

PART III

ACCESS TO JUSTICE AND COSTS OF LITIGATION

CHAPTER 2

ACCESS TO JUSTICE AS A FUNDAMENTAL RIGHT

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TABLE OF CONTENTS

1 Legal Recognition of the Right of Access to Justice	1
1.1 Legal Recognition of the Right of Access to Justice at the National Level	1
1.2 Legal Recognition of the Right of Access to Justice at the International Level....	4
1.3 The Content of the Right of Access to Justice in Legal Texts	5
2 Trends in the Interpretation of the Right to Access to Justice	7
2.1 Historical Trends Approaching the Right to Access to Justice	7
2.2 Defining the Right to Access to Justice Today. A User-centered Focus Approach: Are We in the Fourth Wave?	11
3 The ‘Fourth Wave of Access to Justice’: Defining its Characteristics.....	13
4 Current Trends in the ‘Fourth Wave’ of Access to Justice: Facing Barriers to Access to Justice	16
4.1 Empowering Citizens Through Legal Information	16
4.2 Facilitating the Understanding and Accessibility to the Justice System	19
4.2.1 Improving Court Accessibility through Self-Representation?.....	19
4.2.2 Legal Language	21
4.2.3 Design of Judicial Spaces.....	24
4.3 Improving Access to Justice to Vulnerable Parties.....	26
4.3.1 General Initiatives for All Vulnerable Collectives.....	26
4.3.2 Measures Aimed at Certain Vulnerable Groups	28
4.4 Reducing Procedural Barriers.....	31
4.4.1 The Need to Adapt the Procedural Models to the Increasing Cases of Self- representation	33

4.4.2 Procedural Consequences of the Measures Adopted in the Substantive Field to Better Protect Vulnerable Groups	35
4.5 Facing Growing Complex Litigation and Overloaded Courts.....	37
4.5.1 Reform the Organization of the Courts	37
4.5.2 Simplification of Procedures	37
5 Final Remarks	40
Abbreviations and acronyms	41
International/Supranational	43
National.....	43
Cases	44
Bibliography	45

1 LEGAL RECOGNITION OF THE RIGHT OF ACCESS TO JUSTICE

- 1 Since courts were instituted as the preferred mechanism to solve disputes, individuals were facilitated a path to approach justice. In Roman law, for example, the Digest provided that ‘an action is nothing else than the right of pursuing, in a court of justice, that which is due to one’.¹ But, even when and where citizens were allowed to exercise their rights before the courts, this faculty was attributed individually and, therefore, the state did not have an excessive concern to protect it. Regarding access to the courts, the states did not understand that it was their job to facilitate it, much less pay for it.
- 2 But the panorama changed in the new socio-economic context that arose after the Second World War, thanks to the common effort of the international community to settle certain basic rights as a common ground for the future. And, as a result, as we will study later in detail, the idea that everyone is entitled to certain rights that require positive action by the state for their enforcement became widespread in almost all countries. Specifically, given the general prohibition of unauthorized private law enforcement, states were required to provide mechanisms for the resolution of legal disputes and therefore had to ensure (or, at least, facilitate) access to the courts for their citizens to seek legal protection.
- 3 Following the words of Cappelletti, access to justice became ‘the most basic requirement – the most basic human right – of a modern, egalitarian legal system’.² Consequently, it has been considered so essential that it has gradually been enshrined in the national constitutions of almost all countries (or, failing that, in their jurisprudence given by constitutional courts) and in all international texts recognizing human rights.

1.1 Legal Recognition of the Right of Access to Justice at the National Level³

- 4 National recognition of the right to access to justice is generalized nowadays in most liberal democracies. Most states expressly include this right in their constitutions. In Europe⁴ for example, a right to be protected by the courts is expressly provided in quite similar terms in many constitutions,⁵ such as the Polish (Art 45), the Ukrainian (Art 55), the Portuguese (Art 20) or the Italian (Art 24).

¹ Digest 44.7.51. Celsus: ‘Nihil aliud est actio quam ius quod sibi debeatur, iudicio persequendi’.

² Cf M Cappelletti, B Garth and N Trocker, ‘Access to justice: comparative general report’ (1976) *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 672.

³ On this issue, see also on the ‘Constitutionalization and Fundamentalization of Access to Justice’ the interesting study of T Domej, in Chapter 2 of the Part IV of this publication.

⁴ See more extensively about the European legal recognition of this right, E Storskrubb and J Ziller, ‘Access to Justice in European Comparative Law’, in F Francioni, *Access to Justice as a Human Right* (Oxford University Press 2007) 177 ff.

⁵ Cf F Maultzsch, *Report for the International Association of Procedural Law Seoul Conference, 2014, 2019*. This indirect recognition also happens outside Europe in countries such as Canada.

- Art 45 of the Polish Constitution: ‘Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court’.
- Art 55 of the Ukrainian Constitution: ‘Human and citizens’ rights and freedoms are protected by the court’.
- Art 20 of the Portuguese Constitution: ‘Everyone is guaranteed access to the law and to the courts for the defence of their legally protected rights and interests, and justice cannot be denied to anyone due to insufficient financial means’.
- Art 24 of the Italian Constitution:

All persons may take legal action to protect their individual rights and legitimate interests. The right to defence shall be inviolable at every stage and instance of legal proceedings. The indigent shall be assured, by appropriate measures, the means for legal action and defence in all courts.

5 In Asia, it is expressly provided in Art 27 (1) of the Korean Constitution: ‘All citizens shall have the right to be tried in conformity with the Act by judges qualified under the Constitution and the Act’; in Art 32 of the Japanese Constitution: ‘No person shall be denied the right of access to the courts’.

6 In Oceania, let us cite Sec 27 of the New Zealand Bill of Rights Act 1990:

(1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person’s rights, obligations, or interests protected or recognized by law. (2) Every person whose rights, obligations, or interests protected or recognized by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination. (3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.⁶

7 In America, for example, we can find a quite comprehensive text of recognition of this right in Mexico. Article 17:

No person may take justice into his own hands or use violence to assert his right. Every person has the right to have justice administered by courts that shall be ready to impart it within the time limits and terms established by law, issuing their decisions

⁶ Cf P Butler and C Herbert, ‘Access to justice vs access to justice for Small and Medium-sized enterprises: the case for a bilateral arbitration treaty’ (2014) 26 New Zealand Universities Law Review 196.

promptly, completely and impartially. Their service shall be free of charge and, consequently, court fees shall be prohibited.

Provided that equality between the parties, due process or other rights are not affected in trials or proceedings conducted in the form of a trial, the authorities shall give priority to the resolution of the conflict over procedural formalities.⁷

- 8 In other cases, the right could be deduced from another expressly recognized fundamental right (normally from the right to effective judicial protection), as is the case in Spain (Art 24), Germany (Art 20 *Grundgesetz*; GG) or Israel,⁸ or provided by another piece of legislation, as is the case of Austria (para 29 of the General Civil Code).
- 9 As explained in detail by Domej, this individual right to court is not subject to recognition in countries in which it does not govern the 'liberal concept of the rule of law', such as China or Russia.⁹

⁷ In Chile, not having still a clear recognition of the right, they proposed a text for a new Constitution - text rejected in September 2022, which even included a right to access to environmental justice.

Art 108: '1. Every person has the right to full access to justice and to request from the courts of justice the effective protection of their rights and legitimate interests, in a timely and effective manner in accordance with the principles and standards recognized in the Constitution and the laws. 2. It is the duty of the State to remove the social, cultural, and economic obstacles that prevent or limit the possibility of going to the courts for protection and the exercise of their rights. 3. The courts must provide adequate attention to those who submit petitions or queries before them, always granting dignified and respectful treatment, in accordance with the law. 4. The State ensures the right to free and comprehensive legal advice, by lawyers authorized to practice the profession, to any person who cannot obtain it on their own, in the cases and in the manner established by the law (...) 5. It is the duty of the State to grant specialized legal assistance for the protection of the best interests of children and adolescents, especially when they have been subject to protection measures. In addition, you must try to create all the necessary conditions for the protection of your rights. 6. The State must guarantee that the bodies involved in the process respect and promote the right to access justice with an intercultural perspective. 7. People have the right to specialized legal assistance, interpreters, intercultural facilitators and consultative expert opinions, when they require it and cannot provide it themselves. 8. The State guarantees access to environmental justice'.

⁸ In Israel the right to access to court was not expressly recognised in the list of fundamental rights guaranteed by their Basic Laws but was declared as a constitutional right by the Supreme Court in 2003. Cf M Ofer-Tsfon and L Zer-Gutman, 'Access to justice in Israel', in H Whalen Bridge, *The Role of Lawyers in Access to Justice* (Cambridge University Press 2022).

⁹ Cf T Domej, 'Constitutionalisation and Fundamentalisation of Civil Procedure', in Chapter 2, Part IV of this publication, 9.

1.2 Legal Recognition of the Right of Access to Justice at the International Level

- 10 At a supranational level, there is a more widespread recognition of this right in the main international legal instruments on fundamental rights, with similar content to that of the national texts.
- 11 In the European context, this right is recognized in a similar way by two legal instruments. From 1950, in Art 6 of the European Convention of Human Rights (ECHR): ‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’.¹⁰ In similar terms, now in the context of the EU, Art 47 of the European Charter of Fundamental Rights (EUCFR), proclaims what follows: ‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article’.
- 12 In America, Art 25 (1) of the American Convention of Human Rights recognizes the so-called ‘right to judicial protection’ in the following terms:

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

- 13 In similar terms, Art 7 of the African Charter of Human and People’s Rights provides that ‘Every individual shall have the right to have his cause heard’.¹¹
- 14 Something further goes the Islamic world since they legally recognized a ‘right to justice’ in Art IV of the Universal Islamic Declaration of Human Rights:

a) Every person has the right to be treated in accordance with the Law, and only in accordance with the Law. b) Every person has not only the right but also the obligation to protest against injustice; to recourse to remedies provided by the Law

¹⁰ Interpreting it, recently, for all, Case *Fischer v Czech Republic*, Decision of 24 February 2022, para 39: ‘The Court reiterates that Article 6 § 1 of the Convention embodies the “right to a court”, which guarantees not only the right to institute proceedings but also the right to obtain a determination of the dispute by a court’.

¹¹ This comprises:

- a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
- b) The right to be presumed innocent until proved guilty by a competent court or tribunal;
- c) The right to defence, including the right to be defended by counsel of his choice;
- d) The right to be tried within a reasonable time by an impartial court or tribunal.

in respect of any unwarranted personal injury or loss; to self-defense against any charges that are preferred against him and to obtain fair adjudication before an independent judicial tribunal in any dispute with public authorities or any other person. c) It is the right and duty of every person to defend the rights of any other person and the community in general (Hisbah). d) No person shall be discriminated against while seeking to defend private and public rights. e) It is the right and duty of every Muslim to refuse to obey any command which is contrary to the Law, no matter by whom it may be issued.

- 15 Even the whole international community has come to a common understanding by including this right to access in the two main universal legal texts on human rights: Art 2 (3) and 14 of the International Covenant on Civil and Political Rights (ICCPR) and Art 8 and 10 of the United Nations Universal Declaration of Human Rights. In fact, for this second organism, the achievement of this right is one of the essential objectives of its 2030 agenda, as we noted in Chapter 1 (Goal 16 and Target 3).¹²

1.3 The Content of the Right of Access to Justice in Legal Texts

- 16 Once established that the general recognition of this right is widespread at the legislative level, a second question arises: is its content identical in all these instruments? If we read the different legal provisions analysed in the previous two sections, even there are slight differences. Its legal wording is practically identical in all of them, but, interestingly, their meaning is not the same in different space-time contexts. For example, as we will study later in this chapter, whereas in Western countries the right is generally referred to as the idea of facilitating access to the courts, in the Islamic states it is directly 'rooted in establishing justice than maximizing accessibility of justice by the State' since the concept has a religious relevance.¹³ It seems that the same expression is often used as a true mixed bag in which everything fits. In this sense, Professor Hess pointed out that, although the right of access to justice has been a 'powerful key concept on the political agenda of judicial systems in Europe' for more than 30 years, 'its precise meaning and the judicial concept of this key term has remained unclear'.¹⁴
- 17 Therefore, it seems necessary to begin this work by trying to define or to clarify the content of this right. Although we will delve into its historical and current trends later, let us start by analysing its wording.
- 18 The first term focuses on the object of our study: it is a 'right' that is recognized to all citizens; a subjective power that allows them to assert their rights and legitimate interests before the state that monopolizes the jurisdictional function. And, given that

¹² UN General Assembly, 'Transforming our world: the 2030 Agenda for Sustainable Development' (A/RES/70/1, 2015) <https://sdgs.un.org/2030agenda> accessed 21 October 2024.

¹³ Cf S Maranlou, *Access to justice in Iran* (Cambridge University Press 2014) 34.

¹⁴ Cf B Hess, 'EU Trends in Access to Justice' in B Hess, L Cadiet and M Requejo (ed), *Privatizing dispute resolution: trends and limits* (Ed. Nomos 2019) 189.

unauthorized private law enforcement is generally prohibited, it becomes a basic human right, normally classified in constitutional texts as essential or fundamental.

