



INTERNATIONAL DEVELOPMENT LAW ORGANIZATION
ORGANISATION INTERNATIONALE DE DROIT DU DEVELOPPEMENT

DISTANCE LEARNING & RESEARCH CENTER
RESEARCH & PUBLICATIONS UNIT

Access to Justice: A Conceptual and Practical Analysis with Implications for Justice Reforms

*Pia Letto-Vanamo*¹

IDLO VOICES OF DEVELOPMENT JURISTS PAPER SERIES
Vol. 2. No. 1, 2005

¹ LL.D., Docent, Director of University of Helsinki Institute of International Economic Law
(<http://www.helsinki.fi/katti/english/>).

Research & Publications Unit (R&P Unit)
International Development Law Organization
Via Veniero 1/A
00192 Rome, Italy
Tel: +39 06 69792621
Fax: + 39 06 6781946

IDLO R&P UNIT

Yohannes Kassahun, Director of Distance Learning & Research Center
(ykassahun@idlo.int)

Thomas McInerney, Head of Research & Publications Unit (tmcinerney@idlo.int)

Rosemary Navarrete, Legal Editor (rnavarrete@idlo.int)

Odette Boya, Research Associate (oboya@idlo.int)

Disclaimer: Voices of Development Jurists is a scholarly quarterly publication directed to a wide audience in developing and transitioning countries, as well as partner organizations, academic institutions, and donor agencies through IDLO activities and online dissemination. IDLO publications are intended to expand legal knowledge, disseminate diverse viewpoints and spark discussion on development law issues. The findings, interpretations, and conclusions expressed in such works are the authors' own and do not necessarily represent those of IDLO or IDLO policy.

Abstract

The present article discusses the principle of access to justice, and its practical implications for judicial reform, by focusing on the role of the court system in guaranteeing individuals' access to justice. The article goes on to evaluate the capabilities of the court system as a whole, as well as the judiciary, and identifies the principle of independence as the main requirement. Furthermore, the article analyzes the concept of judicial independence as defined under various international agreements, and its relevance to access to justice issues. The fundamental and practical problems of court procedures are also examined, as courts must have the substantive and procedural capacity to handle disputes, since the lack of such capacities can become obstacles to access to justice. The popularity of alternatives to court proceedings in response to court problems is also considered. Lastly, the economic and procedural obstacles to individuals' access to justice are questioned, and specifically, issues related to legal aid, the ombudsman institution, and alternatives to ordinary court procedures.

Access to Justice: A Conceptual and Practical Analysis with Implications for Justice Reforms

1. Introduction

It is difficult to define the concept of access to justice succinctly. Nevertheless, a consensus exists as to the central role of the court system in guaranteeing individuals' access to justice. It can be said that access to the courts is a necessary part of an effective democracy, while access to justice begins with a just society.² The courts protect our rights and freedoms against arbitrary interference, as well as ensure that we do not unlawfully interfere with the rights and freedoms of others. Implicit in this responsibility is the duty of the courts to ensure equality of access.

Often, all citizens can achieve in courts is an imperfect remedy that provides, at best, some level of compensation. Actually, a court will normally be able to determine who is right and who is wrong according to the law, but it may not always be able to provide a meaningful remedy to the party found to be right. That is why mere access to an independent, impartial, and incorruptible system of courts (or justice in the thin sense) does not always result in substantive justice (or justice in the thick sense). Resources are often required to vindicate claims of right, and from a broader perspective, access to justice does not begin with adequate regulation and law enforcement: it begins with equal access to the political process for all citizens.

The principle of access to justice is closely related to another principle guaranteeing justice and democracy in society. This is the principle of rule of law: The functionality of the rule of law is understood expressly through particular legal conflicts. It can be said that, for the sake of democratic rule of law development, the focus should be shifted to the availability of justice, the clarity of procedure, the reasonable costs of proceedings, and the quality of decisions. Particularly, in human rights doctrine, the concept of fair trial is used, while access to justice is understood as a fundamental element of the right to fair trial.

² See Connellan, Gregory: *Access to Justice*, Legaldate, 2001, Vol. 13, N. 3, pp. 5–8; The principles of justice have to be in the minds of society's members and institutions to be secure and irreversible. They must also be included in the constitution.

In spite of the centrality of the judicial system and associated procedures, there is an international trend towards increasing use of arbitration and other means of alternative dispute resolution (ADR).³ Some of these other means include, for instance, mediation, arbitration and class actions. Arbitration is itself a legal means of settlement of disputes in business life in particular, but this—like the other alternatives—includes the withdrawal of disputes from the official justice system, and the reduced competitiveness of the courts in the long run. There are also some problems related to the adoption of the class action system.⁴ The system allows several or many parties to take common legal action, making it suitable for consumer protection issues, for example, yet it separates the judiciary from its original main purpose, the protection of the individual by law.

One source of problems associated with the reform of legal proceedings has been the use of foreign models that are disconnected from their cultural contexts. As a result, a more sociologically informed approach to reform of legal procedure is needed. Thus, it is important to analyze the functions and legitimacy of institutions for dispute resolution, as well as citizens' expectations and needs concerning dispute resolution in various societies.⁵

1.1. Institutions for Dispute Resolution

An interesting and in-depth analysis of institutions for dispute resolution, their structure, and functions in society appears in Richard L Abel's article "A Comparative Theory of Dispute Institutions in Society"⁶. The aim of the article is to explain why our dispute institutions (e.g. the court procedure) have the characteristics they do, so that we may shape them according to our values, and thus to some degree influence the society in which we live.

³ Alternative dispute resolution (ADR) system will be discussed in section 6.

⁴ On class action see chapter 5.3.

⁵ See Lawrence M. Friedman and Robert V. Percival: *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, Law & Society Review, 1976, Vol. 10, pp. 267-301, this is an in-depth and interesting analysis of different – and changing - functions of courts, taking Alameda and San Benito as examples.

⁶ Published in Law & Society Review, 1973, Vol. 8, pp. 217-347.

Institutions that take up and solve disputes (dispute institutions) are always connected to society in two ways. First, as an element of society the institution is influenced by the structure of society and of other social institutions, and by the cultural values that accompany them. Second, because any given dispute institution represents only one way of handling a dispute among numerous alternatives, the shape of an institution, even its continued existence, will be influenced by the disputants' choice. A society is characterized by certain kinds of social relations, which generate certain kinds of disputes; as a result, disputants will prefer certain solutions, and choose those institutions whose processes are more desirable.

Abel also discusses social differentiation, which increases the complexity of behavioral patterns and norms, as well as the rate of change of each. Furthermore, social heterogeneity often compels the development of more abstract, and universal norms capable of reconciling the values of different segments of the population. At the same time the task of handling disputes becomes more difficult, and requires special training. Thus, specialization and training, together with social differentiation and development of universal norms, contribute to the bureaucratization of the institution of dispute handling. In turn, bureaucratic patterns of behavior come to be valued, and are often identified with justice itself.

It is interesting to notice that (judicial and other) dispute institutions normally influence society by increasing its unity, because they handle new types, and larger numbers of disputes, thereby avoiding secession, fissures and fighting—alternative responses to conflict that all diminish the size of the social unit. At the same time the social unit is further differentiated: by handling disputes between socially distant, culturally differentiated individuals, the dispute institution permits social contact to ripen into social interaction. In the course of handling the disputes, it creates new, abstract norms, thus enhancing cultural differentiation.

Often, the dispute institution contributes to stratification in the society. It becomes more costly, specialized, differentiated and bureaucratized to handle disputes. At the same time, the number of institutions and instances decreases. This means that the rich have substantially better access to the dispute institution than the poor. Moreover,

it is also socially and culturally more distant from some segments of the population than from others.

According to Abel, the institutions also contribute to social change. They can increase the homogeneity and the coherence of smaller social units. Institutionalized disputing also helps social solidarity because it is in itself an important form of social interaction. At the same time contradictions between society and dispute institutions can produce changes in these institutions. For example, an emphasis on the autonomy of a local unit may lead to the decentralization of dispute institutions. Yet, the impact of social structure and culture on dispute institutions can influence small institutional adjustments; for example, the demand for a change in process can influence a change in personnel and its qualifications.

Although these institutional changes influenced by society create wider harmony, they also create new contradictions, which will influence changes in the surrounding culture and social structures. For example, the (new) dispute process can influence the nature of social relationships, enhancing either those that are multiplex, enduring and affective, or those that are single-purpose, transitory and instrumental. In addition, culture and social structures change in different ways to face these influences. For example, some values derived from the dispute institution—such as the role of law—can become part of the culture. Then, the questions related to the content of law become essential.

There are two main types of dispute resolution procedures: The first type, typical of traditional societies, emphasizes social harmony. This procedure aims at ending a dispute, settling rights within a family or a group (a local community). The procedure is cheap and fast, and there are no legal norms (in the modern sense) or technical rules. This kind of decision-making is adequate in small societies, and often has an educational function, too. It could be said that the law is not technical, but popular. It is—at least historically—associated with small, face-to-face, agricultural or hunting societies. Today, this type of procedure can still be found in local communities in

many developing countries,⁷ and it can be important to further dialogue between that traditional and the modern type of procedure.

The second type, connected to the modern court system, is formal, where legal norms may deviate from social norms. This type is common in western societies, where procedures are often expensive, slow, and technical. Law has its own, special language, and lawyers are its translators. Justice is not open, despite the fact that trials are generally public. Parties to the procedure are not usually linked together in a human relationship: courts do not concern themselves with personal aspects of the dispute; instead they deal with questions of law or fact. This procedure is associated with urban and technical societies.

Analysis of court performance shows that the decline of the dispute settlement function is a common trend in many countries. Nowadays, courts still perform routine (local) administration: they make and keep records, register formalities, and stamp their approval on claims or on change of status. At the same time some people, especially businessmen, prefer to resolve matters by themselves or through an arbitrator, to avoid going before courts, where the procedure is public and protracted. To non-businessmen, litigation before the court is not worthwhile because of its high cost.

In addition, the status and role of ordinary court procedure in dispute resolution reflect the legitimacy and trust courts have among people in a particular society. It can be seen that a decrease in differentiation or fragmentation in society may weaken the position of the judiciary: It is sometimes difficult, in our “post-modern” society, to speak about one idea of justice: there seem to be various meanings attached to it. Thus, the justice defined or guaranteed by the ordinary courts, does not automatically get acceptance among members of the society.

2. Independence of the Judiciary

⁷ For instance findings from the IDLO Interim Training for the Afghan Judiciary in Kabul 2004, suggests the same; Contact www.idlo.int for further information on the IDLO training activities and technical assistance.

It is true that access to the court does not always mean access to justice. However, (equal) access to justice is seldom possible without courts. Thus, the focus of the following section is on the capabilities of the court system as a whole, and the judiciary especially, to guarantee individuals' access to justice.

The essential element that characterizes modern court systems and court procedures is independence. It is the main qualification of the judiciary. The judiciary has to be structurally and, an individual judge personally, free from external interference. Independence of the judiciary is based on the idea of the separation of powers, structurally meaning that the organs of the judiciary must function independently from the organs of the legislative and the executive. Furthermore, the judge has to be independent also from the parties of the respective case.

The father of the idea of the separation of powers is the French lawyer and philosopher Montesquieu (1689-1755), who elaborated his theory in discussions about the English Constitution.⁸ He maintained that 18th century England represented a new type of republican Government, a "popular state", with a constitutional balance of powers. According to the English Constitution⁹ the executive power was held by a monarch, the legislative power was shared between the nobility and people's representatives, while persons drawn from the body of the people exercised judicial power. These fundamentals can still be seen in today's English Constitution, especially the idea of independence, which belongs to the core of constitutional rhetoric and political debates.

