matter. Judicial proceedings should be public except as otherwise provided in procedural laws.

5.1.1.7 The US

- 187 There is no constitutional provision that provides for publicity other than the Sixth Amendment that stipulates the right of criminal defendants to a public trial. However, the First Amendment to the United States Constitution is understood to guarantee public access to trials and is also valid in common law for civil cases. The US Supreme Court never affirmed the right to a public trial for civil cases, although some lower federal courts as well as state courts concluded that the right of the public to attend civil trials is grounded in the First Amendment as well as the common law. Rule 77 (b) and Rule 43 (a) USFRCP require trials on the merits and for taking witnesses' testimonies to be open to the public.

5.1.1.8 China

- 188 The principle of publicity is guaranteed in the Constitution. Art 130 of the Constitution stipulates that, 'Except in special circumstances as specified by law, all cases in the courts are heard in public'. Thus, the circumstances of a closed trial must be clearly stipulated by law and cannot be arbitrarily decided.³⁹³

5.1.1.9 Russia

- 189 The principle of publicity in the Russian civil procedure is enshrined in Art 123 (1) of the Constitution, Art 10 of the Civil Procedure Codes, and in the special Law of 22 December 2008 № 262-FZ 'On providing access to information about the activities of courts in Russian Federation'. This principle is understood as the openness of the proceedings, meaning the possibility of public participation. Exceptions to the general rule and limitations of the principle are expressly permitted by the Constitution and may be established only by federal law. Procedural legislation provides for the right of those present to record proceedings through audio or written notes.³⁹⁴ Regardless of whether

³⁹² S Lee, *New Civil Procedure Law* (14th edn, Parkyoungsa 2020) 311 ff.

³⁹³ W Zhang, *Civil Procedure Law*, (Law Press 2019) 63.

³⁹⁴ Court permission is required for photography, video recording and live broadcasting (Art 10(7) of CCP Russian Federation).

the proceedings were open or closed, the decision of the court is subject to public announcement.³⁹⁵

5.1.2 Supranational Sources

- 190 Art 10 of the Universal Declaration of Human Rights of 1948, Art 6 (1) of the ECHR, Art 14 (1) of the ICCPR, and Art 47 of the CFREU stipulate the right to a public hearing in civil proceedings, but in Art 8 of the ACHR, the publicity of proceedings is only guaranteed for criminal cases. Art 6 (1) of the ECHR states further that ‘judgment shall be pronounced publicly’, which would seem to suggest that reading out in an open court is required. Regarding the value and meaning of public hearings, the ECtHR has ruled as follows:³⁹⁶

The Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in Art 6 (1). This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Art 6 (1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention.

- 191 Art 20 of the PTCP provides the principle of public proceedings with limited exception, and Rule 17 of the ERCP formalizes the principle of publicity in hearings and court decisions except for to protect public interests like national security, privacy, professional secrets, or the due administration of justice.

5.2 Contents

5.2.1 The Public Conduct of Court Proceedings

5.2.1.1 Free Access to Courtrooms

5.2.1.1.1 For Litigants

- 192 As discussed before (2.2.2.2.1), the right of parties to a public hearing is related to the right to be present in person at the oral and public hearing, namely the right to be heard. Another issue is whether oral and public hearings must be guaranteed to the parties.
- 193 In France, according to Art L. 212-5-1 of the COJ, which came into force on 1 January 2020, before the first instance civil court (*tribunal judiciaire*), the proceedings may, at

³⁹⁵ An exception to this rule is the procedure for announcing decisions affecting the rights of minors.

³⁹⁶ *Diennet v France*, Case 25/1994/472/553 (ECtHR), Judgment 26 September 1995, para 33; *Malhous v the Czech Republic*, Case 33071/96 (ECtHR), Judgment 12 July 2001 [ECLI:CE:ECHR:2001:0712 JUD003307196] para 55.

the initiative of the parties where they expressly agree, take place without a hearing. However, the court may decide to hold a hearing if it is impossible to reach a decision based on the written evidence or if one of the parties requests it. And Art L. 212-5-2 of the COJ provides the possibility of a digital procedure to the specific case where the defendant lodges a statement of opposition to an order for payment with the consents of the parties. The CC held that these legal provisions are following the Constitution: it insisted that they can be applied only with the parties' consent.³⁹⁷ Decree No 2020-1452 of 27 November 2020 expressly extends the possible waiver of the hearing before the first instance civil court to summary proceedings (Art 836-1 of the FCCP), accelerated proceedings on the merits (Art 839 (2) of the FCCP), fixed day proceedings (Art 843 (2128) of the FCCP) and proceedings before the family court outside divorce and after divorce regarding applications for review of compensatory benefits (Art 1140 (2) of the FCCP). The new decree also modifies Art 828 of the FCCP, which now gives more details regarding the proceedings without hearing. At any time during the proceedings (not only when starting the proceedings), the parties may expressly agree that the proceedings shall be conducted without a hearing.³⁹⁸

- 194 In German, the court may decide without an oral hearing with the consent of the parties according to Art 128 (2) s 1 and Art 495a of the GCCP. The BVerfG stated that, in principle, Art 103 (1) of the Basic Law does not give rise to a right to an oral hearing or a personal hearing; rather, it is for the legislature to decide how the right to be heard should be granted.³⁹⁹
- 195 According to the judgment of the ECtHR, the right to a public hearing under Art 6 (1) of the ECHR implies the right to an oral hearing at least at one level of jurisdiction unless there are exceptional circumstances that justify dispensing with a hearing.⁴⁰⁰ The court has identified the exceptional circumstances as follows: (a) where there are no issues of credibility or contested facts that necessitate a hearing, and the courts may fairly and reasonably decide the case based on the case file; (b) in cases raising purely legal issues of limited scope or points of law of no particular complexity; and (c) where the case concerns highly technical issues.⁴⁰¹ As regards proceedings concerning prisoners, if they had been deprived of the opportunity to present their cases effectively, the domestic authorities had failed to meet their obligation to ensure respect for the principle of a fair

³⁹⁷ Case 2019-778 DC (CC, France), Decision 21 March 2019 [ECLI:FR:CC:2019:2019.778.DC] para 65-67.

³⁹⁸ These contents refer to F Ferrand, 'COVID-19 and French Civil Justice' in B Krans and A Nylund (ed), *Civil Courts Coping with COVID-19* (Eleven International Publishing 2021), 88-89.

³⁹⁹ Case 1 BvR 765, 766/89 (BVerfG, Germany), Decision 8 February 1994 [NJW 1994, 1053(1053)]; Case 1 BvR 308/05 (BVerfG, Germany), Decision 17 March 2005 [NJW 2005, 1485(1486)].

⁴⁰⁰ *Fischer v Austria*, Case 16922/90 (ECtHR), Judgment 26 April 1995 [ECLI:CE:ECHR:1995:0426 JUD001692290] para 44; *Salomonsson v Sweden*, Case 38978/97 (ECtHR), Judgment 12 November 2002 [ECLI:CE:ECHR:2002:1112JUD003897897] para 36.

⁴⁰¹ *Ramos Nunes de Carvalho e Sá v Portugal*, Case 55391/13, 57728/13 and 74041/13 (ECtHR), Judgment 6 November 2018 [ECLI:CE:ECHR:2018:1106JUD005539113] para 190-191.

trial.⁴⁰² Parties have the right to attend and make oral submissions at a hearing, to choose another way of participating in the proceedings (for example, by appointing a representative), and to ask for an adjournment. Parties must be informed of the date and place of the hearing sufficiently in advance to be able to plan in order to effectively uphold those rights. A domestic court's failure to ascertain whether an absent party received the summons in due time and, if not, whether the hearing should be adjourned is in itself incompatible with the genuine respect for the principle of a fair hearing and may lead to a violation of Art 6 (1) of the ECHR.⁴⁰³ The lack of a hearing may or may not be sufficiently remedied at a later stage in the proceedings.⁴⁰⁴ Parties can waive their rights to a public hearing according to their own free will, whether expressly or tacitly, but such a waiver must be made unequivocally and must not run counter to any important public interest.⁴⁰⁵

5.2.1.1.2 For Those Other than the Litigants

196 Anyone may enter the courtroom and observe the proceedings as long as the trial is open to the public, that is, as long as the trial is not disclosed by the Constitution and the law. The openness of the court to the public means securing the fairness of the trial through public review of the conduct of judges and the truth of witnesses' testimonies and enhancing the confidence in the administration of justice through educating the public about the legal system.⁴⁰⁶

197 In Brazil, all trials conducted by bodies of the judiciary are to be public unless otherwise provided by law (Art 5 LX Brazilian Constitution). For cases under a gag order, only the parties, their counsel, public defenders, and members of the public prosecutor's office are allowed to attend the trial (Art 11 BRCCP).

⁴⁰² *Altay v Turkey (No 2)*, Case 11236/09 (ECtHR), Judgment 9 April 2019 [ECLI:CE:ECHR:2019:0419JUD001123609] para 78-81.

⁴⁰³ *Gankin and Others v Russia*, Case 2430/06, 1454/08, 11670/10 and 12938/12 (ECtHR), Judgment 31 May 2016 [ECLI:CE:ECHR:2016:0531JUD000243006] para 34.

⁴⁰⁴ *Malhous v the Czech Republic*, Case 33071/96 (ECtHR), Judgment 12 July 2001 [ECLI:CE:ECHR:2001:0712JUD003307196] para 62.

⁴⁰⁵ *Le Compte, Van Leuven and De Meyere v Belgium*, Case 6878/75, 7238/75 (ECtHR), Judgment 23 June 1981 [ECLI:CE:ECHR:1981:0623JUD000687875] para 59; *Håkansson and Stureson v Sweden*, Case 11855/85 (ECtHR), Judgment 21 February 1990 [ECLI:CE:ECHR:1990:0221JUD0011855] para 66.

⁴⁰⁶ L Cass describes the advantages of court openness as follows: Public proceedings (1) provide an appearance of fairness; (2) discourage bias or partiality in judicial rulings or prosecutorial conduct; (3) discourage perjury by requiring witnesses' assertions to be tested in public; (4) encourage witnesses who may not know they have relevant information to testify; (5) allow for rebuttal witnesses to counter false testimony; (6) provide the court, parties, and witnesses with scrutiny that fosters a stricter sense of conscientiousness in performing their duties; (7) instill confidence in the justice system; (8) educate the public about the legal system; (9) allow victims of the crime, family members, or others effected to observe and speak; and (10) have significant therapeutic value to the community. L Cass, 'In Open Court: Courtroom Closures and the Sixth Amendment Right to a Public Trial' (2019) 67 Dep't of Just. J. Fed. L. & Prac. 31, 34 ff.

- 198 In England and Wales, the general principle related to court proceedings, subject to rare exceptions, is that the court must sit in public.⁴⁰⁷ The words of Lord Diplock in the case of *Attorney General v Leveller Magazine Ltd* are well-known:⁴⁰⁸

If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the court itself, it requires that they should be held in open court to which the press and public are admitted. As respects, to the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this.

A public hearing is governed by Rule 39.2. UKCPR. The general rule is that a hearing is to be in public. However, it does not require the court to make special arrangements for accommodating members of the public.

- 199 In France, the principle of public hearings is also enshrined in Arts 22 and 433 of the FCCP. The hearings are public except where the law requires them to be held in the judge's council chamber. Art 11-1 Law Act No 72-626 of 5 July 1972 modified by Law Act No 2019-222 of 23 March 2019-Art 33 (V) stipulates the principle of the public hearings and the exceptions thereof.
- 200 In Germany, Arts 169-183 of the Court Organization Act (GVG) regulate public access to both civil and criminal proceedings. Art 169 (1) s 1 stipulates that hearings before the adjudicating court shall be public. The practical emphasis of this constitutional guarantee is no longer to allow access of individuals to a trial but to allow access of the press to the trial.⁴⁰⁹ The ensuing new challenges caused a discussion regarding the extent to which reporting during a trial is permitted, eventually leading to moderate changes to accommodate the general increase in public interest.⁴¹⁰ The violation of the law on the publicity of the hearings comprises grounds for appeal (Art 547 No 5 GCCP). Access to public hearings may be denied to minors and to persons who appear in a manner that is not in keeping with the dignity of the court (Art 175 (1) of the Court Organization Act).