- 19 The two other words define the content of that right: *access to justice*.
- 20 The word *access* is, in principle, not very controversial. According to the Oxford English Dictionary, *access* consists of ‘a way of entering or reaching a place’, of penetrating an area reserved for some purposes. In our context, it means the possibility of entry to the judicial system of justice orchestrated by the state. Having this clear, how is this entrance conceived? Is it open to all, with or without restrictions? It is generally accepted that no exclusions must be accepted neither because of the characteristics of the individual (their age, race, ideology, etc) nor because of the object involved in the conflict. No one should be left out nor can ‘any sector of the legal system’ from which ‘subjective rights or interests derived be excluded legitimately’.¹⁵ Even though reality has shown that that ideal cannot always be realized entirely (in particular, due to cuts in legal aid budgets in most countries); properly understood, this right should entail, at least in theory, equal access to be fulfilled: ‘yet the unlikelihood of fully realizing the ideal of equal access should not deter us from treating it as an aspiration’.¹⁶ However, as explained in Chapter 1, depending on the needs of each justice system or on grounds of public order, certain restrictions on entry are generally allowed (for example, the requirement for court fees), if they are proportionate and justified. But, in any case, in most legal contexts the meaning of access does not refer exclusively to the mere entrance to the judicial system: If the individuals comply with the procedural requirements set by national procedural rules, the right includes the power to get the law enforced or the dispute solved by the mechanism established by the state when applying the law. That is why most constitutional courts consider part of its content certain procedural rights, such as the right to get a judgment, the right to provisional measures, or the right to the enforcement of the judgment, as will be explained in Chapter 3. In any case, even if it is the desideratum of all individuals who sue, almost all legal systems agree in considering that the right to a correct judgment could not be generally included in the essential content of the fundamental right of access to justice, although we are observing in the EU context that the protection of some sectors (in particular, consumers) has managed to make the application of substantive law prevail even above national rules of *res iudicata*, as we will see later in detail.
- 21 The last term that defines the right of access is the word *justice*, which answers the following question: what can citizens expect when they access the courts? Unlike the term *access*, *justice* is not a univocal concept. At least, we can distinguish two different approaches. First, justice can be defined as ‘the legal system used to punish people who

¹⁵ Cf M Capeletti and B Garth, ‘Access to justice: the newest wave in the worldwide movement to make rights effective’ (1978) 27 Buffalo Law Review 181. In addition, from the same authors with N Trocker, ‘Access to justice, variations and continuity of the world-wide movement’ (1982) *Rechts Zeitschrift für ausländisches und internationales Privatrecht*, 664-707.

¹⁶ Cf E Palamer, T Cornford, A Guinchard and Y Marique, *Access to justice* (Hart Publishing 2018) 39.

have committed crimes', according to the Oxford English Dictionary; in other words, justice as the mere access to court, an option which, at least, offers the chance of seeking (at least formal) justice. In this sense, it is frequent to formulate this guarantee as 'the right to access to court', which usually includes compliance with the requirements of the fair trial (eg, reasoned judgment, respect for the principles of audience and hearing, etc).¹⁷ Second approach: 'justice' has also an indeterminate and abstract meaning, imbued with axiological overtones: it is identified with the final objective of the judicial system -that everyone should be given his own -and with the need to restore the situations in which this balance is broken.¹⁸ In this regard, justice is, according to the Oxford English Dictionary, 'the fair treatment of people' and 'the quality of being fair or reasonable'.

- 22 This last term is central in our study to discover if this right has to tend to the achievement of justice. Curiously, the evolution of the interpretation of the right of access to justice has gone hand in hand with this second notion of justice, an issue that we will deal with below.

2 TRENDS IN THE INTERPRETATION OF THE RIGHT TO ACCESS TO JUSTICE

2.1 Historical Trends Approaching the Right to Access to Justice

- 23 If we move back to the nineteenth century, in the context of a more individualistic society, this guarantee was conceived as a personal right to access to judicial institutions to try to find a solution to legal conflicts.¹⁹ This was its essential content until, starting in the 1960s, along with the world movement in favour of the protection of fundamental rights, access to justice began to focus from a more social perspective, equally to other emerging rights such as education or health care. From then on, the fact that many citizens did not have real possibilities of accessing the courts when they needed it began to be seriously considered. Based on this, academia and the legislators focused their efforts on identifying the barriers to access to justice, in especially those that affected the most disadvantaged.
- 24 In this context of change, in 1978 Professors Mauro Cappelletti and Bryant Garth undertook an ambitious research programme on the evolution of access to justice, the fruit of which they were able to identify three successive waves of global reforms in this area.

¹⁷ Part IV Chapter 2.

¹⁸ Cf C A Whytock, 'Transnational access to justice' (2020) 38 Berkeley Journal of International Law; T C W Farrow, 'What is access to justice?' (2014) 51 (3) Osgoode Hall Law Journal.

¹⁹ Cf M Galanter, 'Access to justice in a world of expanding social capability' (2010) 37 Fordham Urban Law Journal, 118. See also in detail the history of this right, L Friedman, 'Access to justice. Some historical comments' (2004) Fordham Law Review, 927.

- 25 The first wave gave attention to free legal aid. At first, from the beginning of the twentieth century but, in particular, from the sixties, the states were especially concerned with guaranteeing legal assistance to the poorest.²⁰ Consequently, they built quite complete free justice programmes, in such a way that this benefit ended up becoming an essential part of the right of access to justice in almost all national legal systems²¹ and, even, at a supranational level. Unfortunately, since the 1980s in a considerable number of countries the budgets that support this free legal assistance have been cut (see, as a paradigmatic example, the English or Canadian cases). These measures have generated, on the one hand, great social concern due to the lack of protection that these measures cause and, on the other hand, the development of other alternative ways of funding litigation such as financing by third parties, or the proliferation of legal defence insurance.²²
- 26 The second wave of reforms, developed from the sixties, and with particular intensity at the beginning in the United States, focused on the defence of diffuse interests.²³ The welfare society allowed the creation of new collective property rights, which did not receive sufficient protection with traditional legal schemes. Thus, little by little, class actions were introduced into the world's legal systems (although in different ways), which forced the modification of a number of classic procedural categories, for example, the regulation of the effects and limits of the *res iudicata*. However, in practice, class actions did not manage to extend access to justice as much as expected.²⁴
- 27 Access problems persisted despite these legislative advances. For this reason, simpler and faster new ways of solving conflicts were explored, that would serve as an escape valve to the collapsed judicial system. This was achieved in the third wave of reforms through the creation of the so-called ADRs, such as arbitration or mediation. The recognition of these alternative means of dispute resolution brought with it the

²⁰ In Germany, for example, the first steps were taken in 1919 and 1923; in England, in 1949; in the United States, the reforms took place from 1965. Cf M Capeletti and B Garth, *El acceso a la justicia. La tendencia en el movimiento mundial para hacer efectivos los derechos* (Ed. Fondo de Cultura Económica) 25.

²¹ On this topic, see Chapter 6 of this Part III. Even the United Nations have recognized legal aid as a fundamental right, at least in the criminal field: 'United Nations Principles and Guidelines on Access to legal aid in Criminal Justice Systems' https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf accessed 21 October 2024. To give an example of their national recognition and their link to access to justice, in Spain the Constitutional Court pointed out in this regard that: 'Free justice must be granted to those who cannot afford the costs incurred by the process (including the fees of the Lawyers and the customs duties of the Attorneys, when their intervention is mandatory or necessary in view of the characteristics of the case) without failing to attend to their vital needs and those of the family, so that no one is deprived of access to justice due to lack of economic resources. In other words, the procedural expenses of those who, if that payment is required, would be faced with the alternative of ceasing to litigate or endangering that personal or family subsistence minimum must be covered' (STC 136/2016, Judgment of 18 July 2016).

²² Financial issues on access to justice will be address in depth later in this Part III.

²³ Cf M Capeletti and B Garth (n 20) 35 ff.

²⁴ A Canadian report showed this conclusion, as referred by K Roach and L Sossin in 'Access to justice and beyond' (2010) 60 U. Toronto Law Journal 373, 378.

expansion of the concept of access to justice, since, from then on, recourse to these institutions included the content of this fundamental right, if they respect the essential guarantees of fair trial.²⁵ However, this option is convenient as long as it remains within the limits of voluntariness. In the opinion of a large part of the doctrine, to which we join, we must beware of imposing these alternative means on a mandatory basis. But in recent years we cannot ignore that there are many examples of ADR solutions imposed on a mandatory basis. For example, in Europe, compulsory ADR mechanisms have been introduced in some countries, either on a general basis (as occurs in Italy²⁶ or Norway²⁷), just for certain matters (as occurs in England and Wales in family law; in Austria for matters such as child custody; or in France for small claims²⁸) or for certain territories (as occurs in some Länder in Germany). As empirical studies on this matter show²⁹, it is much less likely to reach an agreement when the parties are forced and, even if they finally reach a consensus through this channel, it is very possible that the agreement will be more unfair than the solution reached without pressure within a process or consensual mediation. In fact, what this kind of reforms could really achieve is just the opposite of what was sought: building a new barrier to access to justice.

- 28 As can be seen so far, during this evolution of the right to access to justice, its essence was centred in 'the right to access to a court'; that is, in guaranteeing the entrance to the jurisdiction and, at most, to a natural, independent and impartial judge. Summing up, uniquely in the right to enter a conflict resolution system. In addition, it was this basic understanding of this right, linked to the first way of reading the concept of justice as a judicial power we referred to above, that was enshrined in most legal texts.
- 29 However, the truth is that in its subsequent development - in particular at supranational level - this guarantee was increasingly recognized as having an added value: the state must not only ensure entry to the courts, but also that the procedure that has to be followed is in accordance with basic standards of respect to human rights (redefining the

²⁵ See in the Judgment of the *Oleksandr Volkov v Ukraine* (ECtHR), Judgment of 9 January 2013, para 88-91.

²⁶ Finally introduced since 2013, after intense debates. See in this sense: 'In 2012, the Italian Constitutional Court decided that it would annul the requirement of mandatory mediation in Legislative Decree no. 28/2010. It had found that the Government had gone beyond the scope of the European Mediation Directive and Italian Law 69/2009 allowing the Government to introduce a decree on civil and commercial mediation.¹⁸ In 2013, mandatory mediation attempts were reintroduced, this time based on Decree 69/13 on Urgent Dispositions to Relaunch the Economy (the decree was converted into Law No. 98 of 2013).¹⁹ As the title of this Decree indicates, these attempts were reintroduced for the benefit of the Italian economy by relieving the overburdened Italian courts. Access to justice was and is under threat in Italy'. Cf C H van Rhee, 'Mandatory Mediation before litigation in civil and commercial matters: an European perspective' (2021) 4 Access to Justice in Eastern Europe 12, 13.

²⁷ Cf C H van Rhee (n 26) 20.

²⁸ Ibid: On England, see 9; on Austria, 17 and on Germany, 15.

²⁹ Cf Wissler, note 9 in *African Studies*.

concept as ‘access to a fair trial’, provided, for example, in Art 6 ECHR and 47 EUCFR³⁰). That means that its recognition usually requires that the procedure conform to a series of essential and minimum guarantees, such as the right to have the case heard publicly and fairly, the right to defence, the right to a substantive resolution, the right to recourse or the right to the enforceability of resolutions.³¹ Let us give two examples to illustrate this trend. First, the doctrine of the European Court of Human Rights, which understands that this right extends beyond the initial action of requesting remedy before a court. In this sense, the ECHR has stated repeatedly that the right to a court includes not only the right to institute proceedings, but also ‘the right to obtain a determination of the dispute by a court, based on the premise that if Member States were not able to guarantee the power of their courts to settle disputes by issuing final decision, the right to a court would be illusory’.³² Second example: the definition of this right given by the United Nations in 2004 also reflects this broader understanding of this guarantee: the right of access to justice ‘is the ability of people [...] to seek and obtain remedy through formal and informal institutions of justice, and in conformity with human rights standards’.³³

- 30 However, even if, at this point, this level of protection has already been enshrined in most countries at the legislative (even constitutional) level, is this content of the right of access a sufficient guarantee of the effective protection of citizens’ rights? Because citizens do not go to court to obtain a judicial resolution, even if it has been issued in a very fair trial, but what they expect is that their legal conflict is resolved justly. This is, in our opinion, the question that has been worrying theoreticians and practitioners in relation to this guarantee since, despite all these historical advances, it has been observed that in practice this approach to the right of access to justice is not sufficient to protect the rights of citizens in the way they expect from the state. In this regard, for some years now, an attempt has been made to seek a more open and comprehensive approach, that allows a better response to citizens, a question that we will address in the following section.

³⁰ In this regard, the European Union Agency for Fundamental Rights understands that: ‘access to justice encompasses the right to a fair trial and the right to an effective remedy as guaranteed by Art. 47 of the ECHR, Arts 6 and 13 ECHR and Arts 2(3) and 14 of the International Covenant on Civil and Political Rights’.

³¹ These set of guarantees linked or derived from the right to access to justice are explained in detail in the next Chapter.

³² See *Fălie v Romania* (ECtHR), Judgment of 19 May 2005, 23570/04 [ECLI:CE:ECHR:2015:0519JUD002325704].

³³ And continues: and ‘it is more than improving an individual’s Access to courts, or guaranteeing legal representation [...] and [...] must be defined in terms of ensuring that legal and judicial outcomes are just and equitable’; cf United Nations Development Programme, *Practice Note: Access to Justice, 2004* https://www.undp.org/sites/g/files/zskgke326/files/publications/Justice_PN_En.pdf accessed 21 October 2024.

2.2 Defining the Right to Access to Justice Today. A User-centred Focus Approach: Are We in the Fourth Wave?

Can you imagine libraries at the service of librarians and alien to readers? Can you imagine fire services structured, organized and reformed around firefighters and not about putting out fires or bailing out floods? Well, that is what, for quite some time, has been happening with justice in Spain: that it does not revolve around the defendants, that is, around all of us insofar as we may need the so-called 'jurisdictional protection', but around jurisdictional bodies and judges (Andrés de la Oliva Santos, 1988).³⁴

- 31 Although no one disputes that much progress has been made in the last decades in the protection of access to justice, the vast majority agree that most of the legislative initiatives have been designed by and for jurists, at their convenience. Therefore, many experts all over the world had in recent years agreed both in the diagnosis, and in the solution: it was necessary to change the perspective. From various fronts, it was proposed to abandon the traditional way of creating procedural models designed from and for judges and lawyers,³⁵ with the citizen in a passive role, and shift to the claimant as an active subject who claims effective protection, thus placing them (and, of course, also the defendant) in the centre of the design of conflict resolution systems (what the Anglo-Saxons call a 'bottom-up intervention'³⁶).³⁷ Would this be forging a new movement of access to justice? Perhaps it is time to wonder how much access to justice

³⁴ Cf A De la Oliva Santos, *Cápsulas para la memoria (1966-2006)* (Ed. CERA, Madrid 2006) 208. In a similar sense, in his story entitled 'The justice of Evaristo', Professor Satta gave a similar warning to the Italian proceduralists, indicating that their work should not be an end in itself and, therefore, that if the humanity of the trial was lacking in his studies and treatises, the science, the academia, the justice was merely reduced to 'a game'. Cf S Satta, 'Un giudizio di conciliazione ovvero La giustizia di Evaristo' (1963) 5-6 *Rivista del Dritto Commerciale* 228, 230.