Montesquieu also believed that political power could not be limited without reason, since a constitution based on separation of powers was the product of reason. In this separation of powers, each power balanced the other. Actually, each power represented distinctive "interests and passions" of a different order within society.

⁸ See Krause, Sharon: *The Spirit of Separate Powers in Montesquieu*, Review of Politics, 2000, Vol. 62, pp. 231-265.

⁹ This was and still is unwritten, in the sense that all aspects of English constitutional law have never been embodied in a unified document.

This is why Montesquieu also believed that the functional separation of powers required real class divisions within society, and therefore a differentiated social order. Apart from Montesquieu, the idea of the separation of powers can also be attributed to Locke and Blackstone, but always with reference to England.

In England, parliamentary sovereignty has always had a particular meaning for judicial independence, because the responsible government merges the executive and the legislative. Nowadays, there exists a generally accepted and observed theory of the independence of individual judges.¹¹ This independence, however, is connected with the financial independence of the English /British judges. Also a confused notion of independence of the judiciary can be found: in practice, individual judges are accorded a high degree of independence, while there is no effective independence of the judiciary collectively as a branch of government. Although judicial independence is not a legal concept, its rhetoric is important—in a political body without a written constitution, which relies on a congeries of statutes, delegated legislation, customs and conventions for making the system work.

2.1 Independence and Training of Judges

Judicial independence has various dimensions. Some problems concerning independence are related also to those of training judges. This can be seen in many countries, in discussions on the role and organization of judicial training.¹² The starting point for defining judicial independence is the freedom of the judiciary from external interference. As we have seen, the idea of independence is based on the principle of separation of powers. Judges, as a branch of the State, play a role in balancing competing interests at a constitutional level, so that the principle of judicial independence exists despite the distribution of powers.

Judicial independence is also defined as freedom from interference in individual decision-making, as a principle of impartiality in administering justice. This

¹⁰ Stevens, Robert: *A Loss of Innocence? Judicial Independence and the Separation of Powers*, OXFORD JOURNAL OF LEGAL STUDIES, 1999, Vol. 19, pp. 365-402.

¹¹ *Id.* .

¹² See Malleson, Kate: *Judicial Training and Performance Appraisal: The Problem of Judicial Independence*, THE MODERN LAW REVIEW, 1997, Vol. 60, pp. 655-667.

definition, however, raises problems in identifying its practical implications: the appointment or dismissal of judges comes immediately to mind. Even training or performance appraisal can be seen as an external influence. Indeed, the very purpose of training is to influence the practices of judges in their day-to-day work. But if we analyze judicial independence as a constitutional requirement arising from the need to ensure impartiality in decision-making, then the tension between training and judicial independence appears rather slight: Training and performance appraisal do not undermine judicial independence when defined as freedom from external interference.

There is, however, a less familiar aspect of judicial independence, indeed one that may have more relevance for training and performance appraisal. That is, freedom from internal interference. Actually, training has often been kept within the control of the judiciary in order to avoid external interference, but the danger of internal interference is *prima facie* very strong. The judicial career is normally based on a promotion system and the prospect of promotion can strongly influence individual behavior. So it is in this area that performance appraisal and training may have the most significant impact. A judge who performs poorly—or differently—in training may not face dismissal but he or she may not be promoted.

The development of a judicial career includes not only structural but also cultural elements. The daily work of judges has traditionally been solitary and relatively isolated. It has been dependent on a culture of individualism, and this idea still lies at the center of the two most important debates about the judiciary:

- 1) the extent to which judges play a creative role in shaping the law, and
- 2) whether or not the political views of judges direct their decisions.

In every case, the expansion in size and the formalization of a career structure – of which training is one part – may undermine the culture of individualism that has been understood as a prerequisite of strong judicial independence. This can be true even when the introduction of teamwork is concerned.

2.2 Independence and Judicial Review

It is possible to find some information on how new arrangements and rules concerning the independence of the judiciary have affected the former socialist

countries. One interesting analysis is by Erik S. Herron and Kirk A. Randazzo focusing mainly on the relationship between independence and judicial review.¹³

The authors analyze how guarantees of independence established by the new constitutions after the collapse of former regimes in Central and Eastern Europe have influenced, and been reflected in, the actual behavior of courts. It is true that independence is always related to impartial resolutions of conflicts by a neutral third party. The authors, however, refer to a more detailed definition of independence, originated by Becker, in which judicial independence consists of: a) the degree to which judges believe they can decide, and do decide, consistent with their own personal attitudes, values, and conceptions of the judicial role in their interpretation of law, b) in opposition to what others who have, or are believed to have, political or judicial power think about or desire in like matters, and c) particularly when a decision adverse to the belief or desires of those with political or judicial power may bring some retribution on the judges personally or on the power of the court.

On the other hand, an independent judge should not interfere with the legitimate actions of the political branches, while courts must rely on their power to review legislation and actions under a higher authority, generally the constitution. Thus, the authors believe that three factors may influence the exercise of judicial review. These are:

- 1) The provisions of judicial independence. Judicial independence is provided firstly by the formal judicial structure. However, the tenure of a judge is another component of independence, as well as the actors involved in judges' nomination and confirmation process.
- 2) Economic conditions.
- 3) Contextual factors, which include (level of) civil liberties, structures of the executive system, and (degree of) political fragmentation in the respective society.

After that, independence in seven former socialist countries—the Czech Republic, Estonia, Georgia, Lithuania, Moldova, Russia and Slovenia—was measured with

¹³ *The Relationship Between Independence and Judicial Review in Post-Communist Courts*, THE JOURNAL OF POLITICS, 2003, Vol. 65, n. 2, pp. 422-438.

some empirical parameters, and results were not particularly surprising. These showed that economic conditions were statistically significant and negatively related to the likelihood of judicial review; The recognition of civil liberties by the political branches was not significantly related to the likelihood of judicial review; Courts were less likely to invalidate statutes and governmental decrees when presidential power increased; Certain litigants could influence the application of judicial review; When judges reviewed legislation involving economic issues, they were more likely to invalidate statutes; And were more likely to invalidate legislation in countries with lower levels of economic growth.

The article shows that constitutional and statutory provisions designed to promote judicial independence were not significantly related to the exercise of judicial review, while political power of the executive directly influenced it. When the President was strong, this could also influence the independence of judges, in the sense that they appeared to avoid invalidating legislation, especially in cases where the President appeared before the court.

2.4 International Rules and Principles on Independence

Many international conventions and other official documents include provisions on independence.¹⁴ These define international standards for independence and impartiality that is expected of domestic courts and judges.¹⁵ The overall starting point is the Universal Declaration of Human Rights.¹⁶ Article 10 declares an individual's right to fair trial, providing that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him. The European

¹⁴ The international standards are focused especially on judiciary reforms in developing countries, as reflected in various judicial training programs such as the IDLO Judicial Training Program in East Timor in 2003. For information on IDLO judicial training activities see <<http://www.idlo.int>>.

¹⁵ BEN OLBORNE, *Independence and Impartiality: International Standards for National Judges and Courts*, THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS, 2003, n. 2, pp. 97-126

¹⁶ Adopted and proclaimed by the General Assembly resolution 217 A (III) of 10 December 1948: available at <http://www.unhcr.ch/udhr/lang/eng.htm>.

Convention of Human Rights¹⁷ includes a similar principle, which can be found in Article 6. Section 4.2 below discusses this principle in more detail.

Article 14 of the International Covenant of Civil and Political Rights¹⁸ begins with the following sentences: “1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...” Here, the American Convention on Human rights¹⁹ should also be mentioned. Article 8 assures to “every person the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law.” Interestingly, the African Charter on Human and Peoples’ Rights²⁰ addresses the concepts of independence and impartiality separately. Thus, article 26 provides, that “(S)tates parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter...” By contrast, provisions in the Arab Charter on Human Rights²¹ are less explicit concerning independence of the judiciary. However, the draft of a new charter²², adopted in January 2004 by the Arab Standing Committee for Human Rights, includes a new Article 13 a) that provides: “Everyone has the right to a fair trial that affords adequate guarantees before a

¹⁷ Council of Europe, Rome, 4 November 1950, *available at*

<http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>.

¹⁸ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

¹⁹ Signed at the Inter-American Specialized Conference on Human Rights, San Josi, Costa Rica, 22 November 1969 *available at*

<http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/juridico/english/treaties.html>.

²⁰ Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986 *available at* <http://www.itcilo.it/actrav/actrav-english/telearn/global/ilo/law/africahr.htm>.

²¹ Adopted by the League of Arab States on 15 September 1994, *reprinted in* 18 HUM. RTS. L.J. 151 (1997), *available at* <http://www1.umn.edu/humanrts/instree/arabcharter.html>.

²² Draft Charter on Human Rights *at* <http://www.pogar.org/themes/reforms/documents/dacharter.pdf>

competent, independent and impartial court that has been constituted by law to hear any criminal charge against him or to decide on his rights or his obligations...”²³

Guarantees of the independence and impartiality of courts and judges can also be found in other—and in very different—conventions, and in more or less explicit variations. Examples include the Geneva Convention relative to the Treatment of Prisoners of War²⁴, according to which Article 84 states, “(I)n no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence (...).” Sometimes, the right to an impartial and independent tribunal is implicit within the requirements of conventions touching particular groups and risks of their prejudicial treatment. This is the case with Article 16 of the Convention relating to the Status of Refugees²⁵ (A refugee shall have free access to the courts of law on the territory of all Contracting States. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts...).

Another example is Article 12 of the Convention on the Rights of the Child²⁶ (...the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law). Finally, Article 17 of the African Charter on the Rights and

²³ Article 9 includes the idea of equality before the law, while article 7 assumes that the accused shall be presumed innocent until proved guilty at a lawful trial in which he has enjoyed the guarantees necessary for his defence.

²⁴ Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War. Entered into force 21 October 1950 *available at* <http://www.unhchr.ch/html/menu3/b/91.htm>.

²⁵ Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950. Entered into force 22 April 1954 *available at* http://www.unhchr.ch/html/menu3/b/o_c_ref.htm.

²⁶ Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. Entered into force 2 September 1990 *available at* <http://www.unhchr.ch/html/menu3/b/k2crc.htm>.

Welfare of the Child²⁷: (...States Parties to the present Charter shall in particular: (...ensure that every child accused of infringing the penal law (...)) shall have the matter determined as speedily as possible by an impartial tribunal...)

These are not the only international conventions that elucidate the concept of independence of courts and judges. A number of efforts have been made by intergovernmental and non-governmental organizations to identify, develop, and promote international standards of independence and impartiality for national judges and judicial systems. They contribute to the development of a transnational body of rules and principles, which can be used for the elaboration of equivalent standards—for international courts, too.

Among these are, for example, the United Nations Basic Principles on the Independence of the Judiciary.²⁸ The first principle provides that “the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. ...”, while the second adds that the judiciary shall decide matters before them impartially, “on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interference,...”. According to the fourth principle, there shall not be “any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision.” The principle of independence also entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly, and that the rights of the parties are respected (Principle 6), while it is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions (P. 7).

27 OAU Doc. CAB/LEG/24.9/49 (1990). Entered into force 29 November 1999 *available at* http://www.ilo.org/public/english/employment/skills/recomm/instr/afri_3.htm.

28 Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 *available at* http://www.unhchr.ch/html/menu3/b/h_comp50.htm.

Other similar bodies of rules include the International Bar Association's Code of Minimum Standards of Judicial Independence²⁹, and the Universal Declaration on the Independence of Justice (the so-called Montreal Declaration)³⁰. The former draws a distinction between personal and substantive independence, while a judge must enjoy both. Personal independence refers to the terms and conditions of judicial service, while substantive independence means that a judge should be subject to nothing but the law and the commands of conscience. Judges should also enjoy collective independence, particularly *vis-à-vis* the executive.