⁴⁰⁷ *R v Felixstowe justices, ex p Leigh* (Divisional Court of EWHC, UK), Judgment 7 October 1986 [(1987) QB 582(592)].

⁴⁰⁸ *Attorney General v Leveller Magazine Ltd* (House of Lords, UK), Judgment 1 February 1979 [(1979) UKHL J0201-1].

⁴⁰⁹ L Rosenberg, K H Schwab and P Gottwald, *Zivilprozessrecht* (18th edn, Verlag CH Beck 2018), § 21, para 16.

⁴¹⁰ C Degenhart, in J Isensee and P Kirchhof (ed), *Handbuch des Staatsrechts der Bundesrepublik Deutschland, Band V: Grundrechte: Wirtschaft, Verfahren, Gleichheit* (3rd edn, CF Müller Juristischer Verlag 2007), §115, para 42.

- 201 In Korea, Arts 57 and 58 of the Court Organization Act stipulate the procedure for the openness of trials and the maintenance of order in the courts. Whether or not the trial is open and the ground for nondisclosure should be necessarily stated in the hearing protocol (Art 153 No 6 Korean CCP), and the violation of the law on the opening of the courts comprises grounds for appeal (Art 424 (1) No5 Korean CCP). The presiding judge may prohibit any people who may endanger the dignity and order of the court from entering the court or order them to leave the court and issue an order necessary for maintaining order in the court (Art 58 of the Court Organization Act). Taking measures to limit the number of spectators, such as by issuing tickets in advance in consideration of the courtroom's size, maintenance of order, and smooth progress of the trial, and allowing only holders of the tickets, does not breach the principle of publicity.⁴¹¹
- 202 In Spain, Art 232 (1) of the LOPJ stipulates that judicial proceedings should be public except as otherwise provided in procedural laws. Judges and courts may order all or part of the proceedings to be secret in nature for motives of public order and the protection of freedoms and rights (Art 232 (2) LOPJ).
- 203 In the US, Rule 77 (b) USFRCP stipulates the openness of the trials on the merits, and Rule 43 (a) USFRCP stipulates that the witnesses' testimonies should be taken open to the public. In *Richmond Newspapers, Inc. v Virginia* of 1980, the Supreme Court stated that even though the Constitution contains no provision that, by its terms, guarantees to the public the right to attend criminal trials, the right to attend criminal trials is implicit in the guarantees of the First Amendment because without the freedom to attend such trials, which people have exercised for centuries, important aspects of the freedom of speech and the press could be eviscerated.⁴¹² The holding of the court does not mean that the First Amendment rights of the public and representatives of the press are absolute, and a trial judge, in the interest of the fair administration of justice, may impose reasonable limitations on public access to a trial.⁴¹³
- 204 In China, citizens including journalists are allowed to sit in on the trial unless otherwise provided for by law. Art 137 of the CNCLP stipulates that 'The trial of civil cases by the courts shall be open to the public, unless they involve state secrets, personal privacy or otherwise stipulated by law. Divorce cases, cases involving commercial secrets, if the parties apply for a private trial, the trial may be held in private'.
- 205 In Russia, Art 12 (2) of the Law 'On providing access to information about the activities of courts in Russian Federation', which was adopted in 2008, allowed the procedure of admission of persons to proceedings to be determined by the rules of courts and (or)

⁴¹¹ Case 90Do646 (Supreme Court, Korea), Judgment 8 June 1990.

⁴¹² *Richmond Newspapers, Inc. v Virginia*, Case 79-243 (Supreme Court, US), Judgment 2 July 1980 [448 US 555, 580 (1980)].

⁴¹³ L Cass, 'In Open Court: Courtroom Closures and the Sixth Amendment Right to a Public Trial' (2019) 67 Dep't of Just. J. Fed. L. & Prac. 31, 35 ff.

other acts regulating the internal activities of courts. In practice each judicial body has now elaborated its own procedure for presence/pass of citizens to the court building. At the level of regional courts various regulations on accreditation of media representatives are applied. Such regulation authorized by the Law has a negative impact not only on the principle of publicity, but also on the principle of equality before the law and the court (Art 19 of the Constitution). Indeed, one citizen depending on the location of a particular court may exercise their right to be present at a public hearing in different ways.⁴¹⁴

5.2.1.2 Recording, Filming, and Relay Broadcasting in the Courtroom

- 206 The public need for information in judicial proceedings is considerable. The needs are currently being satisfied by the indirect public, which is primarily created by journalists. The discussion regarding the extent to which reporting during a trial is permitted, particularly whether the trial may be broadcasted by TV or by Internet, is ongoing.⁴¹⁵
- 207 Since 2003, the Brazilian Federal Supreme Court (*Supremo Tribunal Federal* - STF) plenary sessions have been broadcast live on a TV channel owned by the judiciary Branch – *TV Justiça*.⁴¹⁶ It was launched on 11 August 2002. The channel is dedicated mainly to the live broadcasting of judgments in the Supreme Federal Court and the Superior Court of Justice (*Superior Tribunal de Justiça* – STJ).⁴¹⁷
- 208 In England and Wales, photography and broadcasting of a Crown Court was illegal from 1925 until June 2020 per Art 41 of the Criminal Justice Act and Art 9 of the Contempt of Court Act of 1981. Art 41 of the Criminal Justice Act 1925 prohibits the taking of photographs and making of sketches in and around the court and the publishing of any such photograph or sketch. Case law has interpreted Art 41 to also prohibit filming in court. Art 9 of the Contempt of Court Act of 1981 prohibits the recording of sounds except with leave of the court, and Art 9 (2) makes it a contempt of court to broadcast recordings of court proceedings to the public. However, broadcasting in the Supreme Court is allowed through section 47 of the Constitutional Reform Act of 2005. This exemption from the Criminal Justice Act of 1925 was intended to replicate the arrangements for broadcasting that had existed in the House of Lords before the establishment of the Supreme Court. Since 2009 the Supreme Court has been

⁴¹⁴ See more about discussion: D Ya Maleshin, 'The concept of the reform of open justice' (2015) № 1(16) The Legislation 44-49; K A Shumova and A D Nahodnova, 'The problem of ensuring the principle of publicity and openness in civil proceedings' (2018) 8 Arbitrazh and civil procedure, 8-12.

⁴¹⁵ The model of the publicity of hearings through TV or Internet is the model of the electronic publicity or worldwide audience model, in contrast to physical courtroom publicity. C Chainais, 'Open Justice and the Principle of Public Access to Hearing in the Age of Information Technology' in B Hess and A Harvey(ed), *Open Justice* (Nomos 2019), 70.

⁴¹⁶ V A Silva, 'Big Brother Is Watching the Court' (2018) 51 *Verfassung und Recht in Übersee/Law and Politics in Africa, Asia, and Latin America* 437, 438.

⁴¹⁷ STJ available at <https://www.stj.jus.br> accessed 3 February 2023.

broadcasting its hearings.⁴¹⁸ The Crown Court (Recording and Broadcasting) Order 2020 (SI 2020/637) came into force on 20 June 2020 and allows cameras to broadcast the sentencing remarks of High Court and Senior Circuit judges in some Crown Courts. Filming is restricted to sentencing remarks only, and no other court user – including victims, witnesses, jurors, and court staff – is filmed.⁴¹⁹

209 In France, the new Law Act No 2021-1729 of 22 December 2021 seeking to ‘restore confidence in the judicial institution’ contains several reforms including a new possibility to authorize audio-visual recording of court trials ‘for a reason of public interest of an educational, informative, cultural or scientific nature with a view to their broadcasting (Art 1)’. The Law Act permits the use of cameras inside courtrooms for the purpose of filming trials and making them available to the public. The recordings will only be made available to the public once the case has been decided. The Law Act also has a requirement to obtain written consent from all relevant stakeholders like the parties to the case, before filming.⁴²⁰ Decree No 2022-462 of 31 March 2022 has been adopted by the government to implement Article 1 of the Law Act of 22 December 2021. It states that applications for authorization to record must be sent to the Ministry of Justice (the opinion of the Minister of Justice is requested, but it is the president of the relevant court of appeal who will decide). This request must specify the public interest, educational, informative, cultural, or scientific reason for authorizing the recording. The journalist must also specify the editorial project as well as the recording and broadcasting methods. The ministry of justice has signed an agreement with a French public TV channel which has set up a programme on all types of hearings.

210 In Germany, Art 169 (1) s 2 of the Court Organisation Act prohibits recording and filming in courts. There has been a continuous discussion on the access of the media during a trial.⁴²¹ Art 17 (a) of the Federal Constitutional Court Act amended in 1998 stipulates that TV and radio broadcasts, filming, and sound recording shall be allowed in oral proceedings until the court has ascertained that the parties are present and during the public promulgation of decisions for public presentation and the publication of decisions’ contents. In 2001, the BVerfG stated that Art 169 (1) s 2 of the Court Organization Act is compatible with the freedom of information and broadcasting from Art 5 (1) s 1 and Art 2 of the Basic Law in connection with the rule of law and

⁴¹⁸ Proposal to allow the broadcasting, filming, and recording of selected court proceedings available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/217307/broadcasting-filming-recording-courts.pdf accessed 3 February 2023.

⁴¹⁹ Press release from Ministry of Justice and HM Courts & Tribunals Service available at <https://www.gov.uk/government/news/cameras-to-broadcast-from-the-crown-court-for-first-time> accessed 3 February 2023.

⁴²⁰ S Ajay, ‘France Minister of Justice proposes law to allow filming of trials’ (2021) JURISTnews, available at <https://www.jurist.org/news/2021/04/france-minister-of-justice-proposes-law-to-allow-filming-of-trials> accessed 3 February 2023.

⁴²¹ C E Eberle, ‘Gesetzwidrige Medienöffentlichkeit beim BVerfG?’, NJW 1994, 1637; L Rosenberg, K H Schwab and P Gottwald, *Zivilprozessrecht* (18th edn, Verlag CH Beck 2018), § 21, para 16.

democracy.⁴²² According to new Art 169 (3) of the Court Organization Act, reporting on the pronouncement of the judgment at the BGH is now possible on the basis of audio or video recordings if allowed by the court.

- 211 In Korea, recording, filming, and broadcasting in a courtroom without the permission of the presiding judge is prohibited (Art 59 of the Court Organization Act). A court may, if deemed necessary, tape-record the whole or part of pleadings or order a stenographer to record the hearings. And if any party petitions tape-recording or stenography, the court may grant the petition (Art 159 Korean CCP). The current Court Organization Act and the CCP do not explicitly provide for the method or procedure in which the parties themselves can record all or part of the hearings. In 2013, the Supreme Court enacted the Supreme Court Rules to allow recording, filming, and relay broadcasting of the hearings held in the Supreme Court, and since then, the hearings of the plenary sessions have been broadcast live on a TV channel or on the Internet 2-3 times per year.⁴²³
- 212 In Spain, all oral hearings are videotaped by the courts themselves. The parties may request the clerk for the copy of the recording (Art 147 SCCP). The video recording of the hearings should be made for the parties and should not be available for the public.⁴²⁴
- 213 In the US, placing cameras in the courtroom has historically stirred controversy. Opponents and proponents have invoked the First Amendment provisions guaranteeing the public's right to public information, the Sixth Amendment's rights to a fair and public trial, and the Fourteenth Amendment's due process protections. Electronic media coverage of criminal proceedings in federal courts has been expressly prohibited under Rule 53 of the Federal Rule of Criminal Procedure since the criminal rules were adopted in 1946. In 1965, the US Supreme Court ruled that 'the television industry, like other institutions, has a proper area of activities and limitations beyond which it cannot go with its cameras. That area does not extend into an American courtroom'.⁴²⁵ In 1972, the Judicial Conference of the United States adopted a prohibition against broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto. The prohibition, which was contained in the Code of Conduct for United States Judges, applied to criminal and civil cases. But in 1981, the Supreme Court ruled that 'the Constitution does not prevent states from allowing broadcast coverage of criminal trials' and said that 'the danger that jurors might be affected by the presence of cameras in the case was not enough to justify an outright ban on broadcast coverage'.⁴²⁶ Since 1988, there have been several discussions at the Judicial Conference, and a pilot program for cameras in the courtroom has been implemented. The following

⁴²² Case 1 BvR 2623/95 (BVerfG, Germany), Judgment 24 January 2001 [NJW 2001, 1633].