³⁵ Cf H Ahrens, H Fischer, V Gómez and M Nowak (ed), *Equal access to justice for all and Goal 16 of the Sustainable Development Agenda: challenges for Latin America and Europe* (Lit 2019).

³⁶ Cf I Van der Meene and B Van Rooij, *Access to justice and legal empowerment* (Ed Leiden University Press 2008) 6. As defined by Trevor, 'put the public at the center of the justice system' (cf C W F Trevor, 'What is access to justice?' (2014) Osgoode Digital Commons 959). Also see J Roberge, 'Access to justice in the 21st century: towards an empirical and plural approach' (2020) 54 *Revue Juridique Themis*, 487.

³⁷ Goal already legally enshrined in the recent OECD, *Recommendation of the Council on Access to Justice and People-centred Justice Systems* (12 July 2023): 'Design and deliver people-centred legal and justice services by [...]: b)ensuring that legal, justice and related services are: i. designed with people at the centre, taking into account their rights and possible vulnerabilities, and based on empirical understanding of their legal and justice needs, preferences and capabilities', <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0498> accessed 21 October 2024. How to develop this goal? *The Session Notes of the 2023 OECD Global Roundtable on Equal Access to Justice* (December 2023) developed it in more detail: 'People-centred justice offers a strategy for governments to meet this challenge, at least within the justice context. Regular programmes of legal needs assessment, evaluation of 'what works', the responsive adaptation of justice policy according to this evidence, and the development and financing of services to address people's needs can help ensuring resilience and adaptability to changing circumstances', <https://web.archive.org/temp/2024-01-17/666067-2023oecdglobalroundtableonequalaccesstojusticemakingpeople-centredjusticehappen.html> accessed 21 October 2024.

do we really want? This new perspective also supposes a new way of elaborating the laws: prior to the adoption of any measure, it is necessary to empirically identify the difficulties and specific needs of citizens (through statistics, surveys, field work, etc) and start building the new systems of procedure from there.³⁸ The model gradually revealed as more successful than the traditional one, since it allowed that the new legislative proposals were formulated to be better adjusted to the objective pursued and to be able to measure the impact of further reforms.³⁹

- 32 In addition, this new perspective places Justice with capital letters at the heart of the right of access to justice. Why? Because, if the starting point of this new approach is situated in the interests and needs of citizens, and we know that they aspire to something more than a simple judicial decision at the end of a judicial procedure -even if all the essential guarantees of the procedure are respected-, this new approach to the right of access opens the doors to justice with 'added value'.⁴⁰ In other words, individuals do not spend money and time in the courts just to get a response, but a get an appropriate solution to their dispute. Thus, from this perspective, the right of access to justice should presuppose the existence of a material and procedural regulatory structure that sufficiently guarantees the effective protection of the rights and legitimate interests of citizens, to which this guarantee serves.
- 33 In recent decades, this new approach has not remained theoretical, embodied in dozens of scientific works,⁴¹ and most significantly, it is consolidating a nuclear target in the

³⁸ Following the words of District Attorney Steve Mulro, while working with the citizens in one of the IL workshops to improve the justice in communities talking to their addressees: 'If you want to improve something, measure it', <https://medium.com/@Lab4justice/rethinking-how-we-define-public-safety-and-justice-a0d2ac5a21a1> accessed 21 October 2024.

³⁹ In this sense, Section I of the OECD Recommendation (n 37): 'People-centred justice data refers to data that is collected in line with data protection standards directly from people, businesses and communities, and which relates to the justice problems they face, the impact these problems have, the justice they want and need, their decisions about resolving their justice problems, their experiences with justice services and their ability to obtain a fair outcome'.

⁴⁰ S Wrkba called this new approach to this right: 'Access to Justice 2.0' (cf S Wrkba, *European Consumer Access to justice revisited* (Cambridge 2019) 28).

⁴¹ Among all the doctrines over this right to Access, we highlight the following works: A Zuckerman and R Cranston, *Reform of Civil Procedure. Essays on Access to Justice* (Ed. Oxford 1995); D Rhode, 'Access to justice: connection principles to practice' (2004) 17 *Georgetown Journal of Legal Ethics*, 369; M Galanter, 'Access to justice in a world of expanding social capability' (2010) 37 *Fordham Urban Law Journal*, 1; E Hurter, 'Access to justice: to dream the impossible dream?' (2011) *Comparative and International Law Journal of Southern Africa*; P Hughes, 'Advancing access to justice through generic solutions: the risk of perpetuating exclusion' (2013) *Windsor Y B Access Just* 31; T Farrow, 'What is access to justice?' (2014) 51 *Osgoode Hall Law School of York Law Journal*; C Crawford and D Bonilla Maldonado, 'Access to justice: theory and practice from a comparative perspective' (2020) 27 *Indiana Journal of Global Legal Studies*, 1; J F Roberge, 'Access to justice in the 21st century: towards an empirical and plural approach' (2020) 54 *RJT*, 487; X Kramer, A Biard, J Hoevenaars and E Themeli, *New Pathways to Civil Justice in Europe* (Ed. Springer 2021); A Storgaard, 'Access to justice research: on the way to a broader perspective' (2022) *Oñati Socio-Legal Series*; N Creutfeldt, A Kypriniades, B Bradford and J Jackson, *Access to Justice, Digitalization and Vulnerability: Exploring Trust in Justice (Perspectives*

most prestigious international institutions.⁴² Two relevant milestones must be highlighted: first, the adoption in 2015 by the United Nations of Goal 16 (within the SDG: Sustainable Development Goals, aimed for 2030), on the rule of law and access to justice. Second, the 'Recommendation on Access to Justice and People-centred Justice', adopted in July 2023 by the OECD, even defined 'people-centricity' in this context:

People-centricity refers to a human-centred approach that adopts the perspective of people as a starting point and places people at the core when designing, delivering, implementing and evaluating public policies, services and legal procedures within and beyond the justice system. It considers the perspectives and needs of specific communities, including marginalised, underserved and groups in vulnerable situations (eg, women, children, indigenous groups, elderly and people with disabilities).⁴³

- 34 Taking all of the above into account, we take the liberty of formulating the following conclusion: we consider that this change has acquired sufficient importance to affirm that we are facing the fourth wave of the global movement for access to justice, which brings with it a clear change of focus by defending a model of access designed from and for the protected citizen, which logically defines both the content and the ways of undertaking the Justice reforms inspired by this movement.

3 THE 'FOURTH WAVE OF ACCESS TO JUSTICE': DEFINING ITS CHARACTERISTICS

- 35 Extracting common features from the various initiatives analysed, this fourth wave of access to justice is characterized by the following notes that we will study in the next section of this chapter considering concrete practices that are being carried out.

on *Law and Access to Justice*) (Oxford 2024); D Watson, J Berg and L Laponi, 'Actioning the Human Rights Agenda and issues of Access to Justice' in L Weber and M Marmo (ed), *A Research Agenda for a Human Rights Centred Criminology* (Springer 2024); R Brescia, 'The Access to justice crisis and the rise of legal technology' in R Brescia (ed), *Lawyer Nation* (New York University Press 2024).

⁴² Among other studies, FRA, *Handbook on European Law relating to Access to justice*, 2016 (https://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2016-handbook-on-access-to-justice_en.pdf accessed 21 October 2024); European Parliament, *Effective access to justice* (Study for the PETI Committee 2017); Center on International cooperation, *Justice for all. Work group on Justice* (Final Report, 2019) www.justice.sdg16.plus accessed 21 October 2024; OECD, *Equal access to justice for inclusive growth: putting people at the centre* (2019) https://www.oecd-ilibrary.org/governance/equal-access-to-justice-for-inclusive-growth_597f5b7f-en accessed 21 October 2024; OECD, *Access to justice and the Covid-19 pandemic: compendium of country practices*, 25 September 2020.

⁴³ OECD Recommendation (n 37) discussed in the *OECD Global Roundtable on Equal Access to Justice* (Session Notes, Ljubljana, December 2023) <https://web.archive.oecd.org/temp/2024-01-17/666067-2023oecdglobalroundtableonequalaccesstojusticemakingpeople-centredjusticehappen.htm> accessed 21 October 2024.

- 36 First: adaptative: better solutions for all (for example, it is a UN explicit commitment to ‘leave no one behind’⁴⁴) and, in particular, for the most vulnerable.⁴⁵ Traditionally, legal solutions had a very general scope, so some needs of citizens were never met, especially those of the most vulnerable, so that certain situations of lack of protection against certain groups were perpetuated (children, migrants, indigenous groups, elderly, people with disabilities, etc). This new trend is making it possible to adapt the pieces of legislation to the needs of different population groups and different types of societies at each historical moment⁴⁶ from the moment the government ‘engage directly with people’ for these purposes.⁴⁷ For example, their deficiencies can be overlapped through informative campaigns or apps for illiterate people or for a part of the population who is marginalized (eg, for indigenous people in Canada), as we will see later, or accommodating the procedural rules to their circumstances (for example, when regards to people with disabilities or minors⁴⁸) or implementing tools to address systemic bias.⁴⁹
- 37 Second: fostering creative solutions. This approach would give rise to more creative legal solutions, which, in many cases, determine the joint action of various agents and disciplines to achieve the intended goal (courts, NGOs, social workers, lawyers, libraries, etc), supporting also multidisciplinary initiatives, which integrate legal, psychological, and social perspectives. A good example of this tendency are the projects led by the HILL (Hague Institute for Innovation of Law), such as the Justice Innovation Labs or the Justice Accelerator, all aimed at improving the judicial system worldwide and achieving a

⁴⁴ Cf OECD Session Notes (n 43) 14.

⁴⁵ For example, for the special protection of children, the OECD adopted a Child-Friendly Justice Framework to ‘support countries in developing a government-wide strategy to strengthen child-friendly practices in the justice system’. This framework, built ‘on the analysis of the legal needs of children and challenges they face when confronting justice problems’, provided ‘a basis for child-friendly reforms of justice systems, in line with international standards and obligations’ (cf OECD, ‘OECD Child-Friendly Justice Framework: Building a people-centred justice system’, *OECD Public Governance Policy Papers*, No 41 (OECD Publishing, Paris), <https://doi.org/10.1787/6a60970e-en> accessed 21 October 2024).

⁴⁶ In this sense, the OECD Report of 2019 (n 42) 7.

⁴⁷ ‘Practically, this means engaging directly with people -- and especially with disadvantaged groups -- on their greatest justice needs, problems and experiences. Such interactions can shed light on the disconnect that many people experience between their lives and concerns and the systems and services of the justice sector. They can also help identify and address procedural bottlenecks, structural barriers (e.g., complex legal language, technological challenges, physical accessibility issues, or systemic biases), and service inefficiencies and gaps (e.g., lack of support for certain legal issues, insufficient geographical coverage, or inadequate representation for certain groups)’ (cf OECD Session Notes (n 43) 6).

⁴⁸ For example, in the OECD Session Notes, they cite the case of Egypt, where they have developed Children Courts and a Child Helpline, as a ‘way for children to reach out for help and support’. Or the example of Latvia, where child-friendly and multi-agencies services have been established for child victims and witnesses of violence or abuse (cf OECD Session Notes (n 43) 15).

⁴⁹ For concrete examples of good practices in this regard, see OECD Session Notes (n 43) 15 and 16.

'turning point' towards people-centered justice (currently developing programs in Ethiopia, the Netherlands, Niger, Nigeria, Tunisia and Uganda).⁵⁰

- 38 Third: benefiting from ICTs and, more recently, from the potential that AI is offering. In this sense, the words of Chief Justice John Roberts in the Year-End Report on the Federal Judiciary can be highlighted:

For those who cannot afford a lawyer, AI can help. It drives new, highly accessible tools that provide answers to basic questions, including where to find templates and court forms, how to fill them out, and where to bring them for presentation to the judge—all without leaving home. These tools have the welcome potential to smooth out any mismatch between available resources and urgent needs in our court system.⁵¹

- 39 In any case, the implementation of these new tools must be carried out without forgetting their problems (for example, authenticity and accountability) and the effects of the so-called digital gap on special groups (elderly, illiterate, etc), who must be provided with tools adapted to their needs. To avoid this last problem many initiatives are taking place; for example, in the European context, the European Commission for the Efficiency of Justice (CEPEJ) has highly recommended to 'devote specific attention to the risk of digital divide and guarantee that no one is left behind because of the remarkable technological developments judiciaries and our societies as a whole have been benefited from'.⁵² Or the initiative of the World Justice Programme in 2019 with the objective of 'Measuring the Justice Gap', aimed to undertake a 'people-centered assessment of unmet justice needs around the world'.⁵³
- 40 Fourth: addressed to prevention and solution of conflicts ('dispute avoidance' and 'dispute containment' in words of Susskind⁵⁴). Solutions are proposed not only for the resolution of disputes, but also for their avoidance, training and informing citizens so that they learn to avert legal conflicts or, when occurred, to be able to quickly de-

⁵⁰ HIIIL official website accessible at <https://www.hiil.org/> accessed 21 October 2024. Their current motto in their webpage is a very interesting question regarding this topic: 'How fair is justice if it does not get you anywhere?'.

⁵¹ J G Roberts Jr, '2023 Year-End Report on the Federal Judiciary' (2023) 6, <https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf> accessed 21 October 2024, cited by C Chien, M Kim, A Raj and R Rathis, 'How LLMs Can Help Address the Access to Justice Gap through the Courts' (2024) *Loyola of Los Angeles Law Review*, 1 (open access).