The concept of independence of national courts and judges has also been developed by the jurisprudence of international courts. For instance, the European Court of Human Rights has elaborated the concept of judicial independence through its practice. One typical formulation can be found in the case of *Findlay v. UK* (1997), which states that in order to establish whether a tribunal can be considered as "independent", due regard should be given to the manner of appointment of its members, as well their term of office, and the existence of guarantees against outside pressures. The Court has also developed the concept of independence by considering the relationship between the court and the judge in question, on the one hand, and the executive and the parties, on the other hand. Thus, the judicial body must be independent in its functions and as an institution. Furthermore, it has to appear independent and impartial in the eyes of citizens - and also those of the respective parties.³¹

It is interesting to note that rules, standards, and ideas concerning the independence of judges in the international courts also exist. Generally, the statutes of the international courts proclaim that members of the court shall be independent.³² Such independence

²⁹ Adopted in 1982.

³⁰ The World Conference on the Independence of Justice, held in Montreal, Canada, in June 1983, adopted the Universal Declaration on the Independence of Justice (E/CN.4/Sub.2/1985/18/Add.6, annex IV).

³¹ See also The Council of Europe Recommendation R (94)12 on the independence, efficiency and role of judges.

³² See, e.g., the Statute of International Court of Justice, Article 2. The Court shall be composed of a body of independent judges elected regardless of their nationality from among persons of high moral

is guaranteed by requirements applicable to judges' appointment, duration of office, status of judges, and the manner in which the courts are organized and functioning.³³ There have also been some studies conducted on the behavior of judges at the International Court of Justice, which show that the main element of independence is the judges' character: A judge who wants to be independent is in fact independent in his/her practical work. It must also be kept in mind that judges normally deliberate together in a (international) court, making judgments collegial. Thus, such collective deliberation favors collective—not individual—independence.

Every judge has to be and appear independently. This principle has been précised, for instance, by the Rules of Procedure (1998) in the European Court of Human Rights.³⁴ According to them, in certain situations a judge may or must withdraw from a case: of his/her own motion (*proprio motu*) with the President's agreement; after a decision taken by the President or, in case of disagreement, by the competent chamber; or after a party has made an objection concerning the judge, and that objection has been accepted by the President or the Chamber (Rule 28).

Even activities outside the respective court can influence the independence of judges. For example, participating in the work of another international tribunal may lead to conflict of interests, or raise doubts over the judge's impartiality. The Strasbourg Court Regulation takes into account three kinds of outside activities: serving on bodies of a similar nature, as well as teaching and writing. These can be exercised only on three conditions: they do not hamper the Court's regular work, are not detrimental to the judge's independence, and should not result in indiscretion about the Court's work.

character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

³³ See Guillaume, Gilbert: *Some Thoughts on the Independence of International Judges Vis-à-vis States*, The Law and Practice of International Courts and Tribunals, 2003, N. 2, pp. 163-168.

³⁴ Caflich, Lucius: *Independence and Impartiality of Judges: the European Court of Human Rights*, The Law and Practice of International Courts and Tribunals, 2003, N. 2, pp. 169-173

3. PROBLEMS OF THE COURT PROCEDURE

The mere existence of independent and impartial courts does not alone guarantee individuals' access to justice. Courts must have the substantive and procedural capacity to handle disputes. The decreasing significance of court proceedings in dispute resolution, evident today in many countries, has already been mentioned. Awareness is also growing, that the traditional court system is no longer adequate to meet the needs of citizens in a complex modern society.

At the same time, many national constitutions guarantee citizens' rights related to access to justice. To these rights belongs, like in Italy, the right to defence. These rights, however, meet obstacles in real life.³⁵ One of the major obstacles to access to justice is—also generally speaking—a lack of information. This results, at least partly, in a strong resistance from members of the legal profession, who often want to make access to justice available only through lawyers.

It is also commonplace for proceedings to last long, while only a small proportion of actions end in a judgment on the merits of the case. The excessive duration of smaller claims makes costs exorbitant, and, as far as other kinds of disputes are concerned, has led to movements aimed to promote alternative models of dispute prevention and dispute resolution. The duration of proceedings may also explain the number of waived claims that is often high. Creditors, for instance, seem to prefer obtaining a small proportion of their monetary claim in a shorter time, rather than wait for years to recover the whole amount.

The problems of the court system and court proceedings and ordinary legal procedure mentioned above are not exceptional. The same perspectives, or trends, are apparent in northern, as well as southern, Europe. For example, a State Commission was appointed by the government in 2001 to analyze and inquire into the court system in Finland, a Nordic country with 5 million inhabitants. Many problems of the Finnish

³⁵ See Chiarloni, Sergio: *Civil Justice and its Paradoxes, Civil Justice in crisis*, in *Comparative Perspectives of Civil Procedure*, edited by A.A.S. Zuckerman, Oxford University Press, New York,

court system, described and analyzed in the final report of the Commission, are by nature common European, even global, problems.³⁶

According to the report of the Commission, two viewpoints—the external and the internal—of the court system should always be taken into consideration when analyzing the work of the courts. This is important, especially when presenting a vision of future development. The position of the judiciary in society, as well as the daily work of the courts, is influenced by social changes, such as changes in economic and demographic structures, the fragmentation of society, and increasing legal regulation). This external viewpoint also takes into account the clients of the courts. Therefore, individuals' access to justice is one of the prominent themes in the report of the Commission: in order to improve access to justice, the needs and expectations of the courts' clients should receive sufficient emphasis. It is essential to the very functioning of the whole legal system and its credibility that the rights guaranteed by the legal system also can be realized in practice.

The Commission put forward two views of judicial proceedings. The first was the "rule of law" view, in which the focus is on the end result of the proceedings, that is, on the judgment. Here, the main task of the courts is to apply the law in an individual case, thereby concluding the proceeding. Secondly, the proceedings must be fair (just). Thus, it is important in all judicial reform work to consider the fairness of the proceedings as perceived by the parties. They should be taken as active participants, rather than mere objects of the courts' operations. According to Commission proposals, the work of the courts and court procedure should be developed from the premise that a client should be able to follow how his/her case is being dealt with in the court, as well as participate in and influence the proceedings. In this way, the parties can experience the proceeding as open, fair, and credible.

1999. pp. 263-290; The problems analysed by Chiarloni are from Italy, but most of them are common to many other industrialized countries.

³⁶ The Report was published in December 2003; *Tuomioistuinlaitoksen kehittämiskomitean mietintö* , with an English summary. See <http://www.om.fi/23391.htm>. The author of this article was one of the members of the Commission.

The Commission also outlined some general notions on what types of matters must always be selected for judicial decision.³⁷ That purpose requires a definition of the judiciary, and an analysis of the role of courts in society. First of all, the constitution must be considered. A constitution illustrates, also generally, how the legislator should perceive the duties of the judiciary in the respective society. The next approach relates to fundamental and human rights: Both national and international norms on fundamental and human rights require that there should be access to courts, and access to remedies, in a variety of matters. Consequently, these rules and principles form a core of the criteria by which to assess judicial matters.

Practical problems concerning court procedure were also widely discussed. In most jurisdictions there is a need to increase openness of proceedings, to make procedure simpler and more flexible, and to introduce class actions for certain matters. According to Commission proposals, effective alternatives to dispute resolution are also needed. For that reason, the report lists and analyzes legal advisory services, extra-judicial conciliation, the ombudsman system, arbitration, and conciliation within the court. Additionally, access to legal assistance as well as the high quality of that assistance, are referenced. A significant element in the further development of the judiciary consists of investment in professional skills and competence of judges, and, indeed, of the entire court staff.

4. ACCESS TO JUSTICE—THE RIGHT OF A CITIZEN

4.1. Access to Justice -Movement

In addition to the prerequisite of having an independent and well-functioning court system, the idea of access to justice implies the existence of a concrete and equal right to use courts or other dispute resolution institutions in society. Historically, the access to justice approach is quite new, with roots in the 1960s.³⁸ One of the key

³⁷ Then, these matters cannot be handled by means of ADR.

³⁸ *The Judicial Process in Comparative Perspective*, Cappelletti Mauro (ed), 1989, Clarendon Press, Oxford; *Achieving Civil Justice – appropriate dispute resolution for the 1990s*, Smith Roger (ed.), 1996, Legal Action Group; Blankenburg, Erhard: *Access to Justice and Alternatives to Courts: European Procedural Justice Compared*, Civil Justice Quarterly, 1995, Vol. 14, pp. 176-189; Campbell, Andrew; Moloney, Susan: *Access to civil Justice: Lord Woolf's final report and subsequent*

persons in the access to justice movement has been Mauro Cappelletti. The movement has wanted to make peoples' rights effective - considering people, along with their cultural, social, and psychological characteristics, as the primary beneficiaries for whom the law and legal systems are created.

Three dimensions are central in this “contextual” conception of law. The first dimension is that of societal problems, in which the needs and demands of people are especially important. The second dimension includes the legal response or solution to those problems, while the third consists of the results and impacts of such response. Thus, it is important to analyze and search for ways to overcome difficulties and obstacles that make civil and political liberties intangible and inaccessible to so many individuals in so many countries. As far as legal procedure is concerned, at least three basic obstacles have to be overcome: economic problems (poverty), lack of access to information, and lack of access to adequate representation.

Since the 1960s the interest in effective access to justice has led to three basic approaches, or waves. The first approach focused mainly on problems concerning legal aid for the poor. Diffuse group and collective interests—also other than those of the poor—and their representation were discussed during the second wave. The third wave can be described as a transition from the access-to-legal-representation approach towards a broader concept of access to justice. This new access-to-justice approach is not afraid of comprehensive and radical innovations, going beyond the mere provision of legal representation. This approach, actually, has been encouraging exploration of several reforms, including procedural changes, changes in the court structure (or establishing new types of courts), changes in the substantive law designed to avoid disputes or to facilitate their resolution, and use of new dispute resolution mechanisms.

developments, Consum. L. J., 1997, Vol. 5, N. 4, pp. 134-137; Cappelletti, Mauro: *Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement*, The Modern Law Review, 1993, vol. 56, pp. 282-296; Cappelletti, Mauro; Garth, Bryant: *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFF. L. REV. 181-292 (1978).

It implies reforming general litigation procedures; devising alternative methods to decide legal claims, (e.g., arbitration and conciliation; creating special institutions and procedures)³⁹ developing new methods for the delivery of legal services, and simplifying the law, which is one of the most difficult challenges to efforts to promote access to justice.⁴⁰

It is possible to define fundamental principles on which the access to justice concept is based. These ten principles, which can be found in the respective literature and documentation, can be listed as follows:

1. Access to justice is a *constitutional right* of each citizen.
2. Interests of *citizens* should predominate in policies on access to justice, not interests of providers of services.
3. The goal is not only procedural justice but *also substantive justice*.
4. People need *legal assistance* both in civil and in criminal law matters.
5. Access to justice requires policies that deploy *every possible means* towards attaining the goal, including reform of substantive law, judicial procedure, legal education, legal information, and legal services.
6. Policies on legal services need to deploy a “portfolio” approach of a *wide range of provisions and arrangements*, some publicly funded and some not, some provided by lawyers and some not.
7. Programs and reforms must take account of the realistic level of *resources*, but these should be seen as limiting policies rather than defining them.
8. Within civil law, more attention should be given to the particular legal needs of *poor people* excluded from legal aid.
9. The full potential of *technological advances* must be harnessed.

³⁹ For instance, this would require special procedures for small claims, “neighbourhood” or “social” courts for resolving community disputes, special tribunals for consumer complaints; specialized machinery to enforce “new” rights in other areas of the law, such as environmental disputes, landlord-tenant disputes, administrative law disputes, individual labour law disputes.