⁴²³ The hearings of the Supreme Court are conducted on matters of law, not on facts.

⁴²⁴ C Chainais, 'Open Justice and the Principle of Public Access to Hearing in the Age of Information Technology' in B Hess and A Harvey (ed), *Open Justice* (Nomos 2019), 70.

⁴²⁵ *Estes v Texas*, Case 256 (Supreme Court, US), Judgment 7 June 1965 [381 US 532, 586 (1965)].

⁴²⁶ *Chandler v. Florida*, Case 79-1260 (Supreme Court, US), Judgment 26 January 1981 [449 US 560, 582 (1981)].

is the current policy for cameras in trial courts: A judge may authorize broadcasting, televising, recording, or taking photographs in the courtroom and adjacent areas during ceremonial proceedings and may authorize such activities during other proceedings or recesses between such other proceedings only for the limited purposes, such as the presentation of evidence, the perpetuation of the record of the proceedings, security, other purposes of judicial administration, etc. When broadcasting, televising, recording, or photographing in the courtroom or adjacent areas is permitted, a judge should ensure that it is done in a manner that will 1) be consistent with the rights of the parties, 2) not unduly distract participants in the proceeding, and 3) not otherwise interfere with the administration of justice. According to the new cameras policy effective 22 September 2023, a judge presiding over a civil or bankruptcy non-trial proceeding may authorize live remote public audio access to any portion of that proceeding in which a witness is not testifying.⁴²⁷ It is noteworthy that the Supreme Court does not allow cameras in courtrooms while in session. This has been the subject of much debate. The Supreme Court makes audiotapes of oral arguments and opinions available to the public.

- 214 All the public hearings of the ECtHR have been filmed and broadcast on the Court's website in their entirety, with interpretation in French and English with the support provided by Ireland since 2007.⁴²⁸

5.2.2 *The Guaranteed Access to Court Files and Records*

- 215 Court files and records should be public for the parties. Access to the court records of the parties is for the preparation of pleadings, and, thus, it is related to the right to be heard.⁴²⁹ Regarding the complaint concerning access to the case files, the ECtHR scrutinises the decision-making procedure compliant with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the persons concerned.⁴³⁰ Court records should be open to persons with a legal interest to guarantee the principle of publicity. The problem is the scope of the interested parties. Court records contain an astonishing amount of private and sensitive information, ranging from social security numbers to the names of sexual assault victims. While court records have long been open to public inspection, the difficulty of accessing individual documents made the information in these records

⁴²⁷ The above description was referenced from the contents of 'History of Cameras in Courts' on United States Courts' website <https://www.uscourts.gov/about-federal-courts/judicial-administration/cameras-as-courts/history-cameras-courts> accessed 10 December 2023.

⁴²⁸ Webcast of ECHR available at <https://www.echr.coe.int/webcasts-of-hearings> accessed 10 December 2023.

⁴²⁹ H Schulze-Fielitz, in H Dreier (ed), *Grundgesetz Kommentar Band III* (Mohr Siebeck, 2008), Art 103 I, para 41.

⁴³⁰ *Evers v Germany*, Case 17895/14 (ECtHR), Judgment 28 May 2020 [ECLI:CE:ECHR:2020:0528 JUD001789514] para 86-87.

practically obscure.⁴³¹ Until recently, the privacy harms latent in the public openness of court records were generally regarded as insignificant because court records were difficult to search and access. But this 'practical obscurity' is rapidly disappearing as the courts move from the paper-based world to an interconnected, electronic world where physical and temporal barriers to information are eroding. With the move to online court records, these impediments to access are vanishing.⁴³²

- 216 In Brazil, the BRCCP regulates the right of lawyers to court records (Art 107 BRCCP).⁴³³ By the constitutional principle of publicity of judicial acts, court proceedings are, as a rule, accessible to the public in general. Therefore, case files may be freely accessed and free of charge, whether made online or directly at the courthouse, except when doing so would risk the constitutional right of the parties. More recently, Brazilian courts have started embracing the use of the electronic process of law in which complete case files are made available online.⁴³⁴ Established by the National Council of Justice (CNJ) Resolution No 331/2020 as the primary data source of the Judiciary Statistical System - SIESPJ, the National Judiciary Data Base - DataJud is responsible for the centralized storage of procedural data and metadata related to all physical or electronic and public or confidential processes of the courts indicated in items II to VII of Art 92 of the Brazilian Constitution.⁴³⁵
- 217 In England and Wales, the UKCPR regulates access to court records. Parties may obtain a copy of any document listed in paragraph 4.2A of the 'Practice Direction 5A' from the records of the court unless the court orders otherwise and obtain a copy of any other document filed by parties or communication between the court and parties or another person if the court gives permission (Rule 5.4B UKCPR). Non-parties are also able to access other documents on the court file with permission of the court (Rule 5.4C (2) UKCPR). At any hearing, the proceedings will be recorded unless the judge directs otherwise (Rule 39.9. UKCPR). Any party or other person may require a transcript (for

⁴³¹ In *DOJ (United States Department of Justice) v Reporters Committee for Free Press*, the Supreme Court of the US commented plainly that there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerised summary located in a single clearinghouse of information. *DOJ v Reporters Comm. for Free Press*, Case 87-1379 (Supreme Court, US), Judgment 22 March 1989, [489 US 749, 770-70, 780 (1989)].

⁴³² D S Ardia, 'Privacy and Court Records: Online Access and the Loss of Practical Obscurity' [2017] U. Ill. L. Rev. 1385, 1391-1392.

⁴³³ A lawyer has the right to 1) examine, at the court clerk's office, the records of any case regardless of the stage of the proceedings, being assured the right to obtain copies and record entries except in case of a gag order, in which case only the duly appointed lawyer shall have access to the case records; 2) request, as attorney-in-fact, to see the records of any lawsuit for a period of five days; and 3) take the case records from the court clerk's office for the legal term whenever required by the judge to enter a statement, as provided by law.

⁴³⁴ C Tavares Paes Advogados, 'In Review: Court Procedure in Brazil' (2021) LEXOLOGY, available at <https://www.lexology.com/library/detail.aspx?g=730a4a07-093c-4f97-a86b-d6c93ede23e6> accessed 3 February 2023.

⁴³⁵ CNJ website available at <https://www.cnj.jus.br/sistemas/datajud/sobre/> accessed 3 February 2023.

which there will be a fee). If the hearing is in private, non-parties can get a transcript, but only if the court orders. In *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court*, the Court of Appeal held that the public should be allowed access not only to the parties' written submissions and arguments but also to the documents that have been placed before the court and referred to during the hearing.⁴³⁶ In *Cape Intermediate Holdings Ltd v Dring*, the Supreme Court of the UK stated that

non-parties should not seek access unless they can show a good reason why this will advance the open justice principle, that there are no countervailing principles of the sort outlined earlier, which may be stronger after the proceedings have come to an end, and that granting the request will not be impracticable or disproportionate.⁴³⁷

Access can also be given to documents that are no longer on the court file, for example, because they were returned after a hearing.⁴³⁸ However, there was no public policy principle requiring early disclosure, even if the non-party was a journalist.⁴³⁹

- 218 In France, in non-contentious matters, third parties may be granted by the judge to consult the case file and to have copies thereof delivered to them if they show the cause of a legitimate interest (Art 29 of the FCCP).
- 219 In Germany, parties may inspect the court records of the dispute and may have the court officials issue execution copies, excerpts, and copies to them; non-parties who demonstrated legitimate interest can inspect the court records with an allowance of the president of the court (Art 299 (1), (2) GCCP). If the court records of the dispute should be kept as electronic files, the court officials can grant perusal of the files by providing a hard copy of the files, by calling them up on a computer screen, or by transmitting them as electronic documents (Art 299 (3) GCCP). When the court records of the dispute have been transferred to an image carrier or other data carrier, execution copies, excerpts, and copies of the image carrier or data carrier may be issued (Art 299a GCCP).
- 220 In Korea, parties or persons with a legitimate interest may apply for the perusal, copying, and issuance of a certified copy of the court records (Art 162 (1) Korean CCP). In addition, anyone can apply for the perusal of court records for a redress of rights, academic research, or public interest when the judgment has been finalized (Art 162 (2) Korean CCP). However, the court may restrict the perusal or the issuance of records and allow

⁴³⁶ *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court*, Case C1/2011/1019 (England and Wales Court of Appeal, UK), Judgment 3 April 2012 ([2012] EWCA Civ 420) para 85.

⁴³⁷ *Cape Intermediate Holdings Ltd v Dring (Asbestos Victims Support Groups Forum UK)*, Case ID UKSC 2018/0184 (Supreme Court, UK), Judgment 29 July 2019 ([2019] UKSC 38), para 47.

⁴³⁸ *Goodley v The Hut Group Ltd*, Case 2012 FOLIO 1356 (England and Wales High Court Commercial Court, UK), Judgment 6 May 2021 [(2021) EWHC 1193 (Comm)].

⁴³⁹ *Yar, R v Secretary of State for Defence*, Case CO/4200/2019 (England and Wales High Court Administrative Court, UK), Judgment 30 November 2021 [(2021) EWHC 3219 (Admin)].

access only to the parties when material matters relate to the privacy of parties, or a trade secret is involved (Art 163 (1) Korean CCP). Regarding the publicity of the court records of criminal cases, the Constitutional Court ruled that the refusal of a request for a copy of the court records on the finalized criminal case infringes on the right to know.⁴⁴⁰

- 221 In Spain, persons with a legitimate interest may access the books, files, and court records that are not reserved and, at their own expense, obtain testimony or certification of the data stated therein (Art 141 SCCP, Art 235 LOPJ). Parties and any individual with a direct and legitimate interest have the right to obtain, in the manner outlined in procedural laws, uncertified copies of the documents that form a part of the court records that have not been declared secret or classified (Art 234 (2) LOPJ).
- 222 In the US, common law and the First Amendment have been pointed out for the perusal of court records as two legal grounds. Traditionally, the disclosure of court records in courts has been made on a case-by-case basis by each court, and it depends on the discretion of the court officials who keep the records and the ability of each court to keep the records. In addition, those who wished to access the court records had to spend considerable time and effort searching the court records to access the information they were looking for. The Supreme Court ruled that ‘it is clear that the courts of this country recognize the general right to inspect and copy public records and documents, including proceeding records and documents’.⁴⁴¹ In *Richmond Newspapers, Inc.*, the Court held that the First Amendment has granted everyone the right to access the criminal procedure as an individual right.⁴⁴² The Supreme Court has held that the First Amendment mandates a presumption of public access only to criminal trials and some pre-trial proceedings. Nevertheless, the Supreme Court’s rationale for recognizing a First Amendment right of access to criminal proceedings applies with equal force to civil proceedings and court records. Indeed, many lower courts already recognize a First Amendment right of access to civil proceedings and court records.⁴⁴³ Starting with the federal bankruptcy court in 2001, the US federal courts introduced an electronic record disclosure system along with an electronic filing system called Case Management/Electronic Case Files (CM/ECF). The system known as Public Access to Court Electronic Records (PACER) allows for public online access to documents of all federal courts. PACER’s Case Locator permits users of the system to search by party name or social security number depending on the type of case; the search will return the names of the parties, the court where the case is filed, the case number, the date filed,

⁴⁴⁰ Case 90Hun-Ma133 (Constitutional Court, Korea), Decision 13 March 1991.