⁵² Cf European Commission, *European judicial systems CEPEJ Evaluation Report* (2022) Part 1, 103, <https://rm.coe.int/cepej-report-2020-22-e-web/1680a86279> accessed 21 October 2024.

⁵³ See the full report in <https://worldjusticeproject.org/our-work/research-and-data/access-justice/measuring-justice-gap> accessed 21 October 2024.

⁵⁴ Cf R Susskind, *Online Courts and the future of Justice* (Oxford University Press 2019) 65.

escalate them. In this sense, the OECD has recently agreed that ‘access to justice refers to the ability of people, businesses and communities to prevent conflicts [...]’.⁵⁵

- 41 Fifth: dynamic and under continuous review. Finally, it is a dynamic approach, because, through continuous evaluation and trial and error practices, it makes it possible to choose the most effective ways to improve access on a solid and well-founded basis.⁵⁶ In fact, it is one of the OECD challenges in the path to generalize the access to justice: ‘to develop and implement a framework of measures and indicators that reveal an accurate picture of the provision of access to justice for all’.⁵⁷ To give a practical example of this trend at the national level, in the Netherlands, under the umbrella of the so-called ‘Law for the Introduction of Temporary Experiments in Civil Justice’, different procedural initiatives have been implemented (which they call ‘experiments’), in which it is even possible to deviate from current procedural rules, provided that the essential principles of access to justice and fair trial are respected. The results of each initiative are analysed case by case to decide whether it should be consolidated in procedural legislation or, on the contrary, abandoned.⁵⁸

4 CURRENT TRENDS IN THE ‘FOURTH WAVE’ OF ACCESS TO JUSTICE: FACING BARRIERS TO ACCESS TO JUSTICE

- 42 At this point, it is time to analyse the main initiatives that are being carried out around the world to improve justice from this new perspective of access. To facilitate the study, we will follow the same structure as the one proposed in the previous chapter to analyse the access barriers, analysing how they are trying to cope with them from this new approach.

4.1 Empowering Citizens Through Legal Information

- 43 One of the first barriers that citizens encounter in accessing justice is the lack of legal information. From this new perspective of the access to justice, it is not only worrying that citizens ignore procedural rules when they are already in court, but also that they do not know the laws that are applied to them when operating in their daily relationships (employment contracts, rental contracts, purchase and sale of objects, etc), even before conflicts arise (trying, when possible, to *de-escalate* them). Frequently they are not only

⁵⁵ OECD Recommendation (n 37), Point I.

⁵⁶ In this sense, the CEPEJ indicates as one of the ways to focus on court users ‘the efforts made by courts to understand their needs and expectations through the organization of regular surveys, workshops, interviews, meetings and other forms to enhance two-way communication, promoting quality and responsibility’, cf European Commission (n 52) 103.

⁵⁷ Cf OECD Session Notes (n 43) 21. An interesting analysis of this topic in 18-23.

⁵⁸ Cf P Van Der Grinten, ‘Self-representation and the courts: some policy observations from the Netherlands’, in X Kramer, *New Pathways to Civil Justice in Europe* (Springer 2021) 195. For example, for matrimonial issues they implemented the ‘Divorce without Damage Project’ or the institution of the ‘Consulting Judges’, with which the parties could dialogue and, if possible, look for a more informal resolution of the conflict.

unaware of the law; they do not even know how to identify the seriousness or the difficulty of their legal transactions and, of course, it is common for them not to know who to ask for help. That is why the state must act on this front in the most active way possible. As pointed out by the OECD in its Report of 2015, 'various paths to justice' have to be explored since in recent years there has been a 'growing focus on the broader range and scope of problems experienced by the public and hence their legal and justice needs (not just those that are adjudicated in courts)'⁵⁹, recommending to display a 'service continuum from public legal education to early resolution services to full representation and resolution'. This new approach is facilitated by the existence of ICTs, which offer many resources to set up complete and agile information through different mechanisms such as webpages, apps, chat boxes (instruments that could be combined with voice recognition and assistants such as Alexa or Siri), that are making possible to overcome the physical or educational barriers that have isolated certain groups for years all over the world (elderly, illiterate, poor people, etc) as they can be easily used from home through a computer but also through a mobile phone.

- 44 A first step could be taken by facilitating basic legal training to all from the very basis, as in Finland and France⁶⁰ that have included these contents as an optional extra subject in secondary school. Education would be probably the best vaccine against legal conflicts.
- 45 Regarding prevention, there are lots of public and private initiatives in this regard. As Susskind remarked 'in Law, as in Medicine, I believe that prevention is better than cure. Most people would surely prefer to avoid legal problems altogether than to have them well resolved [...] then access to justice is as much about dispute avoidance as it is about dispute resolution'. As this author continues affirming: 'improving access to justice [...] may mean more than proving access to speedier, cheaper and less combative mechanisms for resolving disputes'. It should mean 'the introduction of techniques that help all members of society to avoid disputes in the first place and, further, to have a greater insight into the benefits that the law can confer'.⁶¹ There are good examples of these initiatives in Africa, where the widespread lack of awareness regarding access to the state courts was a matter of concern. Some individuals or NGOs have created tools that facilitate access to justice for the most disadvantaged: from broadcasting legal information on television, radio, and social networks (Facebook or Twitter), to the creation of applications or platforms that subjects download to their mobile phones. For example, Barefoot Law, an internationally highly awarded project recognized as a model and was started by a law student in 2012 in Uganda as a private initiative to provide free legal information to law laymen through their Facebook and SMS. It has spread with great success throughout Africa, with more than 800,000 users (and more than 22,000 cases resolved to his credit). With a similar purpose, to provide legal education but in

⁵⁹ OECD Expert Roundtable, *Equal access to justice* (Background notes, 2015) 14.

⁶⁰ Cf E Storskrubb and J Ziller, *Access to Justice in European Comparative Law* (Oxford University Press 2007), 191.

⁶¹ Cf R Susskind, *The end of lawyers? Rethinking the nature of legal services* (Oxford 2010) 232.

this case, to Nigerians, is remarkable the initiative called 'Law Padi' (2015).⁶² Also, the creation of Comic contracts must be highlighted. These contracts 'written in pictures' explain to the citizens in an easy-to-understand way the terms of the agreements and the position and function of each party. It was developed for the first time in 2016 by a South African attorney, Robert de Rooy, to help fruit pickers on farms sign their employment contracts but has been extended to other areas of law (financial, business, etc)⁶³ and the idea is being expanded, with initiatives, for example, in Australia.⁶⁴

- 46 By the time conflicts have already arisen, in addition to multiple public and private initiatives (from legal institutions together with social and/or educational or health entities, depending on the needs), systems called 'triage' have recently been developed, in the manner of those employed in the hospital setting.⁶⁵ It is about offering mechanisms to diagnose the problem, analyse if it really has enough entity to be taken to court, prioritize the most relevant cases and offer, where appropriate, possible help (for example, legal aid when appropriate) or solutions through legal or paralegal services. For example, there is a programme in the Netherlands of interactive diagnosis and triage websites for online dispute resolution through Rechtwijzer 2.0 from 2007,⁶⁶ being visited mostly by citizens in the early stage of the conflict to try to 'collect [the] necessary information that can help them to make proper decisions how to solve the dispute'.⁶⁷ Along with these triage systems, there are multiple ways in which this kind of legal information is being given in most countries, in presence or by phone in justice contact points provided by the bar associations, by the ministries of justice or by the courts⁶⁸, or thanks to the ICTs through self-help centres or internet websites or applications⁶⁹, initiatives whose effectiveness will be intensely enhanced with the application of AI. Let us highlight three current best practices in this regard. First, the Canadian Civil Resolution Tribunal in British Columbia, which will be explained later, facilitates information about the disputes and provides as a first compulsory step a 'solution explorer' system. Second, the comprehensive and easy-to-use UK websites providing

⁶² Law Padi accessible at <https://lawpadi.com/>. About these initiatives, O Longe, 'Increasing access to justice through technology', in S Peter de Souza, *Technology, innovation and access to justice: dialogues on the future of Law* (Edinburgh University Press 2021).

⁶³ See examples of Comic contracts created by the company Creative Contracts at <https://creative-contracts.com/examples/>. Also, about these kind of initiatives, J Nagtegaal, 'Justice for all: why South Africa should invest in legal technology' (2019) Daily Maverick.

⁶⁴ See 'Australia's first visual employment contracts launched' (2018) available at <https://www.aurecongroup.com/about/latest-news/2018/may/visual-employment-contract> accessed 21 October 2024.

⁶⁵ The idea of 'legal triage' was also sponsored by Susskind; cf R Susskind (n 61) 240.

⁶⁶ Rechtwijzer official website accessible at <https://rechtwijzer.nl/> accessed 21 October 2024.

⁶⁷ OECD Expert Roundtable (n 59) 17.

⁶⁸ In Austria, for example, apart from the ordinary information given by the court, once a month there is an open day set up so that citizens can come to ask their questions.

⁶⁹ For example, in the United States, Hotdocs, Probono Net, Stateside Legal, Self-represented litigants Network, Limited License Legal technicians in Washington, Navigators in New York, and Justice Corps in California. In addition, to be remarked the development of the Stanford Legal Design Lab based in the Stanford Law School.

legal information, such as Citizen Advice, Judiciary and Gov.uk, that even allow you to file a claim through a guided platform.⁷⁰ Third, the use of robots in Chinese courts to give citizens legal guidance,⁷¹ as explained in detail in the Section of this book on digital justice.

- 47 And, finally, once the proceedings have commenced, it is crucial that they are given the appropriate information on it from the court and even from their legal counsellors.⁷² As referred by the CEPEJ, it should relate 'primarily to the objectively foreseeable duration of the proceedings, legal costs and the potentially prejudicial consequences of the parties' actions and omissions' and, besides that, 'parties should be able to request information on the progress of the proceedings and relevant explanation when they are unable to understand the purport of certain communication from the court'.⁷³

4.2 Facilitating the Understanding and Accessibility to the Justice System

4.2.1 Improving Court Accessibility through Self-Representation?

- 48 2011. European Commission Eurobarometer: only two out of every hundred consumers went to court for a consumer dispute. 78% stated that the procedure was too expensive, long and complicated.⁷⁴
- 49 No one disputes that, today, citizens prefer to go to court with a lawyer because they feel more secure and know that, in general, it will be easier for their case to prosper; specifically, five times more likely according to experts.⁷⁵ However, the truth is that this

⁷⁰ Citizens Advice available at <https://www.citizensadvice.org.uk/debt-and-money/> accessed 21 October 2024; Courts and Tribunals Judiciary, 'Online Dispute Resolution (ODR)', <https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/previous-work/disputeresolution/online-dispute-resolution/> accessed 21 October 2024; Gov.uk available at <https://www.moneyclaims.service.gov.uk/eligibility/claim-value> accessed 21 October 2024.

⁷¹ China Daily, 'Robot gives guidance in Beijing court', https://www.chinadaily.com.cn/china/2017-10/13/content_33188642.htm accessed 21 October 2024.

⁷² See in this sense, for example, the Case *Anghel v Italy* (ECtHR), Judgment of 25 June 2013 [ECLI:CE:ECHR:2013:0625JUD000596809], in which the European Court found that the court-appointed lawyer gave the client incorrect information regarding both time limits for lodging an appeal and the type of appeal admissible and therefore, that this conduct prevented the client from challenging the decision in good time and proper form.

⁷³ Cf CEPEJ, *For a better integration of the user in the judicial systems* (2021) 8 ff. There is a clear doctrine of the ECHR on the importance of the notification of judicial decisions to guarantee the right to access to justice; in this sense, the Court has repeatedly sustained that 'the right to access include the right to receive appropriate notification of judicial decisions, particularly when the possibility of challenging the decision rests on receiving such information' (Cases *Sukhorubchenko v Russia* (ECtHR), Decision of 15 January 2004 [ECLI:CE:ECHR:2004:0115DEC006931501]; *Hennings v Germany* (ECtHR), Decision of 16 December 1992 [ECLI:CE:ECHR:1992:1216JUD001212986]; *Mikulová v Slovakia* (ECtHR), Decision of 6 December 2005 [ECLI:CE:ECHR:2005:1206JUD006400100] *inter alia*).

⁷⁴ More in detail, on procedural costs, see Chapter 4 of this Part III.

⁷⁵ Rebecca Sanderfur, sociologist of the Stanford University, after studying the impact of the work of lawyers on the outcome of trials, he stated that 'a litigator with a lawyer is five times more likely to win

assistance is expensive or very expensive, depending on the country, so that, ultimately, it ends up being in many cases one more barrier to access to the courts. It can be surmounted, from above, by those who have money available to dedicate to this end without this preventing them from covering their basic daily needs or, from below, by those who, demonstrating their lack of resources to litigate, obtain assistance from the state to go free of charge to the courts (being state budget cuts in this regard on the rise in recent years).⁷⁶ In the middle, there is a very broad stratum of the population, such as the middle class, which in many cases chooses not to enforce their rights in court because the accounts do not come out, especially when it comes to lawsuits for matters of little entity. As the Court of Justice of the European Union pointed out in its judgment in *Case Océano Grupo Editorial SA vs Rocio Murciano* 'in disputes where the amount involved are often limited, the lawyer's fees may be higher than the amount at stake, which may deter the consumer from contesting the application of an unfair term'.⁷⁷ This difficulty could be overcome by extending the coverage of legal aid to a greater number of people who need it, but, curiously and unfortunately, as mentioned above, the trend for more than a decade has been exactly the opposite, with the Justice budget dedicated to this aim being cut more and more in most countries.