⁴⁰ Shortly, the focus of the concept of access to justice is on the full panoply of institutions and devices, personnel and procedures, used to process, and even prevent, disputes in modern societies.

10. The constitutional right to be *regarded as innocent until proved guilty* should be respected as a fundamental principle of criminal law.⁴¹

4.2. Right to a Fair Trial – a Human Right

Today, there exists a common consensus on access to justice as a constitutional right. More widely, the concept of access to justice is closely related to the concept of human rights. The independence of the judiciary, as well the central rules of international conventions on it were already discussed above. Mostly, these rules seem to belong to the articles of the international conventions providing for the right to a fair trial. Thus, it is the right to a fair trial that is generally understood as a human right.⁴² This can also be seen in national fundamental/human rights systems. We can say that an individual should have a right to bring his or her legal matter to an independent court, which should handle the matter fairly. The concept of fairness, however, is multifaceted.

The principle of fair trial is based, first of all, on Article 6 of the European Convention on Human Rights. A considerable body of jurisprudential and theoretical literature also exists concerning the principle and its foundations.⁴³ However, this Article also refers to other fundamental principles, such as publicity of the judiciary. Article begins by stating:

“(1) 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.

⁴¹ Justice – Redressing the balance, Smith Roger, 1997, Legal Action Group.

⁴² The principle of fair trial has many practical dimensions, and yet there are judges—in the developed and developing countries—unfamiliar with them; this was an assessment during the IDLO Practical Judicial and Prosecutorial Skills Training Program for Kosovo 2003. For further information on IDLO training and technical assistance, see <<http://www.idlo.int>>.

⁴³ Dijk van P.: Hoof van G.J.H.: *Theory and Practice of the European Convention on Human Rights*, 2003, Kluwer Law International; Harris, DJ; O’Boyle, M.; Warbrick, C.: *Law of the European Convention on Human Rights*, 1995, Butterworths; Jacobs, Francis, White, Robin C.A.: *The European Convention on Human Rights*, 1996, Clarendon Press, Oxford, Merrills, J.G.: *The Development of International law by the European Court of Human Rights*, 1993, Manchester University Press; Merrills, J.G., Robertson, A.H.: *Human rights in Europe – A study of the European Convention on Human Rights*, 2001, Juris Publishing - Manchester University Press.

Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

The scope of the further paragraphs of the Article covers criminal law matters and proceedings: “(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. (3.) Everyone charged with a criminal offence has the following minimum rights: a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; b) to have adequate time and facilities for the preparation of his defence; c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

Thus, the right of access to the courts “constitutes an element which is inherent in this right (right of access to justice)”, as the Court of Human Rights concluded in the *Golder* case, in 1975.⁴⁴ The Court pronounced that the principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally recognized fundamental principles of law. This is also true according to the principle

⁴⁴ See also Article 7: “No punishment without law: No one shall be held guilty of any criminal offence on account of any act or omission, which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.” And Article 13 “Right to an effective remedy. Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

of international law that forbids the denial of justice.⁴⁵ In 1979, the Court went even further by stating in the *Airey* case that the Convention had been violated because prohibitive costs deprived the applicant of the effective right of access to a court. To be effective, the right of access also requires that a person receive personal and reasonable notice of an administrative decision that interferes with his civil rights and obligations, so that he has the time to challenge it in court (case *De Geouffre de la Pradelle*, 1992). This effectiveness principle has been influential in the Court's subsequent jurisprudence.

However, the right of access to the court has some limits:⁴⁷ Firstly, it is more a guarantee of ultimate judicial control than a right of instant access. It does not provide access to the court by bypassing administrative or other non-judicial procedures. Secondly, it is not an absolute right. The Convention does not define the terms, and leaves room for "limitations permitted by implication" (*Golder* case). So, the (Member) States enjoy a certain margin of appreciation in regulating access to the courts, however, any limitation must not impair the very essence of the right, must be directed towards a legitimate aim, and must be reasonably proportionate (*Ashingdane*, 1985). A third limitation is that it is not a right to seek judicial review on each and every issue a person may wish to litigate, but is restricted to those claims involving cases that fall within the scope of the Article. Thus, the right to a fair trial is guaranteed to everyone in the determination of his civil rights and obligations or of any criminal charge against him.⁴⁸

The basic problem in defining the phrase "civil rights and obligations" is to know whether it is also intended to cover certain rights, which—under some national legal systems—fall under administrative law rather than private law. The Court has consistently stated that the term "civil rights and obligations" cannot be construed as a

⁴⁵ The conclusion was the same in many other cases, such as *Keegan, Vasilescu, Canea Catholic Church*.

⁴⁶ See also European Agreement Relating To Persons Participating In Proceedings Of The European Court Of Human Rights (Strasbourg 5 III 1996).

⁴⁷ See also European Agreement Relating To Persons Participating In Proceedings Of The European Court Of Human Rights (Strasbourg 5 III 1996).

⁴⁸ Not only, then, for the rights laid down in the Convention.

mere reference to the domestic law of the State concerned, but as an autonomous concept, although the general principles of the domestic law of the contracting parties must be taken into consideration in any such interpretation.

A liberal interpretation of this concept was first adopted in the *Reingeisen* case (1971), with a declaration that it is not necessary for the application of Article 6 that both parties are private persons. The key distinction may be that where a decision of an essentially administrative character affects the legal relationship between private individuals, when civil rights and obligations are at issue, then the Article will apply. In the case of *Pudas* (1987) it was made clear that the Article does not concern only what happens in a court or a tribunal, but rather any decision-making process determining an individual's civil rights and obligations. Thus, the concept of civil rights and obligations is to be viewed widely, while public law matters are not excluded where they are directly decisive for the exercise of private law rights.

Finally, the “right of access” has its full meaning only if the court concerned enjoys full jurisdiction to determine the case brought before it. The right of access means not only the right to apply to a court for the determination of rights and obligations, but also the right to an independent and impartial court making this determination—otherwise the right of access would not be secured.⁴⁹

Also other conventions guarantee the right to a fair trial. Article 10 of the Universal Declaration of Human Rights and Article 14 of the International Covenant on Civil and Political Rights have been mentioned in the chapter discussing independence of the judiciary.⁵⁰ Further, a particular convention on access to justice dates back to

⁴⁹ See also European Charter of Fundamental Rights, Article 47: Right to an effective remedy and to a fair trial, 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. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.

⁵⁰ Article 14 (1). All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled

1980: The Hague Convention on International Access to Justice aims at facilitating, for any national or resident of a State party to the Convention, access to justice in any other State where the judicial proceedings take place. The purpose is not to harmonize domestic laws, but rather to ensure that status as an alien, or the absence of residence or domicile in a State, do not form grounds for discrimination in access to that State's justice. The main focus of the Convention is on legal aid. It establishes the entitlement to legal aid and legal advice of all persons on the same conditions as if

to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt. 4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. 6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him. 7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

they were themselves nationals of, or habitually resident in, that State. The Convention also provides free service of documents, letters of request, and social enquiry reports, as well as legal aid to secure the recognition and enforcement of decisions.⁵¹

So, the essential element of the idea of access to justice is access to the court. Additionally, several qualifications are required for a well-functioning court system: for instance, particular structures are needed to guarantee that courts work independently, without any interference from the other State powers. However, apart from structural aspects, those of judicial practice are also important. Court proceedings have to be organized according to the principle of fairness, while the right to a fair trial—with its different implications—belongs to the family of fundamental / human rights.

However, studies on approaches to access to justice need a wider perspective than a (national and international) human rights focus. It also seems quite difficult to operate with a single, and universal, idea of access to justice.⁵² This is especially difficult when details and particularities of national—or international—procedural systems have to be taken into consideration. Ralph Henham presents a fresh and interesting viewpoint, in his newly published article focusing on international criminal justice and access to justice for victims.⁵³ The purpose of the article is to confront some of the theoretical and conceptual difficulties in understanding the meaning and relevance of access to justice notions and rights of victims, in the context of international sentencing. In particular, it emphasizes the need for legal concepts that engage with the nature of the international sentencing process as a transformative mechanism, where facts and values are negotiated to correspond with the morals and ideology of

⁵¹ Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, The Former Yugoslav republic of Macedonia, France, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Romania, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden and Switzerland ratified the convention. See also the following web-site <http://www.hcch.net/e/conventions/menu29e.html>.

⁵² See Moorheadet. Al, *Access to Justice after Universalism: Introduction*, 30 J. L. & SOC'Y 1, 1-10 (2003).

⁵³ Henham, Ralph: *Conceptualizing Access to Justice and Victims' Rights in International Sentencing*, SOCIAL & LEGAL STUDIES 2004, pgs. 27-55.

the new public policy. Thus, it is important to understand how moral values and moral actions are linked through the trial procedure, and the significance of the trial for the legitimacy of punishment. For victims and communities of victims in international conflicts, this means conceiving of participation and rights as a procedural reality, and a recognition that any constructive engagement with notions of truth and justice must be grounded in context.

Hence, according to Henham, access to justice should be evaluated in terms of the following questions:

- ✍ Access to sentencing: particularly pre-sentencing factors that either preclude trial and sentence, or have a fundamental impact in sentence determination. They are, e.g., the ability of victims to participate in the pre-trial process, or victims' intervention and participation in the deliberations of the trial chamber;
- ✍ Access to sentencing by victims of crimes, such as victim participation in sentence determination, e.g., in determining gravity/aggravating/mitigating circumstances; and
- ✍ Access to the community through sentencing: important are factors that identify or connect with "victims communities," such as punishment justification, and significance of reparation and compensation.

Therefore, the judiciary and procedural law can also play a role in international conflicts.

In spite of the significance of court procedure, and of fair court proceedings and just decisions and just court decisions, other forms of resolving disputes in society will be also discussed in the following section. The contextual concept of law influenced by the access to justice movement becomes central to this discussion.

5. TO MAKE PEOPLES' RIGHTS REAL

5.1 Legal Advice and Legal Aid

It has been mentioned that the positive agenda of access to justice scholars has been to make peoples' social and legal rights real and effective. This involves analyzing and

resolving, economic, organizational, and procedural problems. Thus, access to justice is something more than mere access to the court, or the right to a fair trial.

The table below lists the main obstacles to individuals' access to justice, as well as the means to overcome them. With reference to means, especially legal aid, the ombudsman institution, the class action, and alternatives to ordinary court procedure (so called alternative dispute resolution or "ADR") will be discussed in further detail.

<u>Obstacles</u>	<u>Response/ solution</u>
<u>Economic obstacles</u>	Legal aid and advice Legal expenses insurance
<u>Organizational obstacles:</u> 1) How can social rights be protected? 2) How can "diffuse" rights - interests private in nature but belonging to groups or classes of people - be protected?	Specialized (Governmental) Agencies, such as Ombudsmen. ⁵⁴ -Class Action (mainly important in USA): One member of the class can start the action; -Action collective (France; Belgium) or Verbandsklage (Germany; Austria). These actions preserve both a fragment and the entire interest involved. -Citizen action. Anybody from the group can claim standing. ⁵⁵
<u>Procedural obstacle:</u> - in certain kinds of controversies, normal solutions might not be the best possible way to provide effective vindication of rights.	Alternative dispute processes, ADR, ⁵⁶ (conciliation, arbitration, mediation) - Out of court devices - Non-judicial devices.

⁵⁴ Look closer Cappelletti Mauro: Alternative Dispute Resolution Process within the Framework of the World-Wide Access-to-Justice Movement, The Modern Law Review 1993, pp. 282-296, p. 282.

⁵⁵ Examples: Clean Air Act in the US and the *Populärklage* in the Land of Bavaria.