⁴⁴¹ *Nixon v Warner Communications Inc.*, Case 76-944 (Supreme Court, US), Judgment 18 April 1978 [435 US 589, 597 (1978)].

⁴⁴² *Richmond Newspapers, Inc. v Virginia*, Case 79-243 (Supreme Court, US), Judgment 2 July 1980 [448 US 555, 580 (1980)].

⁴⁴³ D S Ardia, ‘Privacy and Court Records: Online Access and the Loss of Practical Obscurity’ [2017] U. Ill. L. Rev. 1385, 1401.

and the date closed.⁴⁴⁴ Although PACER provides access only to the federal courts, several state courts have similar electronic filing and retrieval systems.

5.2.3 The Publication of Court Decisions

5.2.3.1 The Public Pronouncement

- 223 In France, judgments are pronounced publicly. Without prejudice to the application of other legislative provisions and except before the Court of Cassation, they are, however, not pronounced publicly: 1) in non-contentious matters, 2) in matters relating to the status and capacity of persons determined by decree, 3) in matters concerning privacy determined by decree, and 4) in matters involving business secrecy under the conditions provided for in 3) of Article L. 153-1 of the Commercial Code.⁴⁴⁵
- 224 In Germany, the judgment, as well as the final decision in matrimonial matters and family dispute matters, should be pronounced publicly. The public may, under the preconditions of non-disclosure of hearings, also be excluded from the pronouncement of the reasons for the decision or a part thereof by a special ruling of the court (Art 173 of the Court Organization Act). Art 311 of the GCCP stipulates the form of pronouncing the judgment. The judgment is pronounced by reading out loud its operative part of the judgment. When none of the parties has appeared at the hearing at which the judgment is pronounced, such reading of the operative part of the judgment may be replaced by reference being made to the same.
- 225 In Korea, Art 109 of the Korean Constitution stipulates that trials and decisions of the courts shall be open to the public. The publicity of decisions in this clause includes public sentencing of a judgment. A judgment must be pronounced by reading the text thereof pursuant to the original document and it takes effect by a pronouncement thereof (Art 205, 206 Korean CCP).
- 226 In the US, in *In re Washington Post Co.*, the Court of Appeals held sentencing in the criminal case to be subject to the public's First Amendment right of access.⁴⁴⁶
- 227 In China, judgments of cases that are tried in public or not should be pronounced publicly (The first sentence of Art 151 CNCPL).
- 228 Art 6 (1) of the ECHR provides that 'judgment shall be pronounced publicly', which would seem to suggest that reading out in open court is required. The ECtHR has held, however, that 'other means of rendering a judgment public' may also be compatible with Art 6 (1)

⁴⁴⁴ PACER website available at <https://pacer.uscourts.gov/> accessed 3 February 2023.

⁴⁴⁵ Art 11-2 Law Act No 72-626 of 5 July 1972, modified by Law Act No 2019-222 of 23 March 2019 - Art 33 (V).

⁴⁴⁶ *In re Washington Post Co.*, Case 85-2312, 85-5570 and 86-5502 (Court of Appeals Fourth Circuit, US), Judgment 11 December 1986 [807 F.2d 383, 389 (4th Cir. 1986)].

of the ECHR.⁴⁴⁷ Where a judgment was not pronounced publicly, it must be ascertained whether sufficient publicity was achieved by other means. The requirement for public pronouncement has been complied with when, by being deposited in the court registry, the full text of the judgment has been made available to everyone or when a judgment upholding that of a lower court which itself has been pronounced publicly has been given without a hearing.⁴⁴⁸ The requirement concerning the public pronouncement of judgments is satisfied when anyone who can establish an interest may consult or obtain a copy of the full text of the decisions, those of special interest being routinely published, thereby enabling the public to study how the courts generally approach such cases and the principles applied in deciding them.⁴⁴⁹

5.2.3.2 Access to Court Decisions

- 229 Although there are some differences in each country, court decisions can be accessed online by the general public, which was previously done through case books. Access to court decisions is much broader and more convenient than access to court records.
- 230 In Brazil, the publicity of all judgments is explicitly guaranteed by the Constitution but may be restricted by law when a party's right to privacy does not harm the right of the public to information (Art 93 IX Brazilian Constitution). The BRCCP requires the courts to publish precedents corresponding to their majority opinions in the manner established by the respective internal regulations and to keep to the factual circumstances of the precedents that motivated their creation when publishing case law (Art 926 BRCCP).
- 231 In England and Wales, the UKCPR regulates access of non-parties to court decisions as follows: a non-party may obtain a copy of a statement of the case or judgment or order only when (a) there is one defendant, and the defendant has filed an acknowledgement of service or a defence; (b) there is more than one defendant, and either (i) all the defendants have filed an acknowledgement of service or a defence; (ii) at least one defendant has filed an acknowledgement of service or defence, and the court gives permission; (c) the claim has been listed for a hearing; or (d) judgment has been entered in the claim (Rule 5.4. (3) UKCPR). The court may decide to restrict access considering an application submitted by a party or any person identified in a statement of the case (Rule 5.4. (4) UKCPR). There have been multiple sources for court judgment publications, of which BAILII (British and Irish Legal Information Institute) was the largest. From April 2022 judicial review rulings, European case law, commercial judgments and many more

⁴⁴⁷ *Moser v Austria*, Case 12643/02 (ECtHR), Judgment 21 September 2006 [ECLI:CE:ECHR:2006:0921JUD001264302] para 101-104.

⁴⁴⁸ *Axen v Germany*, Case 8273/78 (ECtHR) Judgment 8 December 1983 [ECLI:CE:ECHR:1983:1208JUD00827378] para 32; *RYAKIB BIRYUKOV v RUSSIA*, Case 14810/02 (ECtHR) Judgment 17 January 2008 [ECLI:CE:ECHR:2008:0117JUD001481002] para 32-34.

⁴⁴⁹ *B. and P. v the United Kingdom*, Case 36337/97 and 35974/97 (ECtHR), Judgment 24 April 2001 [ECLI:CE:ECHR:2001:0424JUD003633797] para 47; *WERNER v AUSTRIA*, Case 138/1996/757/956 (ECtHR), Judgment 24 November 1997 [ECLI:CE:ECHR:1997:1124JUD002183593] para 55.

cases of legal significance from the High Court, upper-tier tribunal, and the Court of Appeal are available on the National Archives website.⁴⁵⁰ The long-term aim is for all of them to migrate onto the website that has a track record for hosting digital files safely and securely. BAILII continues to provide free access to judgments for other jurisdictions, including Scotland, Northern Ireland, and the Commonwealth, as well as England and Wales, continuing their great service to date.⁴⁵¹

- 232 In France, subject to the specific provisions governing access to and publication of court decisions, court decisions shall be made available to the public free of charge in electronic form (Art L. 111-13 (1) COJ).⁴⁵² Third parties are entitled to obtain copies of publicly pronounced judgments (Art 11-3 of Law Act No 72-626 of 5 July 1972), except if the requests are abusive, in particular with regard to their number or their repetitive or systematic nature (Art L. 111-14 COJ). The French Supreme Court first disclosed only important judgments through the publication of case books and its website. The important Law Act No 2016-1321 of 7 October 2016 ‘pour une République numérique’ stated the principle of open data according to which all court decisions of all instances must be made accessible to all free of charge in electronic form. The aim of open data is to disseminate case law to ensure the transparency of justice and to strengthen confidence in justice.⁴⁵³ The implementation, however, required governmental decrees and adequate technology. The website of the Court of cassation now contains a new search engine called ‘Judilibre’. The comprehensive legal information search site operated by the government⁴⁵⁴ also provides a large number of judgments. Judges can also search all Supreme Court rulings issued after 1 January 1995 through the court’s internal computer network, which is not accessible to the public.
- 233 In Germany, courts publish important judgments through the publication of case books and websites, but not all judgments issued by the federal court are posted on the

⁴⁵⁰ National Archives website available at <https://caselaw.nationalarchives.gov.uk/>.

⁴⁵¹ Ministry of Justice and HM Courts & Tribunals Service press release, ‘Boost for Open Justice as Court Judgments Get New Home’, available at <https://www.gov.uk/government/news/boost-for-open-justice-as-court-judgments-get-new-home> accessed 3 February 2023.

⁴⁵² According to Art L. 111-13 COJ (2) and (3), the surnames and first names of natural persons mentioned in the decision, where they are parties or third parties, shall be concealed before being made available to the public. Where its disclosure would be likely to undermine the security or privacy of these persons or their entourage, any element enabling the parties, third parties, judges and members of the court registry to be identified shall also be concealed. The identity data of members of the judiciary and members of the Registry may not be re-used for the purpose or effect of evaluating, analysing, comparing or predicting their actual or presumed professional practices.

⁴⁵³ On the goals and consequences of open data, see L’open data des décisions de justice, ‘Rapport à Madame la garde des sceaux’ (2017), available at http://www.justice.gouv.fr/publication/open_data_rapport.pdf and L Cadiet, C Chainais and J M Sommer (ed), ‘La diffusion des données décisionnelles et la jurisprudence, Quelle jurisprudence à l’ère des données judiciaires ouvertes ?’, Rapport remis à la première présidente de la Cour de cassation et au procureur général près la Cour de cassation’ (2022), available at the website of the French Court of Cassation <https://www.courdecassation.fr/print/pdf/node/10562>. See ‘Quelle jurisprudence à l’ère des données judiciaires ouvertes? Actes du colloque du 27 novembre 2023’ (2024) JCP Semaine Juridique, suppl. to No 7-8.

⁴⁵⁴ Legal information search site available at <http://www.legifrance.gouv.fr/>.

website, and important judgments valuable as precedents are selectively posted. When a specific judgment is requested, there may be a fee may be sent by mail or e-mail. The BVerfG publishes each year's Case Book, which contains about 20 judgments and decisions. Regarding the publication of judgments, most of the judgments or decisions sentenced since January 1998 are digitized, converted into pdf files, and arranged in the order of the sentencing date on the website of the BVerfG so that anyone can access it for free through the internet.⁴⁵⁵ The BGH publishes 'Federal Supreme Court Judgment Collection', which is roughly divided into 'civil edition' and 'criminal edition'. Like the BVerfG, for judgments and decisions of the BGH adjudicated after 1 January 2000, pdf-converted judgments can be accessed and used free of charge through the website. Judgments before 2000 are mailed at a certain fee if requested in writing.⁴⁵⁶

- 234 In Korea, the Supreme Court and lower instant courts have published important judgments valuable as precedents through the publication of case books and their websites. Since 2015, all finalized judgments of civil proceedings have been open to the public (in addition to the parties and interested persons) according to the Korean CCP amended in 2011. For the perusal and copy of a judgment, protective measures must be taken so that personal information, such as the name written in the judgment, is not disclosed (Art 163-2 Korean CCP). Subsequently thereafter, a strong demand from practitioners for access to non-finalized judgments continued, and civil judgments of pending cases are made public starting from 1 January 2023 upon the amendment of the Korean CCP on 8 December 2020.
- 235 In Spain, judgments and other decisions shall be made public in the manner allowed or established in the Constitution and according to the law. Any interested party should be allowed access to the judgments or certain specific parts thereof; however, the access of the interested party may be restricted on the grounds of the right to privacy, the rights of the individuals requiring a special obligation of custody, and the guarantee of anonymity of the damaged parties (Art 212 (1), (2) SCCP, Art 266 LOPJ). Regarding the access to the text of the rulings and other resolutions issued within proceedings, Art 235 *bis* and Art 235 *ter* of the LOPJ stipulate that any personal data therein must have been removed with full respect for the right to privacy, the rights of individuals requiring special legal protection, and the guarantee of anonymity afforded to victims and injured parties. Art 236 *bis* to Art 236 *decies* of the LOPJ regulate data processing carried out within the proceedings for the protection of personal data.