- 50 What strategy to adopt, then, to guarantee effective access to justice? In practice, many states have chosen to increase the cases in which a lawyer is not required in civil proceedings (for example, this has happened in the United States, Canada, the United Kingdom, Australia, New Zealand or Hong Kong).⁷⁸ The photograph of what happens in the Member States of the European Union serves also as an example of this tendency: eight of them totally waived the obligation to appear in court with legal assistance at all in all their instances (Denmark, Finland, Ireland, Latvia, Lithuania, Malta, Romania and Sweden) and, in another seven (Belgium, Bulgaria, Croatia, Czech Republic, Slovenia, Estonia and Poland), it is only required for high appeals (second appeal or cassation).⁷⁹ In this way, gradually, legal defence is becoming an option for the citizens, as configured in Art 47 EUCFR and proposed in the ELI/UNIDROIT Model European Rules of Civil Procedure (Rule 14⁸⁰). Is this new trend a guarantee of more effective access to justice? In our opinion, if we analyse it from the point of view of the citizen, if this option comes devoid of additional tools, it is a real fiasco. The state raises this first barrier but leaves the citizen alone before the courts.

a trial than someone who defends himself'. Cf R Sanderfur, 'Access to what?' (2019) 148 (1) *Dedalus*, 986.

⁷⁶ More in detail, on procedural costs, see Chapter 6 of this Part III.

⁷⁷ Para 26.

⁷⁸ Cf S Buhal, 'Access to justice for unrepresented litigants: a comparative perspective' (2009) 42 *Loyola of Los Angeles Law Review* 979, 983.

⁷⁹ Cf Cubillo López, I.J., 165.

⁸⁰ Rule 14 ELI/UNIDROIT Model European Rules of Civil Procedure: 'Except when legal representation is required by law, parties have a right to represent themselves in proceeding'.

- 51 Identified the situation and the problem, various alternatives may be offered to deal with this issue from the perspective of this fourth wave:
- 52 First key: promoting initiatives so that citizens can *self-manage* their legal conflicts, and that allows them to prepare to go to court (as a procedural DIY). How? Facilitating information and legal assistance through traditional means or through technological means, as we analysed in the previous section. Take the UK website citizensadvice.org, mentioned above, as an example.
- 53 Second key: creating forms to access judicial proceedings, built in a flexible way, with drop-down information tabs to help the users understand what data is being required and why they have to give that information, avoiding rigid designs such as the European models provided by the E-justice platform.
- 54 And third and last one: adapting the procedural rules when parties do not need lawyers. The problem is: which model should be followed? Interestingly, almost all the procedural models for small claims or trifle matters agree on the establishment of 'lighter' procedures, which simplify the stage of allegation and evidence (which are often done with forms), the deadlines and, on occasions, the channels for appealing judicial decisions.⁸¹ But, even if these changes are undertaken, can lay persons be required to act within the framework of a civil proceeding with rules of the game designed for lawyers and with a judge who operates solely as a mere referee observing the plays because he counts on the two opponents are track professionals (what some have come to call the 'sports theory of justice')?⁸² If the response is negative, we may formulate proposals of procedural models designed specifically for these cases of self-representation, question that we will study later in the Sec 4.4.1 of this chapter.

4.2.2 Legal Language

- 55 There is no doubt that one of the most difficult barriers to overcome by lay citizens is the understanding of legal language. Of course, we do not consider that it is a question of adopting a basic and simple language or slang, so that everyone understands it; nor of avoiding legal language under the umbrella of a kind of movement like the one that in 1793, during the French Revolution, led to the abolition of the Schools of Law. Technical terms and legal language must be used and, in fact, are essential in many contexts, but it is about making it understandable for their users (above all, court decisions). The judge applies the law through their word and must take care of it: they

⁸¹ Cf W Hau, 'Las pequeñas causas en el proceso civil: tribunales, vías procesales (tracks) y procedimientos de escasa cuantía' (2019) 1 Revista Ítalo-española de Derecho Procesal 102. This author specifically points out that in some countries, appeals are not allowed but another way of attacking the decision issued in the small claims procedures (challenging hearing in Germany (Sec 321 German Code of Civil Procedure (GCCP); by means of a similar remedy in Austria (only by annulment or error of law); complaint in Japan or Switzerland).

⁸² More in detail, on procedural costs, see Chapter 6 of this Part III.

must know how to express themselves clearly, concisely, avoiding the use of complex or convoluted language when it is not required or the employment of stereotyped formulas with obscure or intimidating meaning and, of course, must use the language correctly from both the grammatical and semantic point of view. This idea is clearly explained in the Opinion No 11 given by the Advisory Council of European Judges on the quality of judicial decisions (2008), in the following way: ‘all judicial decisions must be intelligible, drafted in clear and simple language -a prerequisite to their being understood by the parties and the public. This requires them to be coherently organized with reasoning in a clear style accessible to everyone’.⁸³ In some cases, it could involve the need to facilitate the citizens a sort of translation of the entire resolution, briefly explaining the main content of the decision.⁸⁴

- 56 Nevertheless, in addition to complying with these basic requirements, the judge must not forget that the addressee of the decision must understand the result of their deliberations, so it may be necessary in some cases that they have to carry out a sort of ‘translation’ of judicial decisions in plain language, adapted to the circumstances of the addressee (age, level of education, etc).⁸⁵
- 57 To fulfil the objective of making language more accessible to citizens, many initiatives have been developed worldwide. It stands out the works of the CEPEJ, an institution integrated into the Council of Europe, and their Document titled ‘Guidelines and comparative studies on the centrality of the user in legal proceedings in civil matters and on the simplification and clarification of language with users’ (16–17 June 2021). We bring here some of its main recommendations, as they can be taken as a guide of best practices in this regard:

- a) Encouragement of the training of judges in this matter (in oral and written communication), both in their initial and ongoing stages. Even introducing

⁸³ Advisory Council of European Judges, Opinion No 11 (2008), para 32.

⁸⁴ Curiously in mediation a simple and understandable language is regularly used.

⁸⁵ For example, this is provided expressly in Spain for people with disabilities where the Civil Procedural Law has been recently adapted to the international requirements provided by the International Convention on the Rights of Persons with Disabilities of 2006. Thus, the Law 8/2021, of June 2, introduced a new section in Article 7, which states the following: ‘In the processes in which people with disabilities participate, the necessary adaptations and adjustments will be made to guarantee their participation in equal conditions’, adaptations that may be requested by the parties, by the Public Prosecutor or ex officio. It requires adapting, when necessary, their communication (for example, through a sign interpreter), their understanding, requiring the use of ‘clear, simple and accessible language’ based on their personal characteristics and needs, and their interaction with the environment. Good examples of this adaptation are the Pilot Projects for easy-to-read judgements that are being implemented in Courts in Asturias, Madrid, La Rioja and Andalusia. They have achieved to bring court decisions closer to their recipients, so that they understand what aspects will affect them and for this purpose they clarify the legal terms used in boxes, including pictograms on the concepts that the resolution deals with. See more in detail the ‘Guide of best access practices for people with disabilities’ (2021) <https://www.poderjudicial.es/cgpj/es/Temas/Igualdad-de-Genero/Guias-y-estadisticas/Guias-del-Consejo-en-la-materia/Guia-de-buenas-practicas-sobre-el-acceso-a-la-justicia-de-las-personas-con-discapacidadf> accessed 21 October 2024 .

these topics as part of the curriculum at the university level, as occurred, for example, in Germany.⁸⁶

- b) Creation of manuals and style recommendations. The Belgian project of the Higher Justice Council (known as Plan Crocus, 2017–2020) stands out, which has worked to invite all those involved in judicial proceedings to 'use existing tools to communicate in a more understandable way'. Initiatives of Bosnia and Herzegovina, Denmark, and Sweden (Language Act) are also remarkable.⁸⁷
- c) Promotion of information tools such as brochures and web pages on these topics.
- d) Careful implementation of the use of model forms and templates for resolutions, always while respecting judicial independence. In fact, in some countries the use of forms is mandatory (for example, in the United Kingdom - Art 4 of the Civil Procedural Rules). In other countries, such as Germany, Hungary or Moldova, although it is not mandatory, these forms are provided to judges to ensure that they meet certain minimum standards for citizens. These practices are in any case different from the not recommended use of stereotyped reasoning through the 'cut and paste' technique, which unfortunately is frequently used by our courts, and which deprives the defendant of defence opportunities for lack of sufficient reasoning.
- e) Introduction of periodic evaluations of the oral and written skills of judges, at least during their first stage of training (in Austria during the first three years) or throughout their tenure, as several countries already do like Finland, Germany (every four or five years), Italy or Slovenia.⁸⁸
- f) Realization of surveys of users of justice to measure their satisfaction in terms of their understanding of the language after passing through the courts, to adopt the necessary corrective measures to improve their understanding, as is the case in Denmark, Finland, Moldova, Slovenia or Sweden.

58 In the same line, the OECD has recently invited Member States in the abovementioned Recommendation of the Council on Access to Justice and People-centred Justice Systems to 'design and deliver people-centred legal and justice service by': ensuring that they are 'provided in clear, plain and inclusive language and manner, avoiding complexity' (Sec II.2.b.ii).

⁸⁶ Cf CEPEJ (n 73) 27.

⁸⁷ Ibid 34 ff.

⁸⁸ Ibid 44.

4.2.3 Design of Judicial Spaces

- 59 Accessibility to the justice system also involves planning its design considering the needs of users. In this section, we will mention the importance of planning well the physical spaces in which justice is administered in person (Sec 4.2.3.1), as well as the virtual spaces, which are increasingly used (Sec 4.2.3.2).

4.2.3.1 Design of Judicial Spaces for Presential Procedural Activities

- 60 The idea that the design of the place intended to administer justice influences their users' mood and attitude is not new. In fact, the Romans were aware of the importance of the design of law-administering spaces. They set up harmonious buildings with their magnificent basilicas that conveyed an idea of authority and social order to those who came to request justice. This idea has been perpetuated for centuries, as shown by the fact that the court building is usually one of the most prominent and usually one of the most solemn in almost all cities. Linda Mulcahy, Professor at the University of Oxford, resumes this idea in this way: 'how the design of the courthouse and courtroom can be seen as a physical expression of our relationship with ideals of justice'. Changes in the approach to the justice system have been reflected in the configuration of judicial spaces (for example, increasing the room for advocates, reducing, or increasing the place for the public, for the jury, etc). In other words, the history of the design of buildings dedicated to administering justice has much to say about the historical evolution of justice itself.⁸⁹ If, as we maintain in this work, the perception of access to justice is changing in recent years to a more user-centred perspective, it is, therefore, logical to consider how this should be reflected in the judicial architecture. With numerous examples Mulcahy illustrates how new judicial buildings all over the world are being conceived as symbols of democracy, being open to more public participation. Contemporary architects are planning buildings that could be a mirror of transparency, accessibility without losing their sense of majesty or authority. Examples of this new tendency could be found in courthouses in the UK, South Africa, Australia, France, and Belgium, as shown by Mulcahy.⁹⁰ Of all of them, we highlight two examples of this type of construction. First, the enlargement project of the Bordeaux Palace of Justice.⁹¹ This work, carried out in 1992 by the prestigious architect Richard Rogers (who also projected the European Court of Human Rights building, among others), pursues to convey to citizens a positive perception of the accessibility of the French judicial system and reflects its two essential characteristics: transparency identified with the clarity of the glass that covers the whole building, and the honesty of the judges, 'materialized in a

⁸⁹A detailed study of the evolution of the legal architecture could be found in L Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (Routledge 2011). Also interesting on this topic, N W Spaulding, 'The enclosure of justice: courthouse architecture, due process and the dead metaphor of trial' (2012) Yale JL & Human.

⁹⁰ Cf L Mulcahy (89) 151-159.

⁹¹ Cf L Mulcahy and E Rowden, *The Democratic Courthouse A Modern History of Design, Due Process and Dignity* (Routledge 2019). And also in L Mulcahy (n 89).

drastic separation of forms emphasized with a clear differentiation of materials'.⁹² Second, the New Zealand Court of Justice, which expresses throughout its walls the new aspirations of the justice system of the twenty-first century.⁹³

- 61 Another important step to improve the design of judicial spaces goes through the preparation of guidelines for the construction of projects of this type. As far as I know, the United Kingdom is leading this approach in practice, as they have prepared a 169-page guide (available online), literally intended to 'improve the experience of justice users' titled 'Court and tribunal design guide',⁹⁴ that could be used as a reference by other countries. It contains the standards they consider must be followed for the judicial buildings to be:

Appropriate (buildings must provide the right setting and service for each user and every hearing, and reflect the dignity and authority of the courts and tribunals); effective (buildings must provide a safe environment for everyone and help each user fulfil their role); accessible (buildings must be easy to use and understand) and flexible (buildings must be adaptable, both for day-to-day requirements and longer term change); sustainable (the estate must be affordable to resource and maintain).⁹⁵

The guide considers how spaces should be organized to offer a better service to citizens so that their presence in them does not generate so much stress or anxiety; for example, from how the point of entry should be, with a waiting room and a welcoming service desk), whether a room should be set up for children who must go to the courts (in which they play or read) or how to prepare a prayer room, about the best acoustics, the best colour or the furniture that best suits the purpose and tone of each space.

4.2.3.2 Design of Online Judicial Spaces

- 62 The concern to create friendlier environments for the public, but without losing the sense of prestige, authority, and legitimacy that the courts deserve increases in virtual environments. The mere journey that the defendant must make from the street to the courtroom (especially if the architect has planned a large entrance space to reach the building, as is the case, for example, of the Supreme Court of Australia) poses the user in a situation. However, this does not happen online, whoever connects to a hearing

⁹² Cf Arquitectura Viva official webpage available at <https://arquitecturaviva.com/works/ampliacion-del-palacio-de-justicia-burdeos> accessed 21 October 2024.

⁹³ See, for example, about the meaning of this building M T Watson, *Representing Justice: Architecture and the New Zealand Supreme Court*, 2012, <http://researcharchive.vuw.ac.nz/handle/10063/2443> accessed 21 October 2024.

⁹⁴ HM Courts & Tribunals Service, 'Court and Tribunal Design Guide' (2019) https://assets.publishing.service.gov.uk/media/66be1e1ac909b91981323ee8/Court_and_Tribunal_Design_Guide_v3..pdf accessed 21 October 2024.