As mentioned, the first wave of access to justice studies and activism was aimed at guaranteeing better access to legal services and to legal aid for the poor, or people living in regions of scattered settlement. Still today, lack of access to legal information and to legal advice form one of the main challenges of the access to justice approach. This is true both in the developed and developing countries.⁵⁷

The article “Access to Justice” by Tate S. Shepherd, published in the American Bar Association Journal in 1979, reflects well the debates occurring in the first wave of access to justice thought during the 1970s.⁵⁸ According to the author, even though the civil legal needs of the poor had reduced attention, three million indigent citizens were still living in areas with no legal services program. Since the opportunity to have one’s legal rights vindicated should not depend on the vagaries of where one lives, there was a need to ensure funding to achieve “minimum access” in the following years. Thus, the American Bar Association (ABA) had recommended that the federal government share the responsibility for implementing the Sixth Amendment of the U.S. Constitution, guaranteeing the right to effective assistance of counsel. To this end, Shepherd argued a center for defense services should be established that would supplement the efforts of state and local defense programs. Then, the center would provide training services, research assistance and financial support for criminal cases. Thus, it was - and still is - the private bar that plays a substantial role in meeting the legal needs of poor people through contributions of time and knowledge, with *pro bono* services.

⁵⁶ The principle behind this is that nowadays justice should be open to the entire population. Alternative Dispute Resolution has been developed mainly in family and neighbourhood matters. For example, the UK has a strong tradition in family mediation. The National Family Conciliation Council (NFCC) and the Family Mediators Association (FMA) have been appointed to deal with family mediation.

⁵⁷ In fact, IDLO judicial training programs such as *La Réforme Judiciaire: Approche Comparative, Dakar*, 2002 have reached similar assessments. For further information on IDLO training programs and technical assistance, see <<http://www.idlo.int>>.

⁵⁸ Vol. 65, N. 6, pp. 904–908.

Citizens may also lack an effective voice because of institutional settings that deprive them of their constitutional rights. Hence, the ABA presented a recommendation to amend the Criminal Justice Act, which allowed indigents could to be represented before the Supreme Court, while the Act permitted only compensation of counsel for the first level of post conviction appeal. The ABA also favored new means of providing access to legal services. For example, it maintained during witness hearings before grand juries, legal counsel should be allowed to be present. However, proposals other than those concerning legal services/aid were also presented. According to Shepherd, and the ABA, access to the courts had to be improved in a variety of ways: increasing the number and quality of court personnel; increasing the efficiency of the court proceedings; streamlining procedures, reducing both costs and delays - to make courts work for the average citizen - implementing the right to a speedy trial, and exploring the use of legal processes that may involve neither lawyers nor courts.⁵⁹

Regarding guarantees for legal services today, some interesting facts and examples from Wales are noteworthy. These are analyzed in a newly published article by Charlotte Williams.⁶⁰ The starting point of the article is the central role of legal and legal advising services in bringing social justice to the socially excluded: The absence of assistance in enforcing basic rights keeps many in poverty, with resulting exclusionary effects. There are two National Action Plans on Social inclusion. The UK government's second plan (2003-2005), unlike the first, considers access to justice as a way to combat social exclusion - even if it puts the emphasis on economic inclusion as the key factor to addressing issues of social exclusion. Even earlier, in 2000, the Community Legal Service (CLS) was established by the Access to Justice

⁵⁹ Thus, access to a court is not access at all if a judge cannot perform properly its role in the judicial process, which is why judges are not selected only on the basis of the merit standard; *See also* Spann Jr., Wm. B: *Let's Make the Law an Access to Justice*, American Bar Association Journal, 1978, Vol. 64, N. 5, p. 639 ; This article celebrates American Law Day; the theme for the 1978 celebration was "The Law: Your Access to Justice". This theme recognises that law remains a basic cornerstone of implementing social progress and policy, and mainly highlights the progress made by the Bar Association that has fought to improve the legal and judicial system and to make them more responsive to the nation's citizens. It criticizes the transformation of social, political and economic value in society, when this means expecting the legal system to resolve all individuals' needs and desires. In conclusion, what the ABA should still do is to increase public understanding about the justice system, informing people about what it can do and what it cannot do.

⁶⁰ *Access to Justice and Social Inclusion: The Policy Challenges in Wales*. Journal of Social Welfare & Family Law, 2004, Vol. 26, N. 1, pp. 53-69.

Act. This body is charged with improving access to legal and advice services with the aim of achieving better consistency of provision.

However, in her article, Williams refers to Hazel Genn,⁶¹ who speaks of the “access to justice dilemma”, suggesting that a central dilemma of the access to justice argument is whether legal policy should aim to enhance access to legal forums and empower applicants in seeking resolution to disputes, or whether the ambition should be to equip people to resolve problems without recourse to legal action and to divert cases towards private dispute resolution. According to both authors, these two orientations conflict, as enhanced access to legal remedies inevitably means more reluctance to engage with often-fruitless alternative dispute resolution. It is true that this kind of conflict exists, however, both official/public and private dispute resolution are still needed.

The article analyzes the study “Snakes and Ladders”,⁶² conducted in 2001-2, which outlined the current pattern and level of information, advice and representation for people in Wales seeking redress in employment discrimination cases under the equalities legislation. It explored specific barriers to access and support in three main areas of discrimination (race, gender, and disability), as perceived by both providers and applicants within the system, as well as by other key stakeholders. It also considered the likely impacts of existing support on tribunal outcomes. The study included a statistical analysis considering trends across the period 1996-2001 for race, gender, and disability.⁶³

Six main issues were identified as mitigating against a seamless and effective system of complainant aid in Wales: 1) lack of information about rights and sources of advice; 2) the weak infrastructure for delivering advice, support, and representation; 3) lack of training and quality accreditation among major advice providers; 4) a poor system of referral and co-ordination between agencies, including a failure to transfer expertise between agencies; 5) ineffective system of client support; and 6) lack of statistical information disaggregated for Wales.

⁶¹ Williams refers to Genn’s *Paths to Justice*, 1999, Hart Publishing.

⁶²Funded by the three Equalities Commissions and the Legal Services Commission.

The experiences documented in the study indicate much about pathways to justice for particular groups. There seemed to be particular factors that shaped the routes for women, disabled people, and ethnic minorities. Location and facilities for tribunals can form barriers to access to justice, but also the composition of courts or chambers. Members of bodies studied in Wales were mainly male, white, and old, while only a few of them had had the opportunity to develop experience in discrimination cases. Thus, the study highlighted the need for innovative, non-standardized responses to pathways of help seeking. Additionally, searching for advice via the Internet⁶⁴ was increasingly important for many applicants, although a digital divide persists within Wales - as in many other regions and countries - related to gender, age, and socio-economic status. Also generally, the development of the information technology delivers new means and guarantees for peoples' access to justice through efficiencies in procedure and access to information.⁶⁵

5.2 Institution of Ombudsman

The main challenge to the access to justice approach is making individuals' rights real, which, of course, relates to another task: the protection of individuals by law.

⁶⁴ See the article of John Zeleznikow: *Using web-based decision support systems to improve access to justice*, Information & Communications Technology Law, 2002. Vol. 11, N. 1; pp. 16-33. Increasing numbers of litigants represent themselves in courts and many *pro se* appellants have neither the financial resources nor the legal skills to conduct their own appeals. In 1974 the Legal Service Corporation was established by the Legal Service Corporation Act to provide financial support for legal assistance in non-criminal proceedings. The construction of legal decision support systems - if it cannot drastically improve the access to justice - can improve the efficiency of community legal centres and the volume of advice they can offer. But most legal decision support systems have been developed to run on personal computers, but if these are fine tools for lawyers, they may not be easily accessible to *pro se* litigants. The article discusses how the provision of web-based systems enhances access to justice, mainly through two systems that they built (Split-Up and GetAid). The article gives instructions about how to build web-based legal decision support systems, especially with regard to the granting of legal aid and the distribution of marital property following divorce.

⁶⁵ The new technology, e.g., the electronic case reporting, can also simplify the daily work of the courts; as was observed during the IDLO Project: Strengthening the Judiciary in Swaziland in 2004. For further information on IDLO judiciary training activities and technical assistance, see www.idlo.int.

This is also an essential element of the idea of rule of law, and should be taken into consideration in contexts where public power will be exercised. Thus, an important principle is that administrative review should include an opportunity for a complaint to be heard by an administrative body other than that responsible for making the initial decision. Often, the question is about the right to submit a decision of an authority to judicial review by an independent court. Hence, more widespread adoption of independent administrative appeal processes has emerged as an approach. Many countries have established administrative courts separate from civil and criminal courts. This organization of administrative judicial procedure has not been so much about arrangements for the separation of powers, but about securing the legality and controllability of all exercise of public power.

There are strong administrative court systems in all the old Member States of the European Union, apart from Ireland, Great Britain and Denmark. A separate system is also evolving in most new Member States. The progress of administrative courts has also been strong in China and Russia. Among Asian countries, Thailand has established the first separate independent administrative court system, which consists of a supreme administrative court and six regional administrative courts.

Another organizational solution for protecting citizens against violations of rights, abuse of power, or misadministration—more common and older than the administrative court system—is the institution of the so called Ombudsman.⁶⁶ Thus, the ombudsman aims to improve the public sector, governments, and civil servants.⁶⁷

The Ombudsman institution was first established in Sweden, in 1809. It was the Parliament (the *Riksdag*) that created the *Riksdagens justitieombudsman*,⁶⁸ in order to safeguard the rights of citizens, and ensure that courts and authorities were acting in

⁶⁶ See *The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute*, International Ombudsman Institute 1999.

⁶⁷ This is the definition elaborated by the International Ombudsman Institute (IOI), an organisation established in Canada in 1978 for cooperation between Ombudsmen all over the world available at <http://www.law.ualberta.ca/centres/ioi/>.

⁶⁸ Parliamentary Ombudsman.

accordance with the law. Later, the institution spread to other Nordic Countries.⁶⁹ Today, the institution can be found in many countries around the world. Furthermore, the Treaty of Maastricht established the European Ombudsman to deal with complaints about misadministration by institutions and bodies of the European Community/European Union.⁷⁰

The establishment and organization of the ombudsman varies from one country to another. For example, it can be provided for by the constitution, or it can be created through an act of legislation. Some countries have established ombudsman offices at the national level, some others only at the sub-national government level, while others still have combined national and sub-national offices. Although the original concept of ombudsman included the idea of the parliamentary election/appointment, it is today possible, that the ombudsman is appointed by the Head of State, Government, or elected by the Parliament.

Apart from these organizational differences, the role of the ombudsman seems to have a common core. That is, the protection of citizens against violation of their rights, abuse of powers, error, negligence, unfair decisions, and misadministration (e.g., delay, misleading and inadequate advice, or unfairness) by the public administration and by public servants.⁷¹ According to the definition elaborated by the International Ombudsman Institute (IOI), the institution aims at improving the public sector, making the government's actions more open and the government and its servants more accountable to members of the public.⁷²

In Sweden, the Institution of Ombudsman has only one central office located in the capital, Stockholm, but there are four ombudsmen, each of them responsible for a

⁶⁹ Finland established the Parliamentary Ombudsman in 1920; Denmark created the post in 1955 and Norway in 1962.

⁷⁰ The Treaty of Maastricht entered into force on the 1st of November 1993. The first European Ombudsman was elected in 1995. The European Ombudsman homepage is the following: <http://www.euro-ombudsman.eu.int/home/en/default.htm>

⁷¹ Some examples of misadministration could be avoidable delay, faulty procedure, giving misleading or inadequate advice, and unfairness.