⁴⁵⁵ Judgments and decisions website of the BVerfG available at https://www.bundesverfassungsgericht.de/SiteGlobals/Forms/Suche/Entscheidungensuche_Formular.html?language_=de accessed 3 February 2023.

⁴⁵⁶ Judgments and decisions website of the BGH available at https://www.bundesgerichtshof.de/DE/Entscheidungen/HinweiseNutzung/hinweiseNutzung_node.html accessed 3 February 2023.

- 236 In the US, the issue of publicity of judgment is included in the access to court records.⁴⁵⁷ The right to access court records has been recognized early because everyone should know the laws to be followed and should be able to know the judgments and interpretations of the courts that are part of the law and the basis for them. Court decisions have been published through official or unofficial reports, such as United States Reports (US), Supreme Court Reporter (S Ct), Federal Supplement (F Supp), etc. Currently, at the federal level, a system called PACER allows anyone to view court records online by registering and paying a certain fee.⁴⁵⁸ The policy was adopted to make no difference between browsing in court and browsing online.
- 237 In China, Administrative Measures for Publication of Judgments of the Supreme People's Court⁴⁵⁹ was released in 2000 to determine the principles for the disclosure of judgments, since then the judgments of leading cases have been public irregularly through publications and courts' websites. With the goal of promoting judicial fairness and enhancing trust in justice through the full and expeditious disclosure of judgments, the Regulations of the Supreme People's Court on the Publication of Judgments by the People's Courts on the Internet were adopted at the meeting of the Judicial Committee of the Supreme People's Court in 2013. According to the new provision, that was revised on 23 July 2016 and effective from 1 October 2016, all judgments by the people's courts with some exceptions, like cases involving state secrets, minors committing crimes, divorce proceedings or involving the custody and guardianship of minor children etc, shall be public on the Internet within seven days of the sentence.⁴⁶⁰
- 238 In Russia, with the adoption of the Law on providing access to information about the activities of courts in Russian Federation in 2008 the court decisions have been freely available via digital judicial services like My Arbiter and State Automated System (SAS) Justice, which contributed to strengthening of parties' procedural capability and allowed public to study decisions on particular cases as well. The publication of full texts of judicial acts, especially acts of the courts of the superior courts, also served to some extent as a fundament for uniformity of judicial practice.

⁴⁵⁷ Regarding the method and level of allowing online access by federal and state courts in the US, cf D Eisenberg, C Rahl, M Reinke and W Weaver, 'State and Federal Policy on Electronic Access to Court Records', available at <https://www.courts.state.md.us/sites/default/files/import/access/states7-5-01.pdf> accessed 3 February 2023.

⁴⁵⁸ E-Government Act of 2002, Pub. L. No 107-347, §205, 116 Stat. 2899, 2913 (2002).

⁴⁵⁹ Law on the Administration of the Publication of Judgment of the Supreme People's Court (最高人民法院裁判文书公布管理办法).

⁴⁶⁰ Regulations on the Publication of Judgment by People's Courts on the Internet issued by the Supreme People's Court (最高人民法院发布《关于人民法院在互联网公布裁判文书的规定》).

5.3 Exceptions to the Principle of Publicity

5.3.1 Traditional Exceptions

- 239 The principle of publicity or the right to a public trial is not absolute. The values that compete with publicity include national security, harmful effects on fair trials, protection of the confidentiality privileges of lawyers, potential physical harm, trade secrets, and privacy. The principle of publicity has traditionally been restricted on the grounds of these values.⁴⁶¹
- 240 In Brazil, the law may restrict publicity based on the requirement of protection of privacy and social interest (Art 5 LX Constitution).
- 241 In England and Wales, under the pre-UKCPR procedure as seen in *Scott v Scott*⁴⁶², the court has excluded the public on the grounds of the maintenance and upbringing of minors, the preservation of secret technical processes or other commercial confidences, the need to avoid the possibility of disorder, the refusal of a witness to testify publicly, and future prosecutions.⁴⁶³ Rule 39.2. (3)(4) UKCPR outline more detailed grounds for restrictions on public hearings as follows: the priority of the hearing object over publicity; national security; confidential information, including information relating to personal financial matters; a necessity to protect the interests of any child or patient; a hearing made without notice when it would be unjust to any respondent for there to be a public hearing; uncontentious matters arising in the administration of trusts or the administration of a deceased person's estate; or the court's consideration of the disclosure in the interests of justice.
- 242 In France, individual laws stipulate grounds for non-disclosure. Art 11-1 Law Act No 72-626 of 5 July 1972 was recently modified as follows: Hearings are public. Without prejudice to the application of other legislative provisions and except before the Court of Cassation, they nevertheless take place in the chambers of the council: 1) in non-contentious matters, 2) in matters relating to the status and capacity of persons determined by decree, 3) in matters relating to private life determined by decree, and 4) in matters involving business secrecy under the conditions provided for in 3) of Art L. 153-1 of the Commercial Code. The judge may also decide that the hearings will take place or continue in chambers if their publicity would result in an infringement of privacy, if all the parties request it, or if there are disturbances likely to disturb the serenity of justice. Art L. 153-1 of the Commercial Code stipulates that the judge may

⁴⁶¹ Concerning trade secrets, under Art 9 (2) of the EU Directive on Trade Secrets of 8 June 2016 Member States of the EU should ensure that the competent judicial authorities may, on a duly reasoned application by a party, take specific measures necessary to preserve the confidentiality of any trade secret or alleged trade secret used or referred to in the course of legal proceedings relating to the unlawful acquisition, use or disclosure of a trade secret.

⁴⁶² *Scott v Scott*, (House of Lords, UK), Judgment 5 May 1913 ([1913] AC 417, 438).

⁴⁶³ R Clayton and H Tomlinson, *Fair Trial Rights* (2nd edn, Oxford University Press 2010), para 11.184.

decide that the hearing shall not be public, and judgments shall not be pronounced in public in matters involving business secrecy if the protection of this secrecy cannot be ensured otherwise and without prejudice to the exercise of the rights of the defence. The CC ruled that these provisions, which do not disregard the principles of equality before the law and access to the public service of justice, nor Art 34 of the Constitution, nor any other constitutional requirement, conform with the Constitution.⁴⁶⁴ By contrast, the CC declared a legal provision limiting copies of the operative part of the judgment delivered to third parties when the court hearing has taken place without publicity, contrary to the Constitution; because of its generality and its mandatory nature, this restriction imposed by the contested provisions is not limited to cases where it would be justified, in particular, by the protection of the right to privacy.⁴⁶⁵

- 243 In Germany, Art 172 of the Court Organization Act stipulates five reasons for exceptions to the principle of publicity: endangerment of state security; fear of disruption of public order or public morals; fear of endangerment of life, limb, or liberty of a witness or another person; and overriding interests to protect an important business, trade, invention, or tax secret, and if a trade secret is discussed, the unauthorized disclosure of which by a witness or expert carries a penalty; and if a person under the age of 18 is examined. The requirement for trade secrets from the public can only be achieved by excluding the public from the oral hearing by Art 172 No 2, Art 174 (3) of the Court Organization Act. However, a secret evidence procedure in which only the expert and the court work together does not come into consideration; this would violate the right of the other party to be heard, which includes the right to be aware of the evidence.⁴⁶⁶ Art 16 to Art 20 of *Geschäftsgeheimnisgesetz* (the Trade Secrets Act), which came into force on 26 April 2019, provide for the protection of trade secrets about proceedings. In the case of trade secrets, the parties, their legal representatives, witnesses, experts, other representatives, and all other persons who are involved in the disputes bear the obligation to keep the information confidential even after the proceedings are over.
- 244 In Korea, according to Art 109 of the Constitution, if there is a danger that such trials may undermine national security, disturb public safety and order, or be harmful to public morals, trials may be closed to the public by court decision. Art 57 (1) of the Court Organization Act stipulates the same provision, such as Art 109 of the Constitution. If the court decided not to open a hearing to the public in the circumstances where there is no reason to restrict the publicity of the hearings and examine a witness, the testimony of the witness could not be evidence.⁴⁶⁷

⁴⁶⁴ Case 2019-778 DC (CC, France), Decision 21 March 2019 [ECLI:FR:CC:2019:2019.778.DC] para 103-105.

⁴⁶⁵ Case 2019-778 DC (CC, France), Decision 21 March 2019 [ECLI:FR:CC:2019:2019.778.DC] para 106-108.

⁴⁶⁶ Rauscher (n 209) para 428.

⁴⁶⁷ Case 2005Do5854 (Supreme court, Korea), Judgment 28 October 2005.

- 245 In Spain, Art 232 (1) of the LOPJ stipulates the grounds of the restriction on the publicity. Under exceptional circumstances, considering motives of public order and the protection of freedoms and rights, judges and courts may, via a ruling providing grounds, limit the scope of public access and order all or part of the proceedings to be secret in nature. Judges may exclude the publicity of a hearing for the protection of public order, national security in a democratic society, interests of minors, protection of the privacy of the parties and other rights and freedoms, or when special circumstances could harm the interests of justice (Art 138 (2), 140 (3) SCCP). The data in the judgments that allow the identification of the participants in a process, such as their name, image, address, and other personal data, are always reserved in judgment if any of the parties are minors or if the right to privacy may be affected (Art 266 LOPJ).
- 246 In the US, the First Amendment rights of the public and representatives of the press are not absolute. Just as a legislature may impose reasonable time, place, and manner restrictions upon the exercise of First Amendment freedoms, a trial judge may impose reasonable limitations upon the unrestricted occupation of a courtroom by representatives of the press and members of the public.⁴⁶⁸ The Supreme Court has sometimes required that restrictions be ‘essential to preserve higher values’ and at other times stated that they must be ‘necessitated by a compelling governmental interest’. The test for restricting publicity generally matches the Supreme Court’s strict scrutiny test, as applied in other First Amendment contexts. The ‘strong presumption’ of public access can be overcome when three requirements are satisfied: (1) The restrictions to access advance a compelling interest that is likely to be prejudiced by public access; (2) The restrictions are no broader than necessary to protect that interest; And (3) there are no other reasonable alternatives to restricting public access.⁴⁶⁹
- 247 In China, according to Art 137 of the CNCP, non-disclosure trials are divided into two categories. One category is the absolute non-disclosure, namely for the cases involving state secrets or individual privacy or as otherwise provided by law. The other category is the relative non-disclosure, namely for divorce cases and cases involving trade secrets. If a party applies for non-disclosure at such a case, the court may decide whether to close the hearings according to the specific circumstances.⁴⁷⁰
- 248 According to the wording of Art 6 (1) of the ECHR, the press and public may be excluded from all or part of the trial in the interests of morals, public order, or national security in

⁴⁶⁸ *Richmond Newspapers, Inc. v Virginia*, Case 79-243 (Supreme Court, US), Judgment 2 July 1980 [448 US 555, 600 (1980)].

⁴⁶⁹ D S Ardia, ‘Privacy and Court Records: Online Access and the Loss of Practical Obscurity’ [2017] U. Ill. L. Rev. 1385, 1408; Cf R T Reagan, ‘Sealing Court Records and Proceedings: A Pocket Guide’ (Federal Judicial Center 2010) https://permanent.fdlp.gov/gpo4813/sealing_guide.pdf accessed 3 February 2023, the Guide reviews several issues related to the sealing of court records, such as national security, grand jury proceedings, juveniles, false claims act, criminal justice act, personal identifiers, search warrants, discovery, etc, and presents a procedural checklist for courts.