⁹⁵ Cf HM Courts & Tribunals Service (n 94) 9.

from home. Therefore, it is necessary to think about how to help the user get prepared for their virtual entry into the spaces of justice. Although there are other countries that have also made significant progress in this regard, we highlight again as a best practice the initiatives taken in the United Kingdom. As a result of the work of various experts from various disciplines, they have prepared a variety of tools to help users. In particular, apart from a guide of 'Good practices for remote hearings'⁹⁶, there are videos available on the Ministry of Justice website⁹⁷ (on different types of trials) explaining three essential issues: first, how to prepare for court hearings both technically and personally (for example, what to do if you do not want to be seen by one of the participants in the virtual session); second, what will happen during the hearing; and, third, how to behave (indicating, for example, that they should be polite, that they cannot eat or drink, or smoke, or have pets around). As illustrated by Professor Mulcahy, who has led this project, in just 15 minutes citizens can be conscious of what they are going to do so it is easier for them to act accordingly.

4.3 Improving Access to Justice to Vulnerable Parties

- 63 This new way of understanding access to justice is representing very significant progress in improving the protection of the most vulnerable groups in their access to justice. In this section, we will point out some measures taken for this purpose. First, two initiatives that are being taken to improve any kind of vulnerability and, second, some plans or projects specially designed for the collective they are aimed at.

4.3.1 General Initiatives for All Vulnerable Collectives

4.3.1.1 Improving Substantive Law for the Better Protection of Vulnerable Groups

- 64 A key piece to improve access to Justice with capital letters is, logically, the existence of substantive regulations that sufficiently protect the rights and interests of these vulnerable groups. For this reason, states are being especially sensitive to the needs of these groups and are building true regulatory bodies to defend their interests. Consider, both at the national or supranational levels, the progress made in the last two decades in the field of consumers and how it continues to evolve, in constant adaptation to the new needs of commerce users. Thus, for example, in the European context, the Directive 2019/2161, of 27 November 2019, stands out, for the improvement and modernization

⁹⁶ Cf Judicial College, 'Good Practice for Remote Hearings' <https://www.judiciary.uk/wp-content/uploads/2020/03/Good-Practice-for-Remote-Hearings-May-2020-1.pdf> accessed 21 October 2024; HM Courts & Tribunal Service, 'What to expect when joining a telephone or video hearing' (2020) <https://www.gov.uk/guidance/what-to-expect-when-joining-a-telephone-or-video-hearing> accessed 21 October 2024.

⁹⁷ Cf HMCTS.gov.uk, 'Supporting Online Justice' https://www.youtube.com/playlist?list=PLORVvk_w75Py6JCIMOiiItyTjI2gyc81g accessed 21 October 2024.

of the application of the EU consumer protection, which again increases the list of rights and guarantees of buyers, especially reinforcing their protection in online traffic.

- 65 In other countries, there are also numerous legislative initiatives to improve the protection of women⁹⁸ or certain communities marginalized for years or centuries for reasons of gender or race. That is the case, for example, of Canada, where they approved a Reconciliation Plan with Indigenous Peoples (2021–2024), focused, among other things, on the promotion of the rights of this group.

4.3.1.2 Expanding Legal Standing for the Better Protection of Vulnerable Groups

- 66 Once more rights for the most vulnerable groups are recognized, the next step to improve access to Justice involves expanding the circle of subjects or entities that can invoke them before the courts, recognition that can carry out the legislators and the courts.
- 67 At the European level, the legislation that recognizes extraordinary legitimization is very varied, although, due to its novelty, we highlight Directive 2020/1828, which enables certain entities to exercise on behalf of consumers representative actions for the protection of collective interests.⁹⁹ At the national level, there are several examples of the extension of the rules of legal standing for the protection of women or other people marginalized due to age or sexual condition (or disabilities). For example, this occurs in Spain, where the Civil Procedure Act recognizes this power also to political parties, unions, professional associations of self-employed workers, organizations of consumers and users.
- 68 Courts also help in this task. Specifically, as an example, let us cite two recent judgments of the European Court of Justice that have made a broad reading of the extraordinary legal standing rules provided for in the legislation on the environment and data protection, respectively.

⁹⁸ Women are a group that are marginalized in not few countries. As an example, in the Sub-Saharan countries, the gender bias/discrimination was one of the most serious barriers (the second more significant) to access to justice (cf 49). There is also a gender gap identified as there are big differences among women depending on their marital status: 'Married women might be engaged in very different economic activities than never-married women, implying different judicial needs for business and issues related to labor contracts. Marriage might also protect against some forms of gender-based violence against women, albeit offset by potentially higher potential for intimate partner violence' (cf 53).

⁹⁹ Art 11 *bis* Spanish Civil Procedural Law: 'To defend the right to equal treatment and non-discrimination, in addition to the affected persons and always with their authorization, the Independent Authority for Equal Treatment and Non-Discrimination will also be legitimized, as well as, in relation to affiliated persons or associated with them, political parties, unions, professional associations of self-employed workers, organizations of consumers and users and legally constituted associations and organizations that have among their purposes the defence and promotion of human rights'.

- 69 The first, the *Sitchting Varkens in Nood and others Case*.¹⁰⁰ In this case, the Court clarified that Art 9 of the Aarhus Convention on access to justice in environmental matters, should be interpreted in the sense that NGOs should be considered in any case ‘interested public’ in the sense of the second paragraph of that article; therefore, their prior participation in the procedure for adopting the contested decision could not be required for their access to legal remedies against decisions that affect the environment, since this reading would violate the objective of the Convention to guarantee this group ‘broad access to justice’ and would deprive this provision of its ‘useful effect’.¹⁰¹ However, this condition may be deprived to the ‘general public’ (and thus, to the co-plaintiff *LB*, who lived 20 km from the pigsty), for whom more limited access is recognized. Therefore, the signatory states may approve procedural norms that establish certain admissibility requirements with respect to these resources, without prejudice to the fact that said national legislations decide to grant the public a broader legitimation. These possible procedural requirements applicable to the public in accordance with Art 9.3 of the Convention, although they implied a certain restriction of the right to effective judicial protection, should be understood as ‘justified [...] within the respect of the principle of proportionality and if it responds to an objective of general interest of the EU’.
- 70 More recent is the Judgment handed down in the Case *German Federation of Consumers vs Meta Platform Ireland (Facebook)*.¹⁰² In this case, the German consumer protection entity argued before the courts that the download of free games provided by the defendant implied the acceptance of conditions regarding the data of the users that seemed unfair. The discussion was about whether the Federation could have legal standing in accordance with Art 80 of Regulation 2016/679, on representation of data subjects, since no specific violation of the rights at stake was alleged and there was no specific interested party affected. Once again, the European Court of Justice was inclined to broadly interpret the European legislation: they considered this reading to be the most appropriate to ‘guarantee effective protection of the freedoms and fundamental rights of individuals and, in particular, their right to protection of privacy and the protection of personal data’.

4.3.2 Measures Aimed at Certain Vulnerable Groups

4.3.2.1 Protecting Poor and Illiterate Citizens

- 71 In recent years, all supranational organizations have been especially attentive to data on access to justice for the most needy and poorest, since they are becoming increasingly

¹⁰⁰ Better known as ‘Pigs in distress’ because it was about the legal standing to challenge the granting of an authorization from the city council of a town in the Netherlands to build a new barn for breeding sows.

¹⁰¹ In this same line of previous cases such as *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd*, C-664/15 (CJEU), Judgment of 20 December 2017 [ECLI:EU:C:2017:987].

¹⁰² *Meta Platform Ireland (Facebook) v Bundesverband der Verbraucherzentralen und Verbraucherverbände*, C-319/20 (CJEU), Judgment of 28 April 2022 [ECLI:EU:C:2022:322].

aware that a justice system that does not work increases exponential poverty and perpetuates situations of need, as it generates endless spirals of problems, as we indicated in the previous chapter that the OECD reports pointed out in recent years.¹⁰³ They are also worried about the great disadvantages that illiterate or people with low levels of education have before the courts: 'it was found that people who were unable to take action for their legal problems had "low level of capability in terms of education, income, confidence, verbal skill, literacy skill and emotional fortitude" (Genn and Paterson, 2001), thus pointing to the multi-dimensional nature of legal capability (Collard et al., 2011)'.¹⁰⁴ In some cases, the difficulties are aggravated by war or post-war situations, such as the case in Afghanistan or in some Sub-Saharan countries, such as Sierra Leone.¹⁰⁵ In these cases, specific solutions are required, in most cases not only in order to rebuild the justice system, but also to reconstruct citizens' trust in it.¹⁰⁶ In this sense, the UN Secretary General Report (2004) pointed out that 'sensitive of the needs of the groups' must be appreciated in every particular case.¹⁰⁷

- 72 This new approach to access to justice pretends to fill the *justice gap* and, through this, improve the economy of the countries, particularly of Third World countries. As mentioned before, this expansion of the protection of the access to justice is possible in large part due to many different initiatives (such as mobile legal service clinics that visit the villages regularly, particularly in rural areas). In any case, there is no doubt that it is being enhanced thanks to the modern communication techniques, which have made it possible to bring the information or legal help to the most remote places and to the people most in need (even if they are illiterate). And, as we have seen in these pages, especially due to the emergence of the AI, this is just the beginning. The work of the NGOs is also remarkable in this sense, since in the last years they are searching in poor countries for the most appropriate mechanism to improve their system of justice (*no one-size fits all* solutions). Examples of these experiences have already been provided in the previous section of this chapter, to which we refer.

4.3.2.2 Protecting Disabled

- 73 Historically, one of the sectors of the population that could almost be said to have been left out of possible access to justice was the disabled. In recent years there has been a greater worldwide awareness of the need to provide them a more accessible world.

¹⁰³ See Bowdon the difficulties to get to the court in three poorest countries in the world: Sierra Leone, Tanzania and Zambia (cf R Bowdon, 'Access to justice in Africa' (2019) (13) Policy Brief).

¹⁰⁴ OECD Session Notes (n 43) 12.

¹⁰⁵ Cf W H Malik and C L Maghani, *Voices of the vulnerable: promoting access to justice in Sub-Saharan Africa* (World Bank 2023) 34.

¹⁰⁶ Cf *ibid*, 61: 'Lack of trust in the judiciary is considered the leading barrier to the access to justice and is strongly related to other barriers, while corruption is the most direct cause for distrust in the judiciary'.

¹⁰⁷ For example, this lead in Afghanistan (a country where the 69% of the population is illiterate) to the rehabilitation of customary courts, taking into account their lack of confidence in official courts.

From the perspective of access to justice, the United Nations approved in December 2006 an instrument protecting their rights, the International Convention on the Rights of persons with Disabilities,¹⁰⁸ whose Art 13 recognizes their right of access to justice in the following terms:

States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

- 74 Different countries have introduced these measures into their national legislations, such as Spain in its recent Law 8/2021, of 2 June 2021.¹⁰⁹

4.3.2.3 Protecting Consumers

- 75 As remarked by Wrba, the new valued-oriented justice (what he called Justice 2.0) requires a new approach to consumer law; traditional models do not satisfy their rights: 'consumer rights are only as effective as their enforcement'. Therefore, it was necessary to build a system that guarantees not only the access to 'functional procedural system of rights' but also to 'suitable substantive rights'.¹¹⁰ This new perspective has been assumed in different countries but as explained above in Sec 4.3.1, it is for the last years a particular target within the European Union.

4.3.2.4 Protecting SMEs

- 76 Although the fundamental focus of the new approach to access to justice is on the poorest citizens, on marginalized people and on consumers, a group especially affected by inappropriate access to justice cannot be left out, SMEs. SMEs are the social and economic *engine room* of every country. Therefore, states are increasingly analysing the legal protection needs of their companies to provide them with more effective judicial protection. To give an example, this study has been carried out in Poland, with the result that shows the importance of this issue for SMEs: 'almost half (46.9%) respondents who

¹⁰⁸ On this topic, more in detail, see E Flynn, *Disabled justice? Access to justice and the UN Convention on the Rights of Persons with Disabilities* (Routledge 2015).

¹⁰⁹ This Law introduces a new section in Art 7, which states the following: 'In the processes in which people with disabilities participate, the necessary adaptations and adjustments will be made to guarantee their participation in equal conditions', adaptations that may be requested by the parties, by the Public Prosecutor or ex officio. It requires adapting, when necessary, their communication (for example, through a sign interpreter), their understanding, requiring the USE of 'clear, simple and accessible language' based on their personal characteristics and needs, and their interaction with the environment.

¹¹⁰ A wonderful treaty on this issue is the work of S Wrba, *European Consumer Access to Justice revisited* (Cambridge University Press 2015) 28. Also on this topic C E F, Rickett and T Telfer, *International perspectives on consumers' access to justice* (Cambridge University Press 2003), in particular Part I.

ran a business at the time of the survey had at least one legal issue in the three years preceding the study',¹¹¹ data that is probably equal in most countries. And the problem is that many small and medium-sized companies do not only know what to do when a legal conflict arises, but also how to prevent it (improving, for example, the wording of their contracts), and they mostly do not have access to free legal assistance to help them finding the better path to solve the conflict. These differences are aggravated, as Butler pointed out for New Zealand (although it can be generalized to any country),¹¹² in international trading, reason why many of these micro-enterprises decide not to operate abroad to avoid problems. Apart from the escape in these cases to the mechanisms of ADR (Professor Butler proposes in her article as a partial solution the creation of Bilateral Arbitration Treaties), it is necessary to evaluate country by country what needs their SMEs have and propose measures that can improve their access to the courts, many of them will go through the use of ICTs to improve conflict prevention and the first approach to the case.¹¹³

4.3.2.5 Protecting Indigenous People

- 77 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted in 2007. It establishes minimum standards for the survival, well-being, and dignity of Indigenous Peoples around the world. UNDRIP recognizes, among other things, Indigenous Peoples' right to self-determination, autonomy, or self-government (Art 4, UNDRIP). There are certain countries such as Australia, Brazil or Canada, where these rules are of special interest for the presence of an important number of Indigenous. For example, Canada did not fully endorse UNDRIP until 2016 and finally approved on 2021 the Bill C-15, 'an Act respecting the UN Declaration on the Rights of Indigenous People'.¹¹⁴

4.4 Reducing Procedural Barriers

- 78 Apart from the requirements that both national and supranational jurisdictions have traditionally formulated as desired so that procedural requirements do not constitute obstacles to effective access to justice (avoiding inadequate procedural rules that

¹¹¹ Cf K Muszynski, 'Access to justice in small and medium-sized enterprises in Poland. An empirical report', 2019 https://www.academia.edu/40798193/Access_to_justice_in_small_and_medium_sized_enterprises_in_Poland_An_empirical_report accessed 21 October 2024.