⁷² See, e.g., <http://www.law.ualberta.ca/centres/ioi/>.

certain area.⁷³ They are elected by the Parliament for a four-year period. Their main activity is dealing with complaints from the “general public”: any citizen can present a complaint, even those who are not Swedish citizens, and those who have been arrested or committed for treatment. There are two possible ways of investigating a complaint. According to the first, an executive office will contact the official dealing with the case and file a record, whereas, second way involves a more exhaustive inquiry, in which the complaint is referred to the authority concerned. Additionally, it ought to be mentioned that the Swedish ombudsmen can also take initiatives by themselves, for example as a result of observations made during their inspections. However, the adjudication of an ombudsman is not a legal statement, but only the expression of his/her opinion, although sometimes an ombudsman’s actions resemble those of a prosecutor.⁷⁴ Actually, an ombudsman can bring charges against an official who has committed criminal acts, and can invoke disciplinary measures.

In Finland the Parliament appoints the ombudsman and the deputy-ombudsmen, for a renewable term of four years.⁷⁵ The tasks are defined in the Finnish Constitution and in the Parliamentary Ombudsman Act. According to these, the ombudsmen oversee authorities and officials, “to guarantee the legality of actions”. They also give special attention to the implementation of fundamental and human rights⁷⁶, even focusing on the way the police employ coercive measures. The ombudsman accomplishes her/his duties mainly by investigating citizens’ complaints received, but also taking investigations under their own initiative. Moreover, the Finnish ombudsman has a special duty to make regular inspection visits to prisons, and other institutions, such as psychiatric hospitals and military garrisons.⁷⁷

⁷³ The official web site is <http://www.jo.se>.

⁷⁴ Originally, the Parliamentary Ombudsman was a position based on that of a prosecutor, even if today criminal investigations are rare.

⁷⁵ Available at <http://www.oikeusiamies.fi/Resource.phx/ea/index.htm>.

⁷⁶ The Ombudsman has been requested to pay special attention also to the implementation of children’s rights.

⁷⁷ Finland has another authority to oversee the legality of public action: this is the Chancellor of Justice (<http://www.okv.fi/>). Like the Ombudsman, the Chancellor of Justice is responsible for controlling the action of public servants to ensure that they comply with the law, respecting fundamental rights and liberties. The Chancellor can also oversee the actions of lawyers. In principle, a complaint can be addressed to the Ombudsman as well as to the Chancellor of Justice, even if there is a small difference

In the United Kingdom, a Parliamentary Ombudsman and Health Service Ombudsman were established in order to undertake independent investigations into complaints from citizens about government departments, other public bodies, and the National Health Service.⁷⁸ However, the ombudsmen cannot investigate complaints about the police or the content of legislation, nor can they investigate crimes. In general, the ombudsman cannot investigate any matter for which it is possible to obtain a remedy by appeal to an independent tribunal. Complaints about public bodies involved in Scottish or Welsh matters are dealt by the Scottish Public Service Ombudsman or the Welsh Administration Ombudsman.⁷⁹

In France, the ombudsman is called *Médiateur de la République*.⁸⁰ This was created in 1973 to assist citizens⁸¹ who complain about decisions or behavior of the public administration. The Mediator is appointed by government decree for a six-year mandate, and he/she appoints delegates to quickly resolve certain conflicts. Generally, the Mediator resolves conflicts involving the public administration, public communities, or other actors with a public interest mission. This means that the Mediator can also take part in conflicts involving big enterprises (for example French Télécom), social security bodies, or banks. It does not matter if a party does not have public status, as long as its mission covers a public interest⁸². However, the Mediator cannot take part in conflicts directly, but only through deputy mediation, after a complaint has been presented to the administrative organ concerned. The French

in the division of their tasks. Unlike the Ombudsman, the Chancellor of Justice oversees the legality of the Government's actions, attending cabinet sessions and examining the relevant documents.

⁷⁸ By the Parliamentary Commissioner Act 1967. The Ombudsman, appointed by the Queen, is independent of government: not a civil servant, but an officer of the House of Commons. For further information: <http://www.ombudsman.org.uk>.

⁷⁹ The Scottish Public Service Ombudsman was created in 2002 and the Welsh Administration Ombudsman in 1999.

⁸⁰ See <http://www.mediateur-de-la-republique.fr>. By the law of the 3rd of January. The law of the 13th of January 1989 defined the Mediator as an Independent Authority.

⁸¹ Even a foreigner can appeal to the Mediator, but he/she needs to have a personal interest in the conflicts and he/she has to appeal as a private citizen and not as a community representative.

⁸² As in other countries, the Mediator does not have competence in conflicts between private citizens.

Ombudsman can also prevent conflicts by addressing reform propositions to the public administration.

Italy does not have a Parliamentary Ombudsman, but has created regional offices of *Difensore Civico* (Civil Defender).⁸³ The institution of the Civil Defender was established in the early 1990s with the aim of protecting citizens against the public administration and guaranteeing the legality of the public administration's actions. Hence, Italian citizens and foreigners, associations, committees, and corporations, can appeal to the Civil Defender by a written or oral request, while the Civil Defender can also intervene under its own initiative. The Civil Defender may, among other things, request information on processes and acts, or ask for a disciplinary process, but they cannot – in spite of their title - defend citizens before courts or take part in conflicts involving national security, defense and justice.

The institution of the ombudsman has spread all over the world since the early 1960s, when many Commonwealth and European countries established ombudsman offices.⁸⁴ Additional offices were established during the subsequent two decades. This happened particularly in Latin America⁸⁵ (e.g., Argentina, Costa Rica, Guatemala, Central and Eastern Europe (e.g., Poland, Slovenia, Hungary), partly in Africa (e.g., South Africa, Namibia) and Asia-Pacific (Thailand and the Philippines).⁸⁶ In the Republic of the Philippines, the ombudsman was created pursuant to the Constitution of 1987. It is defined as the “Protector of the people”, and empowered to engage in the following tasks: monitoring the general and specific performance of government officials and employees; ensuring that the government delivers basic

⁸³The National Coordinator of Italian Civil Defenders is the Civil Defender of Valle d'Aosta Region (<http://consiglio.regione.vda.it>). Some web sites of Civil Defenders: in Emilia-Romagna region (http://consiglio.regione.emilia-romagna.it/fr_ser_dif_er.htm); in Toscana region (<http://www.consiglio.regione.toscana.it/difensore/default.asp>); in Veneto region (http://www.difensorecivico.veneto.it/a_ildifensore/).

⁸⁴ New Zealand (1962), United Kingdom (1967), Canadian Provinces (from the 1967), Israel (1971), Puerto Rico (1977), Portugal (1975), Austria (1977), Australia (1977 at federal level, 1972-1979 at the state level).

⁸⁵ See Ombudsman Iberoamericanos available at <http://www.portalfio.org/inicio/iberoamerica.html>.

⁸⁶ Countries and territories that established an Ombudsman office at national or sub-national level are listed at <http://www.law.ualberta.ca/centres/loi/eng/worldwide.html>.

services efficiently; evaluating governmental procedures in order to improve them; and imposing administrative sanctions on public officials and prosecuting them in court in case of criminal offences. To cope with these functions, the ombudsman⁸⁷ is entitled to investigate and collect evidence over anomalies and inefficiencies, prevent corruption, prosecute corruption cases before the courts, conduct administrative procedures, impose administrative penalties on public officials, as well as require public officials to offer assistance to people.⁸⁸

In Bolivia, the “Defensor del Pueblo” was established in 1997 as an autonomous body aimed at defending persons’ rights in the face of action by the public service, and promoting and defending human rights.⁸⁹ To accomplish its tasks, the ombudsman can make investigations, suggest statutory modifications, address recommendations so that public officials fulfill their duties, request information from public authorities, and monitor prisoners’ conditions. Furthermore, the Bolivian ombudsman is responsible for promoting and defending the human rights of women, also monitoring and advocating laws concerning them.⁹⁰

Finally, that the usefulness of the ombudsman model in maintaining the functioning of complex organizations, is demonstrated by the fact that that the ombudsman model has also been adapted for use in the private sector to resolve internal disputes or handle complaints by customers. Some of these arrangements will be discussed in subsequent sections focusing on the ADR system and consumer protection. Universities, private health care facilities, corporations and banks are some of those private entities that have established an “Ombudsman”. In India, for example, the Reserve Bank of India (RBI) set up the banking Ombudsman in 1995 to provide an alternative, fast and inexpensive mode of dealing with customer complaints.⁹¹ In case

⁸⁷ Ombudsman offices have been established in the main regions of the country, and are held by Ombudsman Deputies.

⁸⁸ Further information at <http://www.ombudsman.gov.ph/index.php?pagename=Home>

⁸⁹ See <http://www.defensor.gov.bo/>.

⁹⁰ Law related to domestic workers, sexual harassment, and equal opportunities.

⁹¹ After the liberalisation of the Indian economy when the RBI changed its role from a controller to a facilitator of economic development. See <http://law.indiainfo.com/vital-info/260800ombudsman.html>, <http://www.indian-bank.com/ombudsman.htm>, The Governor of the RBI appoints the Ombudsmen,

of an unresolved grievance against a bank, the customer can address his/her complaints concerning deficiency in banking services or non-observance of directives and instructions of the bank on loan interest or delay in sanctions to the Ombudsman.⁹² After receiving a complaint, the Banking Ombudsman issues a recommendation to both parties and, in case this is not accepted, the Ombudsman will make an award. It is not possible to complain twice about the same matter, nor later than one year after the cause of action occurred.⁹³

5.3 Class Action

In the “access to justice table” in chapter 5.1 the institution of class action was mentioned as one of the legal devices that has been developed to take account of, and represent, diffuse interests before the courts. The institution is especially important in the United States and elsewhere in the common law world, while it is rarely adopted in civil law countries. On the Continent, however, another solution is used: the *action collective* in France and Belgium or *Verbandsklage* in Germany and Austria, where standing to sue is entrusted to associations. A civil law version of the class action, which is more restricted than that in the common law countries can be found, for instance in Sweden.

Typical of the class action is that one or a few member(s) of the class, a class that might extend to thousands, even millions of persons, has standing to represent the entire class, if the court recognizes him or her (or them) as an adequate representative of the entire class. Thus characteristic elements of the class action differ from the traditional principles of civil procedure, which, at least partly, may explain difficulties in its introduction. According to Mauro Cappelletti, the class action breaks away from some of the traditional principles of civil litigation: the principles that are called ‘rules of natural justice’.⁹⁴ First, the traditional principle is that standing to sue belongs only

who hold office at his pleasure. The RBI decides where to locate Ombudsman offices and the territorial limits for the exercise of their powers.

⁹² Other matters can be specified by the Reserve Bank itself.

⁹³ This scheme is applicable to every commercial bank (other than Regional Rural Banks) and Schedule Primary Co-operative Bank having its place of business in India, notwithstanding the fact that it was incorporated in India or outside.

⁹⁴ Cappelletti, *supra* note 38, at 285-286.

to the person or persons who are, or represent to be, the 'owner(s)' of the right vindicated in court. In the case of a class action, standing is granted to the 'owner' of a mere fragment of the right.

Second, these rules imply that all persons for or against whom the decision will have *res judicata* effects should be 'heard', which includes duly notifying every person *inter alia*. This is simply impossible in class actions. Thirdly, the idea of *res judicata* cannot be traditionally considered as a statement that *tertiis neque prodest neque nocet*. Finally, the concept of damage in class actions is different from that based on traditional principles. The traditional concept of damages implies that only damages suffered by the plaintiff can be restored. However, the only way to make the vindication of diffuse rights effective is to consider the entire damage caused by the mass-wrongdoer, and to find imaginative ways to distribute the damages among members of the entire class, including members not "present" in the case.