⁴⁷⁰ C Song (ed), *Science of Civil Procedure Law* (Peking: Higher Education Press 2018) 76.

a democratic society, where the interests of juveniles or the protection of the private life of the parties so require. In the judgments of the ECtHR, ‘public order’⁴⁷¹; ‘the interests of juveniles’; ‘the protection of the private life of the parties’; ‘the protection of the professional confidentiality’, such as that of doctors and lawyers;⁴⁷² and ‘the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice’, such as the protection of the safety and privacy of witnesses or the promotion of the free exchange of information and opinion in the pursuit of justice,⁴⁷³ are in issue. Before excluding the public from a particular set of proceedings, the courts must consider specifically whether such exclusion is necessary for the protection of public interest and must confine the measure to what is strictly necessary to attain the aim pursued.⁴⁷⁴

5.3.2 Exceptions Linked to the Digitization of Civil Proceedings

249 New concepts based on information technology have appeared in jurisprudence, such as e-justice, e-proceedings, e-court or online court, etc, in addition to online hearings and their audio recordings, electronic document management and open internet access to information at all stages of the trial have been introduced into judicial practice. The digitalization of proceedings has driven positive movement in the direction of judicial reform, namely in increasing the openness and accessibility to the judiciary, the overall efficiency and acceleration of all court proceedings, the complication of corruption, and other negative phenomena that have caused outrage and formed legal nihilism in the population for decades.⁴⁷⁵ The terms ‘online human rights’ or ‘fundamental digital rights’ are also appearing to refer to human rights in the digital age, also known as the digital era or internet era.⁴⁷⁶ The application of electronic technologies in civil

⁴⁷¹ *ZAGORODNIKOV v RUSSIA*, Case 66941/01 (ECtHR), Judgment 7 June 2007 [ECLI:CE:ECHR:2007:0607JUD006694101] para 26.

⁴⁷² *Diennet v France*, Case 25/1994/472/553 (ECtHR), Judgment 23 March and 31 August 1995 [ECLI:CE:ECHR:1995:0323JUD001816091] para 34; *Hurter v Switzerland*, Case 53146/99 (ECtHR), Judgment 15 December 2005 [ECLI:CE:ECHR:2005:1215JUD005314699] para 30-32.

⁴⁷³ *B. and P. v the United Kingdom*, Case 36337/97 and 35974/97 (ECtHR), Judgment 24 April 2001 [ECLI:CE:ECHR:2001:0424JUD003633797] para 38-39; *OSINGER v AUSTRIA*, Case 54645/00 (ECtHR), Judgment 24 March 2005 [ECLI:CE:ECHR:2005:0324JUD005464500] para 51-52.

⁴⁷⁴ *Nikolova and Vandova v Bulgaria*, Case 20688/04§§ 74-77 (ECtHR), Judgment 17 December 2013, [ECLI:CE:ECHR:2013:1217JUD002068804] para 74-75, this case is concerning a hearing held in camera because of documents classified as state secrets.

⁴⁷⁵ N Veselovska and others, ‘Electronic Proceedings in Modern Legal Conditions’ (2021) 21 International Journal of Computer Science & Network Security 224, 224.

⁴⁷⁶ In France, the *Conseil d’État* published a research report titled ‘Digital and Fundamental Rights (Le numérique et les droits fondamentaux)’ in 2014, that outlines the major changes in the technological innovation, economy, along with the understanding of digital by society, and the results of a review of the effects of digital on fundamental rights. Groups of German citizens have endeavoured to establish the ‘Charter of Digital Fundamental Rights of the European Union’.

proceedings has the advantage of significantly increasing access to courts,⁴⁷⁷ but there is a big difference between physical access to courts and access to a computerized system for civil proceedings in relation to publicity.⁴⁷⁸ Against this background, there is a position to raise the question of whether the open courtroom, which requires the spectators to be present in the courtroom, is still up-to-date in the age of digital transformation.⁴⁷⁹ The trend of the digitization of the judicial system is accelerating in each country due to the COVID-19 pandemic. Regarding the rules and policies for public access to electronic court records, the Sedona report is worth noting, which categorises the basic policy approaches into four categories as follows, with the fourth being the most promising: 1) open electronic access with minimal limits, 2) generally open electronic access coupled with more significant limits on remote electronic public access, 3) electronic access only to documents produced by the courts, and 4) systematic re-evaluation of the content of public case files combined with limited access to electronic files. The fourth approach focuses on limiting the filing of information that should not be in public case files and on sealing or otherwise limiting public access to information that is truly private or confidential yet also necessary for the adjudication of the dispute.⁴⁸⁰

250 In Brazil, Law No 11, 419 of 19 December 2006 inaugurated the computerization of the judicial process in national law. The PJe, Electronic Judicial Process, is a system for processing legal proceedings whose objective is to meet the needs of the various segments of the Brazilian Judiciary.⁴⁸¹ The CNJ launched, at the end of February 2021, the Justice 4.0 Program. The initiative covers the '100% digital judgment' (Resolution No 345/2020), the digital platform of the Brazilian Judiciary Power (Resolution No 335/2020) and support to the courts in the operationalization of the national database of the Judiciary Power (Resolution No 331/2020). The Program aims to make the Brazilian

⁴⁷⁷ Videoconference technology supports the quality of justice, *inter alia*, because videoconference, especially via online video platforms, effortlessly bridges locations that are separated by great distances. In this aspect, it enhances the access to justice and reduces procedural costs and delays. The wider accessibility supports equality and legal certainty and stresses that videoconferencing is more than a cost-effective tool. G Fekete, 'Videoconference Hearings after the Times of Pandemic' (2021) 5 EU and comparative law issues and challenges series (ECLIC) 468, 482.

⁴⁷⁸ In this context, on 2 December 2020, the European Commission published 'Digitalisation of Justice in the EU', which outlines proposals for introducing or broadening the use of digital technology in justice systems, and emphasizes that the design and implementation of the digitalization of justice must ensure full respect to fundamental rights, as enshrined in the CFREU, such as the rights to the protection of personal data, to a fair trial, and to a fair remedy, including for those with no access to digital tools or the necessary skills to use them and taking account the situations of the elderly and disadvantaged individuals. Cf European Commission, Directorate-General for Justice and Consumers, 'Digitalization of justice in the European Union,' 2 ff <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2020:710:FIN> accessed 3 February 2023.

⁴⁷⁹ A Paschke, 'Digitale Gerichtsöffentlichkeit und Determinierungsgesamtrechnung' (2019) 9 Multimedia und Recht, 563, 564 ff.

⁴⁸⁰ A Blakley, 'The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality and Public Access in Civil Cases' (2007) Protective Orders, Confidentiality & Public Access 181-185.

⁴⁸¹ PJe website available at https://www.pje.jus.br/wiki/index.php/P%C3%A1gina_principal accessed 3 February 2023.

Judiciary more innovative, efficient, intelligent, collaborative, integrated, and transparent.⁴⁸²

- 251 In England and Wales, video hearings are permitted in the courts under the Access to Justice Act 1999 (for example, to hear the evidence of witnesses based abroad). Since 2016 the civil courts, as part of Her Majesty's Courts and Tribunals Service's (HMCTS) reform programme, had increased the use of online technology to deliver civil justice.⁴⁸³ The courts have been also testing video hearing technology to enable certain limited proceedings to be dealt with remotely. The Video Hearings Pilot Scheme aims to test a procedure for applications to set aside default judgments entered under Part 12 UKCPR to be heard by the court via an internet-enabled video link ('a video hearing'). All parties or their legal representatives attend the hearing, using the video link, from suitable IT equipment. Members of the public may access a hearing by attending the court in person and seeing and hearing the judge in the courtroom and the parties or their legal representatives on a screen in the courtroom. The pilot has been running from 2 March 2020 (Practice Direction 51V).⁴⁸⁴
- 252 In France, video hearings are possible in civil proceedings (Law Act No 2019-2022 of 23 March 2019). Their use started during the pandemic. Ordinance No 2020-304 of 25 March 2020 allowed the court to deviate from the publicity principle during the emergency. According to Art 7 (1) of the Ordinance the judge or the president of the court panel could decide that the hearing shall take place via a videoconference. If such technology is not available, the court could decide that the parties and their lawyers shall be heard by any electronic means, including by phone. When using such technologies, the judge shall conduct the proceedings and ensure that the rights of the defence and the adversarial character of the proceedings are safeguarded. This regulation remained in effect until 16 March 2021 according to the new ordinance of 18 November 2020.
- 253 In Germany, videoconferencing is provided in Art 128a of the GCCP. The court may permit the parties, their representatives, and advisers to stay at another location during the hearing and to act in the proceedings from there. Then, images and sounds from the hearing must be broadcast in real-time to the location and the courtroom. The court may examine a witness or an expert who stays at another location during the hearing. Regarding video conferencing, it is an issue how the principle of publicity should be realized during videoconferencing. Some scholars and a lower court support that during the videoconferencing, the principle of publicity only relates to the courtroom and the control function of publicity is retained by the simultaneous transmission there. It is not

⁴⁸² Justice 4.0 Program available at <https://www.cnj.jus.br/tecnologia-da-informacao-e-comunicacao/justica-4-0/> accessed 3 February 2023.

⁴⁸³ The HMCTS Reform Programme available at <https://www.gov.uk/guidance/the-hmcts-reform-programme> accessed 3 February 2023.

⁴⁸⁴ Practice Direction Amendments available at <https://www.justice.gov.uk/courts/procedure-rules/civil/pdf/update/cpr-115-pd-update.pdf> accessed 3 February 2023.

necessary for the audience present in the courtroom to be able to visually follow the transmission, and the acoustic impression is sufficient.⁴⁸⁵

- 254 In Korea, since 29 September 2016, the court may, by listening to the opinions of the parties, have the witness or experts present at the place where there is a relay device or an internet video device and examine the witness or expert by video and sound in the following cases: (1) There are special circumstances in which it is difficult for the witness or the expert to appear in court; (2) there are psychological or mental circumstances in which it is difficult for the witness to testify face-to-face with parties; or (3) it is necessary to interrogate a person residing in a foreign country as an expert. In these cases, the witnesses or the experts can make a statement sitting in front of the computer in their office or home (Art 327-2, 339-3, 340 Korean CCP).⁴⁸⁶ Art 287-2 of the Korean CCP, newly established on 17 August 2021 and came into force from 18 November 2021, presents the videoconferencing of hearings. If there are circumstances where parties have difficulties attending the hearings in the courtroom, the court can relay the hearings through a relay facility using a video or other relay device or by using an internet video device upon the request and consent of the parties. In this case, the court shall take necessary measures for the publicity of the hearing. By the provision, when the videoconferencing of the hearing is held outside the courtroom, it is controversial in practice how to take concrete measures for publicity.
- 255 In Spain, since 2003, Art 229 (3) and 230 of the LOPJ include several legal provisions authorizing courts to carry out videoconferences or other similar systems that allow two-way, simultaneous communication of image and sound, as well as visual, auditory, and verbal interactions between two persons or groups of persons that are geographically separated, ensuring the possibility of the parties contesting the evidence and safeguarding their right of defence in all cases when so agreed by the judge or court. The reality to digitalize the civil justice system by electronic filing, digital signatures, and electronic notifications and summonses in legal proceedings was attempted by the civil procedural law approved in 2015. Nearly all communications and notifications in Spanish civil court system are currently carried out through the official electronic platform *Lexnet*.

⁴⁸⁵ Musielak, Voit and Stadler, *ZPO* (18 edn, 2021)§ 128a, para 2; Case 21 U 125/19 (KG, Germany), Judgment 12 May 2020 (NJW 2020, 2656); in the case, during the hearing, only the three members of the Senate of the Court of Appeal were present in the courtroom, and they held a video conference there with the legal representatives of both parties, who were connected via web conference software. The court stated that this procedure is covered by Art 128a (1) of the GCCP, and the hearing was also open to the public, as the Court of Appeal was open to the public at the time of the hearing.

⁴⁸⁶ In Korea, the Framework Act on Electronic Documents and Electronic Transactions was enacted in January 2002, which enables all government agencies to work using electronic documents, and in March 2010, the Act on the Utilization of Electronic Documents in Civil Procedure, etc (EDCPA) was enacted. Details of the implementation of this Act were refined in 'Supreme Court Rules on the Utilization of Electronic Documents in Civil Procedure, etc', enacted in June 2013. Regarding the comparison of China, Japan, Taiwan, and Korea on the introduction of electronic technologies in judicial proceedings, H O Moon-Hyuck, 'Application of Electronic Technologies in Judicial Proceedings' (2020) 24 (2) Civil Procedure 269, 271 ff.