¹¹² Cf P Butler and C Herbert, 'Access to justice vs access to justice for Small and Medium-sized enterprises: the case for a bilateral arbitration treaty' (2014) 26 *New Zealand Universities Law Review*, 2 and 12.

¹¹³ See P Butler and G Whelan, 'Does the Dispute Resolution Regime in Europe Really Serve MSMEs?', in B Beament, A Foucard and F Brodlija (ed), *International Arbitration: Quo Vadis?* (Wolters Kluwer 2022) Ch 6.

¹¹⁴ Act respecting the United Nations Declaration on the Rights of Indigenous Peoples, Bill C-15, 21 June 2021 <https://www.parl.ca/DocumentViewer/en/43-2/bill/C-15/royal-assent> accessed 21 October 2024.

contain disproportionate procedural formalities or excessively strict interpretations of such rules¹¹⁵), two questions must be raised regarding the novelties introduced in this

¹¹⁵ For example, in the context of the ECHR, the ‘right to a court of which the right of access to a court is one aspect, is deemed as not absolute and subject to limitations permitted by implication, in particular as regards the conditions of admissibility of an action, since by its very nature it calls for regulation by the State, which enjoys, in that regard, a certain margin of appreciation’. However, the European Court of Human Rights cannot allow courts to make an unreasonable or excessively strict interpretation of these requirements that would effectively restrict a litigant’s right to effective legal remedy. Various examples can be found. First, the Court has had to rule on the correct interpretation of the reasons for lodging an appeal. An example of this is the judgment of the European Court of Human Rights, which found against Spain in *Sociedad Anónima del Ucieza v. Spain* (ECtHR), Judgment of 20 December 2016 [ECLI:CE:ECHR:2016:1220JUD003896308] on the grounds that ‘the particular combination of facts’ in the case prevented ‘proportionality between the limitations imposed by the High Court and the consequences of those limitations’. The Spanish High Court had refused an application for cassation on the grounds that the plea did not exceed the minimum requirement of EUR 600,000, as the plaintiff had stated that the amount at stake was beyond calculation, even though expert reports included in the documents indicated that it did in fact exceed EUR 600,000.

Another fundamental issue is the interpretation of deadlines for bringing appeals, since disproportional limitations can constitute an absolute impediment to the exercise of this right. In this respect, the Court of Justice of the European Union, in its ruling in the case of *Internationale Fruchtimport GmbH & Co. KG v European Commission* (CJEU), Order of 16 November 2010 [ECLI:EU:C:2010:684], states that ‘rules concerning time-limits for bringing proceedings are mandatory and must be applied by the court in question in such a way as to safeguard legal certainty and equality of persons before the law (findings of the court in *PKK and KNK/Council*, of 18 January 2007, paragraph 101)’, with exceptions only being admissible when ‘fundamental rights are at stake’. Under European laws, therefore, exceptions are only justified in the case of excusable error that ‘only refers to exceptional circumstances in which, in particular, the conduct of the institution concerned has been, either alone or to a decisive extent, such as to give rise to a pardonable confusion in the mind of a party acting in good faith and displaying all the diligence required of a normally well-informed person (see, specifically, the ruling given in *case C-112/09, SGAE/Commission*, of 14 January 2010)’. This occurred, for example, in two well-known cases brought before the European Court of Human Rights, in which the Court found against Spain: in the first, *Pérez de Rada Cavanilles v Spain* (ECtHR), Judgment of 28 October 1998, Reports 1998-VIII [ECLI:CE:ECHR:1998:1028JUD002809095] para 49, because an appeal had been dismissed by the court in question on the grounds that an appeal for reversal had been lodged after the deadline. The Court considered that the applicant had been diligent in lodging the appeal as, in accordance with court rules, she had sent it by post from Madrid, which is where the decision had been served, instead of travelling to Aoiz to lodge the application in person, a requirement which the European Court deemed unreasonable. In the second, in the case of *Stone Court Shipping Company, S.A. v Spain* (ECtHR), Judgment of 28 October 2003 [ECLI:CE:ECHR:2003:1028JUD005552400], because the High Court had made a particularly loose interpretation of the deadline for lodging a cassation appeal. The applicant had lodged the appeal at the Night Court on the last day of the deadline, which was a Friday, outside the office hours of the general Registry of the High Court. ‘The Court notes that the applicant cannot be judged to have acted negligently or to have committed an error in lodging the appeal on the one hand, at the Night Court on the day before expiry of the deadline, considering that the dies a quo was disputed, and on the other, outside the office hours of the general Registry of the High Court’. Above all, because the High Court dismissed the appeal due to it being lodged at the Night Court on a Friday. It would have been admitted if it had been lodged on any other day of the week, according to a wholly arbitrary rule imposed by the High Court, which, according to the ECHR, was not included in the applicable regulations. This is not the case when the parties act out of time by their mistake. As an example, in the aforementioned case of *Fruchtimport*, the Court of Justice ruled that this fundamental right had not been violated because the applicant’s lawyer lodged the appeal late.

The European courts have also had to rule on the proportionality of dismissing an appeal that did not comply with other formalities, such as the requirement to deposit a sum of money before lodging the

fourth wave. First, the need to adapt our procedural models to the increasing cases of self-representation (Sec 4.4.1) and second, the procedural consequences that the measures adopted in the substantive field to better protect vulnerable groups (Sec 4.4.2).

4.4.1 *The Need to Adapt the Procedural Models to the Increasing Cases of Self-representation*

79 Given that, as we mentioned above, states are increasing the cases in which individuals are not obliged to go to court with a lawyer, it may be necessary to adapt the procedural models to this new panorama. If not, citizens will not be able to cope with multiple formalities thought for a procedure with legal experts, building a clear new barrier to access justice. Thus, we will formulate below a series of proposals to adapt our civil procedures to this new situation:

- a) Regarding the form of the procedure: procedures should predominantly be oral. It is true that some models of small claims procedures such as the European one (highly criticized for it) or some countries for reasons of greater effectiveness¹¹⁶ are preferring written procedures. In our opinion, this option clearly reduces guarantees for the litigants, even greater when they do not go with a legal professional to bring the dispute before the courts. When the parties go unrepresented, it becomes even more urgent to have at least the option of holding a hearing and for the parties to

appeal. Specifically, the European Court, in the case of *García Manibardo v Spain* (ECtHR), Judgment of 15 February 2000, 38695/97 [ECLI:CE:ECHR:2000:0215JUD003869597] found that Spain had breached the applicant's right to an appeal when the court declared her appeal inadmissible owing to her failure to deposit the sum she had been ordered to pay at a time when her application for legal aid had yet to be decided by the court. In the case of *S.A. Sotiris and Nikos Kouras Attee v Greece* (ECtHR), Judgment of 16 November 2000, 39442/98 [ECLI:CE:ECHR:2000:1116JUD003944298], the appeal had been dismissed because the record of deposit stamped on the application did not comply with regulations. This error was beyond the applicant's control and deprived the company of its right to remedy before the courts. Nevertheless, the requirement in domestic legal systems that applicants must be represented by a practising lawyer is not considered an obstacle to seeking legal redress. Specifically, the Court has ruled that the requirement that an appeal be lodged by a lawyer is not a violation of Article 6.1 ECHR (*Masirevic v Serbia* (ECtHR), Judgment of 11 December 2014, 30671/08 [ECLI:CE:ECHR:2014:0211JUD003067108], which cites earlier rulings, such as *Gillow v. the United Kingdom* (ECtHR), Judgment of 24 November 1986, Series A no 109; *Vacher v France* (ECtHR), Judgment of 17 December 1996 and *Tabor v Poland* (ECtHR), Judgment of 27 June 2006 [ECLI:CE:ECHR:2006:0627JUD001282502]).

The Court of Justice also considers it proportional to require that the appellant has an interest in the appeal, as this requirement 'pursues a legitimate aim, which is none other than to prevent, in the interest of proper administration of justice, theoretical issues with no legal consequences or, as in the present case, no benefit to the applicant, from being brought before the court' (*Mindo Srl v European Commission*, C-652/11 P (CJEU), Judgment of 5 September 2013 [ECLI:EU:C:2013:229]).

For more examples of traditional barriers on access to justice according to the ECHR, see M L Villamarín López, 'Access to civil justice under European Case Law' (2017) *International Journal of Procedural Law*, n 1.

¹¹⁶ For example, Spain in its recent Royal Law Decree 6/2023, 19 December 2023.

present their claims personally and directly to the judge.

- b) Regarding the times of the procedure. First, the deadlines. It is worth considering whether those legally provided for the acts of allegation and defence are sufficient to allow an effective defence of lay parties, because normally there is a unique temporal regime for cases with or without the intervention of lawyers. Second, regarding preclusion, because in most cases strict procedural rules were designed and thought for litigation with the help and assistance of legal professionals.¹¹⁷ When this situation does not occur, our recommendation is to relax them, unless it is guaranteed that the parties have been duly informed of its consequences and have fully understood them.
- c) The rules of the burden of the proof. For similar reasons to what we indicated for the preclusion, the application of the rules of the burden of proof should be relieved when applied to this kind of procedures, as countries like the United States or the United Kingdom do in their trifle civil proceedings.
- d) The role of the judge. Although the construction of the model of the contemporary civil procedure is based on the dispositive principle, which implies that the parties define entirely the object of the procedure, this does not mean that the judge should not assume any active role during the procedure, without abandoning their impartial position. Thereby, in this kind of proceedings without legal assistance to the parties it could be recommendable that the court assume not only the duty to inform the parties equidistantly of their rights and burdens, but also to give them the chance to introduce legal arguments during the proceedings and to make their resolutions understandable to their recipients.¹¹⁸
- e) The control of the decisions adopted in these procedures. Although it is true that a large part of the small claims procedures do not count on a second instance, they are normally subject to any kind of appeal, even exceptional. We still believe that there is more need for a recourse when the parties are in court without a lawyer since they are deprived of any option to challenge judicial decisions if the judge has violated their

¹¹⁷ In Spain, for example, Art 265 of the Civil Procedural Law requires that the documents be accompanied with the claim (or the answer to the claim, for the defendant), without it being possible to do so later if there was the opportunity to incorporate them at this initial moment.

¹¹⁸ On the role of the judge when the parties are unrepresented, see, *inter alia*, S L Buhai, 'Access to justice for unrepresented litigants: a comparative perspective', (2009) 42 Loyola of Los Angeles Law Review 979, 997.

essential guarantees.

4.4.2 Procedural Consequences of the Measures Adopted in the Substantive Field to Better Protect Vulnerable Groups

- 80 As we analysed before, one of the achievements of this new wave of access to justice is the better effective protection of the rights of citizens through a more comprehensive regulation of their substantive rights and the extension of the rules of legal standing. But the efficacy of some of these initiatives may be hampered by the requirements set by some national procedural rules.
- 81 At this point, one may wonder: How much access to justice is enough? How much access to justice do we want? Because the truth is that, if we create an entire *corpus* of substantive laws for the protection of citizens and special rules for the most vulnerable groups, those procedural rules do not have to leave them empty of content. Do we have then to alter or change our 'traditional way of building civil procedures' (their principles, their rules, their limits, etc) to make substantive laws effective? Do we have to start accepting exceptions in the application of procedural requirements to make the rights applicable (eg, regarding the rules of *res iudicata* or of the preclusion)?
- 82 Within the European Union there is a clear trend in this direction in some fields considered in need of special protection (eg, consumers): a path towards the prevalence of making European substantive rights effective above, if necessary, national procedural laws. As explained in *Ibercaja*¹¹⁹, a case over the control of unfair terms, the starting point is the need of special protection of certain groups; in this case, consumers: 'the system of protection introduced by Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his or her bargaining power and his or her level of knowledge'. From there, the European Court of Justice dares to affirm that, unless the absolute passivity of the consumer is proven (para 38), the application of the national procedural principles in question (such as the principle of initiative of the parties, the requirement of consistency of the judgment or *res iudicata*) cannot make the protection of such rights impossible or excessively difficult, thus violating the principle of effectiveness (*Unicaja*¹²⁰ case). In the same direction, the Court has also precluded in *Vicente*¹²¹ that the internal procedural rules cannot impede the application of European substantive laws:

a national law relating to a summary procedure for the recovery of lawyers' fees pursuant to which the claim brought against the consumer client is the object of a decision delivered by a non-judicial authority, the intervention of a court being provided for only at the stage of a possible objection being raised against that

¹¹⁹ *MA v Ibercaja Banco SA*, C-600/19 (CJEU), Judgment of 17 May 2022 [ECLI:EU:C:2022:394], para 35.

¹²⁰ *L v Unicaja Banco SA*, C-869/19 (CJEU), Judgment of 17 May 2022 [ECLI:EU:C:2022:397].

¹²¹ *Vicente v Delia*, C-335/21 (CJEU), Judgment of 22 September 2022 [ECLI:EU:C:2022:720].

decision, without the court seised on that occasion being able to ascertain, if necessary of its own motion, whether the terms contained in the contract which gave rise to the fees claimed, are unfair or to allow the production, by the parties, of evidence other than the documentary evidence already produced before the non-judicial authority.

83 At least in this case the Spanish courts were given the opportunity to examine if ‘the national procedural regime may be the object of a consistent interpretation with Directive 93/13 and to establish the consequences therefrom, disapplying, where necessary, any provisions of national law or case-law which precludes the obligation for the court’ (para 74).