6. ALTERNATIVE DISPUTE RESOLUTION PROCESSES

6.1. Introduction

The chapters discussing problems of court proceedings already mentioned the increasing number of disputes brought to courts, long waiting periods for disputes to be resolved, and excessive costs of dispute resolution. These are all obstacles to access to justice. At the same time, they are central reasons for the popularity of the ADR approach. Principally, alternative dispute resolution methods are extra-judicial procedures, used mainly for resolving civil or commercial disputes. These usually involve collaboration between the disputing parties in finding a solution to their dispute with the help of a neutral third-party. Hence, during the resolution process, the two parties are no longer at loggerheads but actually cooperate in finding a solution with the help of the third party. However, a wider concept of ADR includes all forms of dispute resolution outside the normal (ordinary) litigation process. In every case, the *raison d'être* for the ADR is that disputes should be resolved at low cost, easily, and swiftly.

In recent years, the use of ADR processes has increased considerably. For instance, countries of the European Union use these procedures to resolve disputes between citizens and administrative bodies (e.g., ombudsman), within family and working relationships, in commercial relations, and, very often, in consumer disputes.⁹⁵ For instance, the UK has a quite strong tradition in ADR, particularly in family law matters. Italy benefits from institutions of *procedimento monitorio* (ex parte procedure to obtain payment of a debt) and *difensore civico*, while from France the use of *Conciliateur* or *Médiateur*. In addition, in the United States almost every court offers the possibility of arbitration, while in Canada ADR has been increasing in recent years, enforcing mediation, conciliation, and arbitration. In Japan, alternative dispute resolution started developing in the 1990s, mainly related to public pollution, labor disputes, construction disputes, consumer disputes and traffic accidents.

Hence, the term alternative dispute resolution, ADR, is used to describe a basket of procedures outside the traditional litigation process, usually entered into voluntarily by parties to a dispute, in an attempt to resolve it. Of course, parties and their lawyers do negotiate in most cases. Indeed, a big majority of cases settle before trial through some form of negotiation. Thus, negotiation could also be understood as one ADR procedure, as many agreements are structured to require parties to negotiate as a precondition to litigation. Only after a good-faith attempt to negotiate a settlement has failed may litigation proceed. Where negotiation is used at the outset of a dispute, it is frequently successful, and, very often, involves lower costs than litigation.

One of the most commonly used forms of ADR is mediation, a process by which the parties agree to appoint a neutral third party to assist them in attempting to reach a voluntary settlement. This neutral party does not make a decision, while the parties may terminate the process at any time. It is confidential and without prejudice. The parties are usually encouraged to seek independent legal advice, and where a voluntary settlement is achieved, it only becomes binding when the parties have concluded a settlement agreement. Savings in costs and time are the dominant reasons for using mediation, but there are other significant reasons, such as preserving

⁹⁵ In the field of consumer disputes, ADR has become a special priority of the European Commission. As such, it has adopted two recommendations on the subject

(business) relations between the parties. If the third party proposes a solution then another form of ADR, conciliation, is involved.

In addition, arbitration involves adjudication by a neutral third-party. It is possible to structure arbitration to be non-binding, but arbitration is generally designed to be binding. Often, arbitration is based on the agreement of the parties, that is, either on a pre-existing agreement or on a specific term in an arbitration agreement entered into after the dispute has arisen. Hence, it can be distinguished from mediation chiefly due to the fact that the decision of the arbitrator, unless otherwise agreed, will be binding, and, generally, the resulting decision may be entered in the court record. Arbitration thus functions a lot like adjudication. Arbitration is regularly used in (international) commercial disputes.

6.2 Means and Bodies of ADR

When the most common means of present dispute resolution - apart from the traditional court procedure - are taken into consideration, the following classification can be presented:⁹⁶

- (1) Unilateral resolution (of one of the disputing parties): The problem is resolved on one's own within the scope of one's rights.
- (2) Consultation (dialogue-based, but one side only): A third party is consulted by one of the disputing parties, and he /she provides information, corrects any imbalance between the two sides, and offers support in arriving at an agreement. However, this cannot be called mediation.
- (3) Negotiations (dialogue-based; requires agreement from both sides): The two parties engage in direct dialogue to examine ways to eliminate the problem and to reach an agreement that resolves the dispute.
- (4) Conciliation (dialogue-based): A third party intervenes to negotiate a solution to problems enabling the disputing parties to reach an agreement. The solution is not legally binding unless it was negotiated by a court and a report was written.⁹⁷

⁹⁶ The classification is by Yasuo Atsumi : *Observations regarding Alternative Dispute Resolution*, ECOM Journal No.3., at: http://www.ecom.jp/ecom_e/latest/ecomjournal_no3/wg1_e03.htm

⁹⁷ Article 16 of the Law for Conciliation of Civil Affairs and Article 203 of the Code of Civil Procedure.

However, if the third party does not propose a solution, a mediation case is concerned, and it is assumed that consultations will be extended.

- (5) Arbitration (ruling-based; to initiate, requires agreement by both sides): The dispute is resolved through a ruling by a third party (arbitrator), while the procedure is based on the agreement of the parties. The decision is equivalent to a final court ruling.
- (6) Small-claims litigation (ruling-based; initiated by one of the disputing parties): A summary court makes a ruling that includes a small-sum award.

Although the foregoing describes circumstances in Japan, it is generally valid elsewhere, too. The concept of ADR in the narrow sense refers to conciliation (4), including mediation, and arbitration (5). However, consultation (2) and small-sum/claim litigation (6) can apply, too, when their aim is dispute resolution

It is possible to classify not only ADR procedures but also the types of institutions that conduct ADR. Again, the classification refers to Japan. It is, however, so generally formulated that it well describes the situation in many other countries, too. The following types of bodies can be found:

- 1) Judicial type. These are special courts that conduct civil or family arbitration proceedings;
- 2) Administrative type: administrative organizations, such as national and local government agencies, including counselling centres of various ministries, and national and other centres for consumer affairs;
- 3) Private sector types, like
 - attorney type, organized by bar associations or coordinated in association with private organizations;
 - public-interest-organization type, e.g., Centre for Settlement of Traffic Accident Disputes and the Japan Commercial Arbitration Association;
 - industry-organisation type, for instance, product liability centres, Japan Direct Marketing Association, and Japan Consumer Credit Industry Association;
 - private-business type: arrangements according to, e.g., foreign direct marketing; and
 - private-volunteer-group type, e.g., so-called *Shirogane Cyperpol*.

The variety of ADR bodies *per se*, however, does not guarantee the popularity of alternative dispute resolution. In Japan, activities of ADR bodies have remained quite limited, except in areas requiring professional expertise, such as civil and family affairs arbitration, traffic accidents, real estate, and financial-product disputes. Level of popularity / activity seems to reflect several factors. Where Japan is concerned, one reason in particular ought to be mentioned: traditionally, Japan is not a litigation-oriented society. At the same time, there is a low level of trust in the alternative dispute resolution system, including the quality of mediators and arbitrators, in addition to a low level of public knowledge of the system. Moreover, the necessary infrastructure is underdeveloped, due to inadequate assessment of market needs, while costs of ADR are too high. Furthermore, the recent emergence of so-called *grievance*-processing by private organizations and citizen volunteers is a notable development in Japan, and, in the future, it could form a real alternative to ordinary court litigation.

In commercial disputes ADR is commonplace in Japan, as in many other industrialized countries.⁹⁸ However, many Japanese parties to commercial disputes have resolved their international disputes by arbitration in New York or in London, but seldom in Japan. Moreover, arbitration of domestic commercial disputes is unpopular in Japan. Domestic commercial disputes are brought neither into the courts nor into arbitration. They are usually resolved by reconciliation, that is ADR mechanisms/processes, other than arbitration. So, there are compromises outside the court and before the court. Both are simple, fast, cheap, flexible, and practical solutions, while a compromise before the court has the same enforceability as a final and binding judgment of a court. There are also conciliations outside the court: these are *ad hoc* and institutional conciliations.

An amicable settlement, which results from conciliation outside the court, is a compromise outside the court, and has a similar legal effect as conclusive evidence on the legal relationship between the parties. Further, conciliation outside the court is a simple, cheap, fast, and closed method of ADR. In particular, speed and

⁹⁸ See Iwasaki, Kazuo: *Reconciliation of Commercial Disputes in Japan*, <http://www.gsid.nagoya-u.ac.jp/project/apec/lawdb/japan/dispute/adr-en.htm>; ADR is not the title because arbitration is excluded.

confidentiality are elements that generally persuade businessmen to prefer these to court proceedings. It should also be mentioned that a conciliator can flexibly adopt an appropriate and practical solution according to the individual nature of the dispute, since the conciliator has no obligation to apply any law to the substance of the dispute or to follow any procedural law in the conciliation process. On the other hand, the conciliator cannot expect any assistance from the court, even if a person concerned refuses to submit evidence to the conciliator or to appear before the conciliator as a witness.

Conciliation before the court is also possible, in commercial as well as in many private disputes. Generally, it is commenced either upon application by a disputing party or by a court order. Conciliation before the court is a simple, speedy, closed, and cheap method of ADR, and it is the most popular and effective ADR form in Japan. The number of conciliation cases has been gradually increasing. According to Kazuo Iwasaki, the volume has been about 30% of newly filed civil cases.⁹⁹ In addition, about 55% of cases of conciliation before the court have been successfully settled by compromise between the parties. In Japan, the fee for conciliation before the court is determined according to the amount in dispute, but conciliation covers roughly speaking about 60% of the cases in court litigation. However, a disadvantage of conciliation before the court is that the parties cannot appoint the conciliator(s) by their own agreement, and the quality of a conciliation committee member is not always suitable for a commercial dispute: the fees are too low to attract an able businessman or business lawyer as a conciliation committee member.

UNCITRAL has also actively promoted international commercial arbitration and conciliation. The UNCITRAL Arbitration Rules, adopted in 1976, provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship. These rules are widely used in *ad hoc* arbitrations as well as administered arbitrations. In addition, there are UNCITRAL Recommendations (1982) to assist arbitral tribunals and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules. Additionally, the UNCITRAL Conciliation Rules from 1980 are applicable when

⁹⁹ Iwasaki, Kazuo: *ibid.*

parties to a commercial dispute wish to settle their disputes amicably through conciliation. So, they agree upon this set of procedural rules to govern the conciliation proceedings.

Also relevant is the UNCITRAL Model Law on International Commercial Arbitration that is designed to assist States in reforming and modernizing their laws on arbitral procedure taking into account the particular features and needs of international commercial arbitration.¹⁰⁰ The Model Law was adopted in 1985 and has been enacted into law in a large number of jurisdictions from both developed and developing countries. Furthermore, the Model Law on International Commercial Conciliation is designed to assist States in creating new or enhancing existing legislation governing the use of conciliation or mediation conducted by a neutral third party (or parties) in order to amicably settle disputes that may arise in the course of international commercial relations. This Model Law was adopted in 2002.¹⁰¹

6.3 Resolution of Consumer Disputes

Finally, some arrangements concerning consumer dispute resolution should be discussed. Hence, consumer disputes are usually characterized by the disparity between the economic value at stake and the cost and duration of the judicial settlement: The cost of settling disputes between consumers and business via the courts outweighs the economic value of the transaction concerned. Therefore, forms / bodies of alternative dispute resolution, especially dealing with consumer disputes have been developed in many countries. The flexibility, low cost, speed and informality of these procedures are attractive for both consumers and businesses. Several out-of-court bodies for consumer disputes have been established. These have been created by public initiative at central or regional level, like the central consumer complaints boards in the Nordic countries, or they have been developed by the private sector, like the mediators of banks in Austria and Luxembourg. At the same

¹⁰⁰ See Model Arbitration Law Quarterly Reports; <http://interarb.com//malqr.html>.