Lexnet is a platform for the secure exchange of information between judicial bodies and a wide variety of legal operators who, in their daily work, need to exchange judicial documents (notifications, writs, and lawsuits), launched in 2004.⁴⁸⁷ The videoconferencing in civil proceedings was initiated during the pandemic by the Royal Decree-Law 16/2020 of 28 April (RDL 16/2020).⁴⁸⁸

- 256 In the US, the First Amendment right of access to court proceedings can be overcome when the countervailing interests supporting secrecy are sufficiently compelling. Although the question of whether a specific interest will justify restrictions on public access can be answered in the abstract, it is clear from the case law whether personal privacy can be a compelling interest in certain situations.⁴⁸⁹ Rule 5.2. USFRCP requires the redaction of certain personal information in federal filings, both paper and electronic. Such information is security number and taxpayer identification number, date of birth, name of a minor, and financial-account number. In individual cases, the court may allow the record of the matter to be sealed to limit public access.
- 257 In China, to promote the two important goals of the judicial reform since 2013, namely judicial transparency and access to justice, Chinese courts have constructed four official websites,⁴⁹⁰ such as 'China Judgements Online'⁴⁹¹, 'China Judicial Process Information Online'⁴⁹², 'China's Enforcement Information Disclosure Website'⁴⁹³, 'China Court Trial Online'⁴⁹⁴. In addition, the courts at all levels have set up court affairs websites, 12,368 litigation service platforms, courts' Weibo, WeChat, apps and so on. 'Courts at fingertips' and 'Courts in the era of internet' are becoming new fronts for judicial openness.⁴⁹⁵ By June 2019, the national 'Smart Court' system was offering a complete process of online services to the public where access to the trial process, judgment documents, and execution information was assured, enabling litigants and their lawyers to check all cases relevant to them and the specific situation of the case by entering their names and ID on the national judicial Internet. Since 2016, when the Supreme Court established China

⁴⁸⁷ G Hillenius, 'Spain Expands Its Electronic Judicial Network' <https://joinup.ec.europa.eu/collection/justice-law-and-security/news/spain-expands-its-electronic> accessed 3 February 2023.

⁴⁸⁸ J G Sanz and J G G Silva, 'Video Conference Hearings in Spain: New Mandatory Rules for Court Proceedings Due to COVID-19' <https://www.ibanet.org/article/B5B479D3-228C-49B7-A170-2FD7E6F47F1D> accessed 3 February 2023.

⁴⁸⁹ D S Ardia, 'Privacy and Court Records: Online Access and the Loss of Practical Obscurity' (2017) U. Ill. L. Rev. 1385, 1427.

⁴⁹⁰ Y Fu, 'Civil Justice in China in the COVID-19 Period' in B Krans and A Nylund (ed), *Civil Courts Coping with COVID-19* (Eleven International Publishing, 2021) 42.

⁴⁹¹ 中国裁判文书网 <https://wenshu.court.gov.cn/> accessed 3 February 2023.

⁴⁹² 中国审判流程信息公开网 <https://splcgk.court.gov.cn/gzfwwww/> accessed 3 February 2023.

⁴⁹³ 中国执行信息公开网 <http://zxgk.court.gov.cn/> accessed 3 February 2023.

⁴⁹⁴ 中国庭审公开网 <https://tingshen.court.gov.cn/> accessed 3 February 2023.

⁴⁹⁵ Judicial Openness Makes Justice Visible under the Sun (司法公开让阳光下的正义可触可感), <https://www.court.gov.cn/zixun-xiangqing-307881.html> accessed 3 February 2023.

Trial Live Broadcast, more than 3,500 courts across the country have been connected to the network, and nearly 300,000 judges have conducted online live trials.⁴⁹⁶

- 258 The first case where the ECtHR examined the use of videoconferencing in a civil case was the case of *Vladimir Vasilyev v Russia*. In connection with the question of the in-person presence at the hearings, the ECtHR does not guarantee the right to be heard in person at a civil court but rather a more general right to present one's case effectively before the court and to enjoy equality of arms with the opposing side. According to the ECtHR, as a way of securing the applicant's participation in the proceedings, the national authorities could have held a session by way of a video link or in the detention facility insofar as is possible under the rules on court jurisdiction.⁴⁹⁷ In the case of *Yevdokimov and Others v Russia*, the ECtHR reiterated that the use of a video link or videoconferencing equipment in proceedings is aimed at reducing the delays incurred in transferring detainees and simplifying and accelerating the proceedings, and resorting to such facilities is not, as such, incompatible with the notion of a fair and public hearing. The court emphasized that it must be ensured that the detainee can follow the proceedings, see the persons present, hear what is being said, and be seen and heard by the other parties, the judge, and witnesses without technical impediment.⁴⁹⁸

5.3.3 Publicity and the COVID-19 Pandemic

- 259 The COVID-19 pandemic has had a great impact on the judicial proceedings. Courts have faced many of their own unique challenges as well. The primary goals of effective emergency management response included maintaining both the continuity of services, especially essential services and the health and safety of those responsible for providing those services. Each country's response to this was somewhat different, but in the spring of 2020, the measures, such as the suspension or postponement of cases, restriction on the openness of courtrooms, adaptation to online procedures, etc, were taken to protect the health and safety of trial participants. The COVID-19 pandemic has delayed and impeded access to justice, but it has consequently highlighted the need for reforms to digitalize the justice system⁴⁹⁹ and has driven the use of remote hearings⁵⁰⁰. Although remote hearings pose some inherent problems, there has been no concrete and practical

⁴⁹⁶ Y Fu, 'Civil Justice in China in the COVID-19 Period' in B Krans and A Nylund (ed), *Civil Courts Coping with COVID-19* (Eleven International Publishing 2021) 43-44.

⁴⁹⁷ *Vladimir Vasilyev v Russia*, Case 28370/05 (ECtHR), Judgment 10 January 2012 [ECLI:CE:ECHR:2012:0110JUD002837005] para 84.

⁴⁹⁸ *Yevdokimov and Others v Russia*, Case 27236/05, 44223/05, 53304/07, 40232/11, 60052/11, 76438/11, 14919/12, 19929/12, 42389/12, 57043/12 and 67481/12 (ECtHR), Judgment 16 February 2016 [ECLI:CE:ECHR:2016:0216JUD002723605] para 43.

⁴⁹⁹ European Commission, Directorate-General for Justice and Consumers, 'Digitalization of justice in the European Union' 1 <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2020:710:FIN> accessed 3 February 2023.

⁵⁰⁰ Remote Courts have been running in 56 countries by mid-July 2020, R Susskind, 'The Future of Courts' <https://thepractice.law.harvard.edu/article/the-future-of-courts/> accessed 1 October 2022.

discussion about how the public could access to remote courts and the risk of invasion of privacy for those involved with the use of Zoom or similar tools.⁵⁰¹

- 260 In Brazil, during the COVID-19 pandemic, the CNJ made available the Emergency Videoconferencing Platform for Procedural Acts to provide one more option to Brazilian courts and magistrates. The emergency platform was used by Brazilian courts, free of charge, for more than nine months, especially by those who did not have their solutions, because of the current locomotion restrictions caused by the pandemic. The practice of videoconferencing procedures has grown exponentially. After the end of the adjustment, each court was responsible for providing its own tool for the continuity of work remotely, as provided in the CNJ Resolution No 337/2020.⁵⁰²
- 261 In England and Wales, the Coronavirus Act of 2020 expanded the availability of video and audio links in court proceedings. On 24 March 2020, Practice Direction 51Y regarding video or audio hearings during the COVID-19 pandemic made under Rule 51.2. UKCPR was signed by the Master of the Rolls and the Lord Chancellor. During the period in which the direction was in force, when the court could direct that proceedings are to be conducted wholly as video or audio proceedings, and it was not practicable for the hearing to be broadcast in a court building, the court could direct that the hearing must take place in private when it is necessary to do so to secure the proper administration of justice. When a media representative could access proceedings remotely while they were taking place, there would be public proceedings.⁵⁰³⁻⁵⁰⁴ Increased use of audio and video technology has enabled justice to keep moving throughout the COVID-19 pandemic. At the discretion of the judiciary, thousands of hearings have taken place remotely, allowing cases to progress safely.⁵⁰⁵
- 262 In France⁵⁰⁶, during the COVID-19 pandemic, specific provisions were enacted to facilitate court proceedings without any hearing. According to the Ordinance No 2020-

⁵⁰¹ B Krans and A Nylund, 'Conclusions on Civil Courts Coping with COVID-19' in B Krans and A Nylund (ed), *Civil Courts Coping with COVID-19* (Eleven International Publishing 2021) 212.

⁵⁰² CNJ website available at <https://www.cnj.jus.br/plataforma-videoconferencia-nacional/> accessed 3 February 2023.

⁵⁰³ Courts and Tribunals Judiciary website available at <https://www.judiciary.uk/announcements/practice-direction-on-video-or-audio-hearings-in-civil-proceedings-during-the-coronavirus-pandemic/> accessed 3 February 2023.

⁵⁰⁴ Practice Direction 51ZA provided a temporary update to Rule 3.8. UKCPR and came into force on 2 April 2020. Until 30 October 2020, parties were permitted to consent to extensions of time of up to 56 days (instead of the usual 28 days) without having to notify the court provided that the extension did not jeopardise a hearing date. Practice Direction 51ZA available at <https://www.justice.gov.uk/the-trade-secrets-act/courts/procedure-rules/civil/rules/practice-direction-51za-extension-of-time-limits-and-clarification-of-practice-direction-51y-coronavirus> accessed 3 February 2023.

⁵⁰⁵ HMCTS published in November 2020 and last updated in December 2021 'Evaluation of remote hearings during the COVID 19 pandemic' <https://www.gov.uk/government/publications/hmcts-remote-hearing-evaluation> accessed 2 February 2023.

⁵⁰⁶ The following contents refer to F Ferrand, 'COVID-19 and French Civil Justice' in B Krans and A Nylund (ed), *Civil Courts Coping with COVID-19* (Eleven International Publishing 2021) 86-87.

304 of 25 March 2020, which was confirmed in the new ordinance of 18 November 2020, when the parties must be represented by a lawyer or when they are assisted or represented by a lawyer, although it is not mandatory, the judge or the president of the court panel could decide that the proceedings shall be exclusively written so that no hearing shall take place.⁵⁰⁷ Parties who were informed by any means of this decision may object to it within two weeks, except in specific proceedings, such as the ones for urgent interim relief or the ones in which the court must render its decision within precise time limits. The Court of Cassation referred the provision (through a QPC) to the CC,⁵⁰⁸ which had previously held that the holding of a public hearing in civil matters is one of the means to ensure the right to a fair trial guaranteed by Art 16 of the DDH 1789.⁵⁰⁹ The CC, however, ruled that the challenged provision conformed with the Constitution while insisting on the interest of the hearing as a legal guarantee of the constitutional requirements of the rights of the defence and the right to a fair trial. According to the CC, the challenged provision merely offers an option to the judge, depending on the circumstances of each case, to ensure that a hearing is not necessary to guarantee the fairness of the proceedings and the rights of the defence. In a detailed conclusion recalling the decisive nature of the contextual elements taken into consideration, the CC noted that, because of the particular health context resulting from the COVID-19 pandemic during the period of application of the challenged provisions, they do not deprive the constitutional requirements of the rights of the defence and the right to a fair trial of legal guarantees.⁵¹⁰

- 263 In Germany, no special measures have been taken to respond to the pandemic on a federal or state level, and within the scope of the statutory provisions for civil proceedings, the relevant courts and judges have decided what measures to take flexibly on a case-by-case basis, eg, written procedure (Art 128 (2) s 1 GCCP), dispensing with the taking of evidence (Art 411a GCCP), or examining evidence via videoconference (Art 128a GCCP).⁵¹¹
- 264 In Korea, the courts have not been completely lock-down even in the first half of 2020. By the social distancing policy to prevent the rapid domestic spread of COVID-19, hearings have been adjourned at the discretion of the presiding judges at various levels

⁵⁰⁷ The judge or the president of the panel may always decide to hold a hearing if they deem it necessary on their own initiative or at the request of the parties (Ordinance No 2020-1400, Art 6 (3)). In the case of psychiatric care without consent, the hospitalized person may request to be heard by the judge of freedoms and detention at any time. This hearing may be carried out by any means that makes it possible to ascertain his or her identity and guarantees the quality of transmission and the confidentiality of exchanges (Ordinance No 2020-1400, Art 6 (4)).