84 At this point, we may return to the question raised at the beginning of this section: is this trend going too far or is this the path we must follow to achieve real protection of the substantive rights? At least these decisions from Luxembourg should serve as to encourage us to spend some time thinking about whether some aspects of our procedures in some special areas of protection have to be redefined, in the sense of what the Court of Justice affirmed in the *Case Impuls Leasing Romania IFN SA*¹²²:

the obligation on the Member States to ensure the effectiveness of the rights that individuals derive from EU law, particularly the rights deriving from Directive 93/13, implies a requirement for effective judicial protection, reaffirmed in Article 7(1) of that directive and also guaranteed in Article 47 of the Charter of Fundamental Rights of the European Union, which applies, inter alia, to the definition of detailed procedural rules relating to actions based on such rights.

85 And, at least, if we do not want to touch the principles that support our national proceedings, at least it would be necessary to examine if our existing procedural laws respect the fair trial guarantees to try to eliminate all possible obstacles to the effective judicial protection of rights. An example of these possible violations was pointed out by the Court of Justice in the *Case Impuls Leasing Romania IFN SA*: there is

a significant risk that the consumer concerned will not lodge the objection required, either because of the particularly short period provided for that purpose, or because they might be dissuaded from defending themselves in view of the costs which legal proceedings would entail in relation to the amount of the disputed debt, or because the national legislation does not lay down the obligation that all the information must be communicated to them which is necessary to enable them to determine the extent of their rights.¹²³

¹²² *IO v Impuls Leasing Romania IFN SA*, C-725/19 (CJEU), Judgment of 17 May 2022 [ECLI:EU:C:2022:396].

¹²³ *Ibid* para 50.

4.5 Facing Growing Complex Litigation and Overloaded Courts

4.5.1 Reform the Organization of the Courts

- 86 In recent years, two fundamental trends can be noted in terms of the reorganization of the courts: first, the disappearance of many courts of first instance and, second, the specialization of the courts. We believe that it is worth examining this trend in this chapter to analyse whether it affects access to justice in any way.
- 87 Regarding the first issue, there is a general trend towards the disappearance of first instance courts of general jurisdiction¹²⁴ (made up of a single judge closest to the citizen), normally due to a reorganization of the territorial distribution of offices. In some countries such as Spain, they tried to justify these measures saying that the establishing of the new judicial model of courts (district courts with a broader jurisdiction) would 'simplify access to justice' but it seems that justification for many of their reforms is far from that. They in fact normally only address building more efficient and cheaper judicial structures (mere optimization of resources by merging single-person courts into a single court, avoiding increasing the judicial staff or, for example in the case of Spain, willingness to reduce power and independence to the judges while, at the same time, the power of the administrative body in justice is increased). Consequently, national legislators must be very cautious with the changes they make in this regard so as not to turn these changes into a new barrier to access to justice if what they achieve is to distance the citizen from the court. In this sense, the CEPEJ reminds the Member States that 'the right to access essentially relies on the conditions under which citizens can, by themselves or a legal representative, appear before a judge', which 'implies a relative proximity between the litigants and the court, at least for the first instance'.¹²⁵
- 88 Similar precautions must be taken against the progressive tendency of specialization of the courts.¹²⁶ To avoid excesses in this regard, it may be appropriate to follow the advice given by the Consultative Council of European Judges in their Opinion 15 (2012) on the specialization of judges: that these courts 'should only be set up when they are necessary for the proper administration of justice, because of the complexity or specificity of the law of the facts', as could happen, for example, with the creation of Environmental first courts in Sweden.¹²⁷

4.5.2 Simplification of Procedures

- 89 It seems, however, beyond any doubt that what can reduce the burden on our courts is the creation of simpler judicial procedures. When possible, developed online taking

¹²⁴ More detailed in CEPEJ Report, 95.

¹²⁵ CEPEJ Report, 101.

¹²⁶ As the CEPEJ remarks, although in the last couple of years it has slowed down a bit, the increase of specialized courts in Europe has been of the 38% in the last decade (2010-2020).

¹²⁷ CEPEJ Report, 99 and 101.

advantage of the possibilities provided by new technologies, that permit the users to manage themselves throughout the proceedings from home with their own computers, tablets or, even with their mobiles. Although it could be possible that, at least, the essential documents of the procedure can be presented online, and must then be sent to the competent court, as is the case for the moment with the European procedures that are managed through the E-justice portal (for example, for small claims processes), there are already countries that have gone one step further and have implemented entire procedures developed online. We highlight two models, which are working very well and are serving as an example for the rest of the world: the first, in Canada, managed as a court although its members are not professional judges but experts in law and conflict resolution; the second, in the United Kingdom, decided by professional judges.

- 90 The first is called the ‘Civil Resolution Tribunal’, part of the British Columbia public justice system.¹²⁸ From the beginning of its journey in mid-2016 to February 2021, it had processed almost 21,000 disputes.¹²⁹ It was created to resolve strata property issues, but it was extended to small claims (below CAD 5,000), to motor vehicle accidents and to certain cases on societies and cooperatives; from 2023, they also covered claims for an intimate image protection order.¹³⁰ The procedure is managed through a web page of very easy access and use, assisted by linked pages with information and simple explanations and complemented by short (one and a half minute) explanatory videos. Its processing consists of four phases: first, called ‘Solution explorer’, free and anonymous, which anyone can access. Through a series of simple questions, with help and information icons just a click away, it tries to identify the type of legal problem in question, informing the user in a simple way of the regulation that deals with the matter and clarifying the best channel to be followed. After this first filter, the second phase is called the ‘online negotiation tool’, which provides the option (since it is voluntary) to the parties to negotiate with each other through a private chatroom, in which they can interact confidentially for a few weeks to try to come to an agreement. In 40% of the cases, they succeed, and the fee is refunded. Decisions became then enforceable. If they do not reach an agreement, they go on to the third phase, ‘facilitation’, in which a member of the Court staff (CRT Manager) tries to mediate, by phone or email. It is also a confidential phase. Also failed this attempt, the case is assigned to a Court for its final decision (‘CRT final decision’). The parties are called to make allegations within the set time, which can be extended at the request of the parties. If necessary, a hearing can be

¹²⁸ Civil Resolution Tribunal official website accessible at <https://civilresolutionbc.ca/> accessed 21 October 2024

¹²⁹ In 2022, 1,972 disputes remain open. According to their last report, in 2021, they resolved a total of 5,227 cases; 5,163 in 2022; 4,755 in 2023. Cf Civil Resolution Tribunal, *2022/2023 Annual Report*, 19 <https://civilresolutionbc.ca/wp-content/uploads/CRT-Annual-Report-2022-2023.pdf> accessed 21 October 2024.

¹³⁰ The distribution of cases is as follows: 79% were involved in small claims, 16% strata, 3% vehicle accident, and 2% society or cooperative association disputes. Curious is also that 34% of claims involved an Indigenous part (Civil Resolution Tribunal (n 129)).

held by videoconference. The decision is appealable before the Supreme Court of British Columbia within 60 days (also extendable, if deemed necessary). Logically, the enforcement of the resolution will also be judicial, if necessary. The CRT default and final decisions are available to the public online.

- 91 The second model is the English procedure known as 'Money claims'. It is applicable to claim debts of less than GBP 10,000, if there is no joint of parties in the case. Although the request can be sent by post, there is a dynamic tool that, as in the Canadian case, asks the user questions until he defines his claim. The website also allows you not only to identify the fees that you will have to pay, but also gives you information about the probability that, if the plaintiff wins the process, the defendant will end up paying you. This is achieved by linking to a page called 'Trustonline', which allows citizens and companies to immediately access information about whether the person or company that may be sued (or, even before the dispute, to sign a contract with her) appears in the records of the courts of the United Kingdom as a debtor or if she has had or has previous problems in the courts (for example, to verify this data of the tenant before signing a rental contract with him) - price: GBP 6 per search. Once the 'claim' is sent directly online, the defendant has a period of 19 days to answer, which can be extended up to 33, if necessary. For the holding of the (in-person) hearing, the parties receive a form to indicate which days best suitable for them. This procedure will start only by request of the parties.
- 92 It cannot be ruled out if in a few years a large part of the lawsuits will be resolved by artificial intelligence and the processes can be started from our mobiles so that a robot can resolve them, as they have been doing since 2017 in Hangzhou, China, through the 'Smart courts', online courts that operate 24 hours a day, seven days a week - already exported to Beijing and Guangzhou - to resolve issues on digital issues.¹³¹ But, for the moment, it seems more prudent to consider only solutions that do not alter the dynamics of our current civil procedures (in fact, for example, they provide for the holding of a hearing), but which, done online, simplify their path for the citizen, as he is helped in the preparation of his claim through the browsers that are focusing his answers and thus facilitating the introduction of his allegations and his evidence. What is certain is that the implementation of these procedures must be done very carefully so as not to

¹³¹ See F Gascón Inchausti in Part IX of this publication.

A clear explanation of this courts is given by C Shi, T Sourdin and B Li, 'The smart court – A new pathway to justice in China?' (2021) 12 International Journal for court Administration, 1 (available online). He refers to the impression that the Chinese Online courts caused in R Susskind when he visited them: 'I was impressed with what I saw: a static robot in the reception area that offered online legal help for court users; on-site facilities for the e-filing of documents; dedicated virtual courtrooms; speaker-independent voice recognition (they no longer need stenographers); and a demonstration of China's first "internet-court", which resolves internet-related disputes concerning, for example, online loans, e-commerce (contractual and product liability issues), domain name disputes, and online copyright issues. With 800 million users in China, the volume of related disputes has called for new methods. I am told that the court in Hangzhou has now handled more than 10,000 disputes, in roughly half of the time of traditional hearings'.

create rigid procedures that end up limiting the parties' mechanisms of defence. But it does not seem that this is happening in the countries mentioned, whose citizen satisfaction index is extremely high.¹³²

5 FINAL REMARKS

- 93 FIRST. The right of access to justice understood in its basic content of entering the court is the subject of widespread recognition in practically all countries worldwide (even at the constitutional level in many of them) and is a basic pillar of international texts recognizing human rights. In addition, both the laws and the jurisprudence have been recognizing multiple complementary guarantees that make this right more effective (for example, the rights to a reasoned judgment, fair trial, the right to execution, and the right to appeals).
- 94 SECOND. There is also a global trend to also recognize an added value to the right to access to justice, in the understanding that citizens expect and deserve from the courts the material protection of their substantive rights (what has been called by the doctrine 'Justice 2.0').
- 95 THIRD. It is also possible to observe at national and supranational levels an overall tendency to approach justice to citizens (through a bottom-up approach) and to try to spread it to as many people as possible, with special attention to the most vulnerable. This trend is what we have called in this study the 'fourth wave of access to justice'. We are probably living the most privileged moment in history to facilitate general access to justice; in particular, thanks to the technological developments we all have within our reach. Obviously, as Cappelletti pointed out, 'it is inconceivable to provide Rolls Royce justice to each person and each claim', but we are closer to, at least, providing everyone with the being able to access a motorized vehicle with enough power to get around. As we have seen throughout these pages, even countries that are underdeveloped or that are suffering conditions of violence or poverty are making tremendous efforts in this direction, perhaps knowing that it is one of the most powerful weapons to overcome their situation.
- 96 FOURTH. These advances towards the improvement of the access to justice do not come only from the field of Procedural Law, not even from the legal area of expertise, as was the case until a few years ago. It may involve many other aspects, such as the economic, statistical, socio-cultural, ethnic, linguistic, etc. Therefore, future works in this field may consider these aspects and use the specific information provided by these areas to develop more accurate and case-specific solutions¹³³.

¹³² See, for example, the surveys done by the CRT available at <https://civilresolutionbc.ca/about-the-crt/reports-and-publications/> accessed 21 October 2024.

¹³³ In the same direction, A Storgaard (n 41) 15, and R Sanderfur (n 75) xvi.

ABBREVIATIONS AND ACRONYMS

ADR	Alternative Dispute Resolution
AI	Artificial Intelligence
Art	Article/Articles
CAD	Canadian Dollar
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)
Cf	Confer
Ch	chapter
CJEU	Court of Justice of the European Union
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ed	editor/editors
edn	edition/editions
eg	<i>exempli gratia</i> (for example)
ELI	European Law Institute
etc	etcetera
EU	European Union
EUCFR	European Charter of Fundamental Rights (EU)
EUCFR	European Charter of Fundamental Rights
ff	following
FRA	European Union Agency for Fundamental Rights (EU)
FRA	Fundamental Rights Agency
GBP	British Pound
GCCP	Code of Civil Procedure (Germany)
GG	<i>Grundgesetz</i> (Federal Constitution) (Germany)
HIIL	Hague Institute for Innovation of Law
ICCPR	International Covenant on Civil and Political Rights
ICCPR	International Covenant on Civil and Political Rights
NGO	Non-governmental organization
No	number/numbers
ODR	Online Dispute Resolution
OECD	Organisation of Economic Co-operation and Development
para	paragraph/paragraphs
SDG	Sustainable Development Goals
Sec	Section/sections
SME	Small and medium Enterprise
UKCPR	Civil Procedure Rules (UK)
UN	United Nations

UNDRIP	United Nations Declaration on the Rights of Indegenous Peoples
UNIDROIT	<i>Institut international pour l'unification du droit privé</i> (International Institute for the Unification of Private Law)
v	versus
vol	volume/volumes

LEGISLATION

International/Supranational

European Convention of Human Rights (ECHR).

European Charter of Fundamental Rights (EUCFR).

American Convention of Human Rights.

African Charter of Human and People's Rights.

Universal Islamic Declaration of Human Rights.

International Covenant on Civil and Political Rights (ICCPR).

United Nations Universal Declaration of Human Rights.

International Convention on the Rights of persons with Disabilities.

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

ELI/UNIDROIT Model European Rules of Civil Procedure.

National

Constitution (Poland).

Constitution (Ukraine).

Constitution (Portugal).

Constitution (Italy).

Constitution (Korea).

Bill of Rights Act 1990 (New Zealand).

Constitution (Mexico).

Constitution (Spain)

Constitution (Germany).

General Civil Code (Austria).

Code of Civil Procedure (Germany).

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