¹⁰¹ To further assist executive branches of Governments, parliaments and legislatures in the use of the Model Law, a Guide to Enactment and Use of the Model Law is currently being drafted by the UNCITRAL Secretariat. Also, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) should be mentioned. This was prepared by the United Nations prior to the existence of UNCITRAL, and as its name indicates, provides for the recognition and enforcement of arbitral awards rendered in foreign countries.

time, the difference in the relative importance and function of these bodies is reflected in similar differences between the statuses of adopted decisions. For example, Scandinavian consumer complaints boards adopt recommendations, while bank mediators can adopt coercive decisions for professionals.

In order to improve the system of out-of-court bodies responsible for handing consumer disputes, the European Commission adopted Recommendation 98/257, setting out principles that should be respected by ADR schemes.¹⁰² These are the principles of independence, transparency, efficiency, and respect for the law: these principles would then enhance mutual confidence between existing out-of-court bodies in member states, and strengthen consumer confidence in national procedures.¹⁰³ For instance, it was proposed that the principle of independence be guaranteed through equal representation of consumers and professionals (business).

Examples of consumer protection bodies are the National Board for Consumer Complaints (ARN) in Sweden, the Consumer Complaint Board in Finland, Consumer Complaints Commissions in France, and Conciliation Services by the Chambers of Commerce, Industry and Craft Trades in Italy.¹⁰⁴ The Swedish ARN is a national authority directly responsible to the Government, and aims at “settling consumer

¹⁰² This Commission Recommendation on the principles applicable to bodies responsible for out-of-court settlement of consumer disputes was adopted on the 30th of March 1998 *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/l_115/l_11519980417en00310034.pdf.

¹⁰³ For further information see http://www.europa.eu.int/comm/consumers/redress/out_of_court/commu/acce_just04_en.html; http://www.europa.eu.int/comm/consumers/redress/out_of_court/index_en.htm.

¹⁰⁴ Another two Italian out-of-court systems have been considered in conformity with the European Commission principles: the Ombudsman of the Italian Banking Association and Conciliation and Arbitration Committees run by Telecom. The banking Ombudsman is a collegiate body made up of five members and whose Chairman is appointed by the governor of the Bank of Italy. Its task is to settle disputes concerning banking or financial transactions between consumers and credit institutions. The procedure lasts up to 60 days (up to 90 days in case of financial transactions) and is free of charge. Telecom Conciliation and Arbitration Committees are bodies that deal with disputes between Telecom and consumers and are composed of two mediators, one appointed by Telecom and the other by consumer associations. The procedure is informal and free of charge and ends with a conciliation report.

disputes impartially and in a quick and cheap way”.¹⁰⁵ The ARN is divided into eleven departments, according to different branches of trade.¹⁰⁶ It has investigating power, and the competence to express opinions on consumer disputes. A consumer can notify a dispute to the ARN only after attempts to achieve an amicable settlement with the trader have failed, and within six months from that. The process is written, and free of charge. The ARN decision is a recommendation that it is not legally binding, and which carries no possibility to appeal.

The Finnish Consumer Complaint Board is a State authority divided into general and housing divisions.¹⁰⁷ Divisions are then sub-divided into sections that usually deal with and restore disputes. According to the Law of Consumer Protection, a consumer is defined as “a person who has purchased a product or service for private use only and not for business purpose”. Thus, only a consumer can bring a matter before the Board, while the Board cannot decide matters already settled by a court.¹⁰⁸ The Board is also responsible for investigating matters on its own initiative, and its decisions take the form of recommendations. Additionally, the Finnish procedure is based on written documents, and is free of charge.

In France, according to the Decree of 20 December 1994, a Consumer Complaints Commission (Commission) should be established within each consumer committee at department level. Each Commission consists of a president, two assessors, representing equally consumers and business, and *rapporteurs*, acting under the authority of the president.¹⁰⁹ The Commission has competence to deal with consumer disputes that involve the purchase of a good or a service between a private persons and professionals, and without business purposes. When the Commission receives a complaint, the President appoints a *rapporteur* to suggest an amicable solution within

¹⁰⁵ See <http://www.arn.se>.

¹⁰⁶ These are: Bank, Boat, Cleaning, Electrical, Housing, Insurance, Motor Vehicle, Shoe, Textile, Travel and General Departments.

¹⁰⁷ See <http://www.kulttajavalituslautakunta.fi/index.php>.

¹⁰⁸ As in Sweden, it is always possible to bring to a court a decision settled by the Board.

¹⁰⁹ In French, *Commission de règlement des litiges de consommation (CRLC)*. See the web site of Consumer Complaints Board in Vilaine at <http://www.cdad-illeetvilaine.justice.fr/crlc.htm>.

two months.¹¹⁰ The parties can accept this amicable settlement by signing the report of the Rapporteur, or they can refuse the suggested solution. In this case, the report will be submitted to the Commission, and the dispute will be put on the agenda of its future meetings. If the parties then reach an agreement before the Commission, they will sign a document.¹¹¹ Otherwise, the Commission will propose a final conciliation. If even this one is unsuccessful, the Commission will inform the parties of the failed settlement and of the option of bringing the case before a court.

There is also the European Consumer Centres Network (ECC-network),¹¹² established by the European Union. Initially, the purpose of the network was to inform and support consumers in cross-border shopping. Nowadays, the network priority is to provide consumers with pro-active information on European consumer issues that concern them. Finally, EU Consumer organizations take part in the Transatlantic Consumer Dialogue (TACD) together with US consumer organizations.¹¹³ The TACD, launched in 1995,¹¹⁴ is a forum to promote consumer interests in EU and US policy-making and to strengthen the EU and US consumer view at the international level. The TACD conference takes place once a year, and it produces recommendations that call for a number of actions from EU Governments, the European Commission, and US authorities. The following are some examples of

¹¹⁰¹¹⁰ To bring a case before the Commission no special formality is required (a letter is enough) and the whole procedure is quite informal and free of charge. The Commission cannot accept a complaint if the parties are disputing the same matter before a court.

¹¹¹ Eventually specifying the point on which there is still a disagreement.

¹¹² The European Commission aims at having at least one ECC in each Member State. Nowadays (without considering the 10 new Member States), we have 16 ECC in 13 countries - since there is no a Consumer Centre either in Denmark or in the Netherlands - while we have three ECC in Germany and two in Spain. The list of the European Consumer Centre is available on the web page, at: http://europa.eu.int/comm/consumers/redress/compl/euroguichet/euroguichets_en.pdf.

¹¹³ <http://www.tacd.org>

¹¹⁴ The TACD is organized by Consumer International, an independent, non-profit organization that links and represents consumer groups and agencies all over the world, with a membership of over 250 organizations in 115 countries (<http://www.consumersinternational.org/homepage.asp>). Consumer International provides the TACD with the Secretariat and the European Commission with financial and co-ordination support.

consumer protection arrangements outside the European Union, in particular in the USA, in New Zealand, and in Japan.

In the USA, the federal agency with the widest jurisdiction over consumer issues is the Federal Trade Commission (FTC), where the Bureau of Consumer Protection (Bureau) has a mandate to protect consumers against unfair, deceptive, or fraudulent practices. The Bureau enforces a variety of consumer protection laws enacted by Congress, as well as trade regulation rules issued by the Commission. Its actions include individual company and industry-wide investigations, administrative and federal court litigation, rulemaking proceedings, and consumer and business education. In addition, the Bureau contributes to the Commission's on-going efforts to inform Congress and other government entities of the impact that proposed actions could have on consumers.¹¹⁵ The Bureau is then divided into specialized divisions: the Division of Advertising Practices, the Division of Enforcement,¹¹⁶ the Division of Financial Practices, the Division of Marketing Practices, the Division of Planning & Information, the International Division of Consumer Protection,¹¹⁷ and the Office of Consumer and Business Education.¹¹⁸

Each State has developed consumer protection laws that are typically enforced by a Consumer Protection Division within the Attorney General's Office¹¹⁹ to protect individual consumers and legitimate business from various types of illegal conduct in

¹¹⁵ On the FTC pages: <http://www.ftc.gov>

¹¹⁶ This division heads several activities to enforce the law related to consumer protection, such as conducting investigations and prosecuting civil actions to stop fraudulent, unfair, or deceptive marketing and advertising practices; ensuring consumer protection laws, rules and guidelines.

¹¹⁷ This Divisions aims to enhance consumer confidence in international trade through cross-border cooperation and information-sharing.

¹¹⁸ This office develops and implements campaigns for consumer and industry audiences, aiming at encouraging consumer choice and business practice in the market.

¹¹⁹ As the public's lawyer, the Attorney General protects consumers, defends state laws, and helps to ensure that the most vulnerable citizens – such as children and the elderly - are safe from abuse and neglect.

trade or commerce.¹²⁰ In the State of Indiana, for example, the Consumer Protection Division,¹²¹ which is responsible for investigating, mediating, and litigating complaints involving consumer transactions, is divided into two sections. The first deals with complaints against professionals licensed by the State, and the second deals with other complaints against business.

In New Zealand, the Ministry of Consumer Affairs¹²² is an operating branch of the Ministry of Economic Development. Its main activities are: developing consumer policy and protection, providing accurate and accessible information, investigating unsafe consumer products, providing advice on consumer representation, and administering a range of consumer legislation. However, in cases where consumers or business request compensation on the basis of the Fair Trading Act¹²³, they will need to take a civil action before a dispute tribunal¹²⁴ or district court.¹²⁵ While the latter is part of the civil jurisdiction system, the former is not. There are neither judges nor lawyers, instead, the parties stand before a referee who encourages litigants to find their own dispute solution. In case of unsuccessful attempts, the referee himself defines the solution.

¹²⁰ Some links to the Attorney General's Consumer protection Divisions: Illinois <http://www.ag.state.il.us/consumers/>, Florida <http://myfloridalegal.com/consumer>, Oklahoma <http://www.oag.state.ok.us/>, New York <http://www.consumer.state.ny.us/>

¹²¹ On the web, at the following page: <http://www.in.gov/attorneygeneral/consumer/>

¹²² The web homepage is the following: <http://www.consumeraffairs.govt.nz/index.html>

¹²³ The Fair Trading Act came into force on 1 March 1987, replacing earlier laws relating to misleading and deceptive conduct, unfair trading practices, and consumer information. The Act applies to all aspects of the promotion and sale of goods and services — from advertising and pricing to sales techniques and finance agreements. The Commerce Commission brings about awareness on the Fair Trading Act, so that consumers and producers benefit from healthy competition. The Commission gives information on unfair or misleading trading practices and on anti-competitive behavior by business, but it does not give advice or take civil action charged by the public. For further information: <http://www.comcom.govt.nz/>

¹²⁴ Dispute Tribunals deal with claims involving less than 7.500 Dollars. On the web: http://www.justice.govt.nz/pubs/courts/disputes_general.html

¹²⁵ District Courts deal with claims involving from 7.500 up to 200.000 Euro. On the web: http://www.justice.govt.nz/courts/district_court.html

In Japan, it is the National Consumer Affairs Centre (NCAC)¹²⁶ that deals with consumers, giving information, orienting their choices and answering inquiries. The NCAC operates in networking with local consumer centers, run by local government around the country. It receives and handles complaints and inquiries about people's lives in general, and about consumer-related issues in particular. NCAC experts reply to inquiries from consumers and handle complaints according to their field of specialization. Finally, the NCAC also handles cases that are too difficult for local consumer centers.

¹²⁶ NCAC was established in 1970 as a special-status organization with the mission to improve and stabilize peoples' lives. In 2003, it was recognized as an independent administrative agency. On the web: http://www.kokusen.go.jp/ncac_index_e.html