⁵⁰⁸ Case 20-40056 (Court of Cassation, France), Decision 24 September 2020.

⁵⁰⁹ Case 2019-778 DC (CC, France), Decision 21 March 2019 [ECLI:FR:CC:2019:2019.778.DC] para 102.

⁵¹⁰ Case 2020-866 QPC (CC, France), Decision 19 November 2020 [ECLI:FR:CC:2020:2020.866.QPC] para 14-21.

⁵¹¹ European Justice, COVID-19 Impact on Civil and Insolvency Matters available at https://e-justice.europa.eu/37843/EN/COVID19_impact_on_civil_and_insolvency_matters?GERMANY&member=1 accessed 3 February 2023.

or were conducted in the courtroom with all persons concerned wearing masks and spaced at a requisite distance. As a result, as aforementioned, in November 2021, the Korean CCP revised their stance on videoconferencing.

- 265 In Spain, a state of emergency was declared by Royal Decree 463/2020 of 14 March (RD 463/2020) under Art 116 (2) of the Spanish Constitution as a result of COVID-19. RD 436/2020 imposed the temporary adjournment of all proceedings being heard by the Spanish judiciary (with limited exceptions mostly in the criminal justice system) and the suspension of any time limits that might be running (replying to lawsuits, appeals, etc) while the state of emergency remained in force. The Spanish government passed the Royal Decree-Law 16/2020 of 28 April (RDL 16/2020) on procedural and management measures to combat COVID-19 in the system of the administration of justice to resume judicial activity by applying protective distance and health measures. Art 19 (2) of the RDL 16/2020 established that all Spanish courts (with some exceptions in the criminal justice system) should preferably hold their oral hearings, trials, and appearances by videoconference – independent of their subject matter – during the state of emergency and the three months following its lifting: that is, until 21 September 2020 unless extensions were imposed. Since 4 June 2020, a large number of oral hearings and trials in the civil proceedings have been held through virtual hearings, and most hearings and trials have been carried out without significant technical problems.⁵¹²
- 266 In the US, the exclusion of spectators in response to the COVID-19 pandemic presents a constitutional problem because the Sixth Amendment guarantees the right to a public trial for criminal defendants.⁵¹³⁻⁵¹⁴ The Coronavirus Aid, Relief, and Economic Security Act (CARES) adopted on 27 March 2020 relaxed the constitutional and statutory mandates and also directed that all the federal rulemaking committees study the question whether special rules should be added for the ‘emergency’ conditions. To the contrary, the Civil Rules have considerable flexibility to cope with the pandemic. As the pandemic has progressed, some states have allowed service by mail in many instances, not by the traditional method of service under the Federal Rules – ‘delivering a copy of the summons and the complaint to the individual personally’. The practical method of

⁵¹² J G Sanz and J G G Silva, ‘Video Conference Hearings in Spain: New Mandatory Rules for Court Proceedings Due to COVID-19’ <https://www.ibanet.org/article/B5B479D3-228C-49B7-A170-2FD7E6F47F1D> accessed 3 February 2023.

⁵¹³ S E Smith, ‘The Right to a Public Trial in the Time of COVID-19’ (2020) 77(1) Wash. and Lee L. Rev. Online 1,3 <https://scholarlycommons.law.wlu.edu/wlulr-online/vol77/iss1/1> accessed 3 February 2023.

⁵¹⁴ Amid the 1918-1919 flu pandemic, an Ohio appellate court ruled as follows: ‘The accused is entitled to a public trial. This requirement is for his benefit that the public may see that he is fairly dealt with and not unjustly condemned; but where at the time of the trial a general epidemic prevails, under the police power, the trial court, upon its own motion, may exclude the general public from the trial when the public health and welfare justify such exclusion, and such exclusion does not operate unreasonably beyond the occasion of its enactment’. *Colletti v The State of Ohio* (Court of Appeals for Summit County, US), Judgment 23 May 1919 [12 Ohio App. 104, 122 (1919)].

deposing witnesses has been changed from in person confrontation to remote means. Remote testimony has been implemented under the compelling circumstances of Rule 43 (a) USFCPR. The courts have shifted to online, which is consistent with Rule 77 (b) USFCPR. The Supreme Court of the United States also had telephone arguments. Due to the pandemic, public access has been furthered in some ways by holding proceedings online.⁵¹⁵

267 In China, the number of online hearings in 2020 increased 9-fold compared with that in the previous year. From 3 February to 20 November 2020, online filing, online mediation, electronic service, and online evidence exchange were actively used based on the national 'Smart Court' system.⁵¹⁶

6 WRAP UP

268 In this chapter, the principles of civil proceedings that have had or should have constitutional or fundamental value were examined in the jurisdiction of Brazil, England and Wales, France, Germany, Korea, Spain, US, China, and Russia.

269 The principle of independence of judges or the independence of the judiciary has been constitutionalized in most jurisdictions. International norms, like the UN Basic Principles, contributed greatly to the constitutionalization of the principle. The right to impartial judges is guaranteed as a fundamental right without explicit provision. However, the role of judges in protecting individual rights and freedoms in civil proceedings differs depending on the system of the countries or national situation. In civil proceedings, if a person who was not directly involved in the hearing of the case is allowed to decide the case, even if he or she is qualified as a judge, it cannot be said that the right of the parties to independent and impartial judges is guaranteed as a fundamental right.

270 The principle of procedural equality in civil proceedings is guaranteed by the constitutional right to equality before the laws or courts in most jurisdictions. The right to be heard is rarely enshrined in the national constitution. However, even without explicit constitutional provisions, the right to be heard is treated as equivalent to the constitutional right of defence, as part of the constitutional right to a trial by independent judges, or is protected by due process clauses. The right to be heard covers many details for accurate decisions and collaboration between the parties and impartial judges is necessary for the just outcomes of civil proceedings. As reviewed above, there are many similarities in the detailed processual designs or tools leading to the justice of civil proceedings, but there are also differences among jurisdictions.

⁵¹⁵ For the above contents, refer to R Marcus, 'COVID-19 and American Civil Litigation' in B Krans and A Nylund (ed), *Civil Courts Coping with COVID-19* (Eleven International Publishing 2021) 196-203.

⁵¹⁶ For statistical figures refer to Y Fu, 'Civil Justice in China in the COVID-19 Period' in B Krans and A Nylund (ed), *Civil Courts Coping with COVID-19* (Eleven International Publishing 2021) 41-42.

- 271 The right to a trial without undue delay is newly constitutionalized. The principle of effectiveness or avoidance of undue delay in civil proceedings is not always explicitly guaranteed by the national constitutions. However, supranational norms concerning human rights following the Universal Declaration of Human Rights guarantee the right without undue delay. The right to a timely trial has been increasingly recognized as a constitutional value through constitutional interpretation. It is noteworthy that the ECtHR has been actively working on developing case law to enforce reasonable time standards for trials and has urged member states to enact legislation to compensate for excessively delayed trials. The principle of avoidance of undue delay is to provide effective remedies to parties and to allow for the efficient allocation of judicial resources. Effective justice also requires a joint effort by the parties and the judges.
- 272 The principle of publicity in civil proceedings applies not only to public or oral hearings but also to access to court records and judgments. The principle of open justice arose as a reaction to the secret judicial proceedings that prevailed in both common law and continental law systems until the eighteenth century. However, the right to a public trial in civil proceedings has not easily achieved the status of a constitutional right. Unlike other principles of civil proceedings, the principle of open justice has its limitations by nature. As technology evolves, so does the legal environment. Public access to courtrooms through the media, public access to electronic court records, and public access to remote courts in conjunction with tools, such as Zoom, are emerging issues in a changing judicial landscape. The new environment is presenting challenges and opportunities for maintaining or reshaping the right to a public process.

ABBREVIATIONS AND ACRONYMS

ACHPR	African Court on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ADR	Alternative Dispute Resolution
ALI	American Law Institute
Art	Article/Articles
BAILII	British and Irish Legal Information Institute
BGH	<i>Bundesgerichtshof</i> (Federal Court of Justice) [Germany]
BRCCP	Code of Civil Procedure (Brazil)
BVerfG	<i>Bundesverfassungsgericht</i> (Federal Constitutional Court) [Germany]
BVerfGG	<i>Bundesverfassungsgerichtsgesetz</i> (Federal Constitutional Court Act) (Germany)
CARES	Coronavirus Aid, Relief, and Economic Security Act (US)
CC	<i>Conseil Constitutionnel</i> (Constitutional Council of France) [France]
CCP	Code of Civil Procedure
CEPEJ	<i>Conseil de l'Europe Commission européenne pour l'efficacité de la justice</i> (Council of Europe European Commission for the efficiency of justice)
CFREU	Charter of Fundamental Rights of the European Union
CPR	Civil Procedure Rules 1998 (England and Wales)
cf	<i>confer</i> (compare)
ch	chapter
CJEU	Court of Justice of the European Union
COJ	<i>Code de l'organisation judiciaire</i> (Code of Judicial Organisation) (France)
CNCPL	The Civil Procedure Law (Mainland China)
CM/ECF	Case Management / Electronic Case Files (US)
DDH	<i>Déclaration des droits de l'homme et du citoyen de 1789</i> (French Declaration of the Rights of Man and the Citizen of 1789) [France]
edn	edition/editions
ed	editor/editors
etc	et cetera
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECLI	European Case Law Identifier
EDCPA	Electronic Documents in Civil Procedure (Korea)

eg	<i>exempli gratia</i> (for example)
ERCP	Model European Rules of Civil Procedure by the ELI/UNIDROIT
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)
GVG	Court Organization Act (Germany)
HMCTS	Her Majesty's Courts and Tribunals Service's
IACtHR	Inter-American Court of Human Rights
ibid	<i>ibidem</i> (in the same place)
ICCPR	International Covenant on Civil and Political Rights of the United Nations
ICT	Information and Communication Technologies
ie	<i>id est</i> (that is)
LOPJ	<i>Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial</i> (Spain)
no	number/numbers
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
PACER	Public Access to Court Electronic Records (US)
para	paragraph/paragraphs
PJE	Electronic Judicial Process
PLC	Political-Legal Committees (China)
pt	part
PTCP	Principles of Transnational Civil Procedure developed by the ALI/UNIDROIT
RDL	Royal Decree Law (Spain)
RSFSR	Russian Soviet Federative Socialist Republic
s	sentence
SAP	Swedish Social Democratic Workers Party (Sweden)
SAS	State Automated System (Russia)
SCCP	Code of Civil Procedure (Spain)
Sec	Section/Sections
SRLs	Self-Represented Litigants
STF	<i>Supremo Tribunal Federal</i> (Federal Supreme Court) (Brazil)
STJ	<i>Superior Tribunal de Justiça</i> (Superior Court of Justice) (Brazil)

supp	supplement/supplements
trans/tr	translated, translation/translator
UK	United Kingdom
UKCPR	Civil Procedure Rules (UK)
UN Basic Principles	The Basic Principles on the Independence of the Judiciary
UNIDROIT	<i>Institut international pour l'unification du droit privé</i> (International Institute for the Unification of Private Law)
US	United States of America
USFRCP	Federal Rules of Civil Procedure (US)
USC	United States Code
ÜGRG	<i>Gesetz über den Rechtsschutz bei überlangen Gerichtsverfahren und strafrechtlichen Ermittlungsverfahren</i> (Law on legal protection in excessively long court proceedings and criminal investigations) (Germany)
v	versus
vol	volume/volumes

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