The Right of Access to a Court

Raffaele Sabato, Judge, European Court of Human Rights
right of access to a court
a two-faced right

- A right in itself (under the ECHR, the CFREU, the domestic Constitutions) and protected for itself

- An instrumental right (in order to protect other rights, under the ECHR, the CFREU, the domestic Constitutions)

Corollaries
- Multidisciplinary approach (civil, criminal, etc.)
- If violated, usually another violation also exists
Access to justice vs. access to court

- **Access to justice**
  - a basic principle of the rule of law;
  - enables people to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable;
  - is necessarily equal for all, including vulnerable groups and persons (in conflicts all parties have equal access)
Access to justice vs. access to court

Access to justice

- Independence of the judicial system, together with its impartiality and integrity, is an essential prerequisite; guarantees of independence of lawyers;
- Monitoring and evaluation of justice; civil society and parliamentary oversight; cultural aspects such as legal awareness; financial aspects such as legal aid;
- Challenges such as police brutality, inhumane prison conditions, lengthy pre-trial detention, impunity and effective investigations.
Access to justice vs. access to court

- Access to justice
Access to justice vs. access to court

- **Access to justice**

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Source: Handbook on European Law Relating to Access to Justice
Rights and remedies, mainly national

Access to justice encompasses a number of core human rights, such as the right to a fair trial under Article 6 of the ECHR and Article 47 of the EU Charter of Fundamental Rights, and the right to an effective remedy under Article 13 of the ECHR and Article 47 of the Charter.

Although different systems govern enforcement of the ECHR and the EU Charter of Fundamental Rights, both emphasise that the rights to an effective remedy and to a fair trial should primarily be enforced at national level.
Figure: Access to justice rights under EU and CoE law

Access to justice

Right to a fair trial

Article 6 of the ECHR applies to criminal charges, disputes concerning civil rights, and obligations recognised in domestic law.

Article 47 of the EU Charter of Fundamental Rights applies to the rights and freedoms guaranteed by EU law. It applies only when Member States are implementing EU law.

Right to an effective remedy

Article 13 of the ECHR applies to all ECHR rights. It requires provision of a remedy before a national authority.

Article 47 of the EU Charter of Fundamental Rights applies to the rights and freedoms guaranteed by EU law. It applies only when Member States are implementing EU law. It requires provision of a remedy before a tribunal.

Source: Handbook on European Law Relating to Access to Justice
From access to justice to access to courts

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### From access to justice to access to courts

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### Other paths to justice

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Source: Handbook on European Law Relating to Access to Justice  
Access to courts

- Article 6 of the ECHR and Article 47 of the EU Charter of Fundamental Rights guarantee the right to a fair trial; and the ECtHR has held that the right to a fair trial encompasses the right of access to a court. Access to court is implicit in the right to a fair hearing because it suggests that disputes must be decided on by courts. States are not compelled to establish specific types of courts – such as, for example, appellate courts. However, if a State Party sets up such courts, Article 6 will apply to them.

- The term ‘tribunal’ is equivalent to ‘court’, but these terms are equivalent. Definition of “tribunal”.

- The right of access to a court is not absolute. It can be limited (time limits, procedural requirements, court fees), but restrictions may not impair the right’s essence.
Access to courts

- Availability of courts (also geographical and/or technological availability).
- Availability of powers of interpretation to the court.
- Access to information as to procedures and court judgments.
- Legal aid, translation or other practical support to enable individuals to access court proceedings.

The story of Qiu Ju (1992). A pregnant peasant woman lives in a rural area of China. When her husband is kicked in the groin by the village head, despite her pregnancy, she travels to a big city to find justice.
Convention Rights

• Article 6 § 1 embodies the “right to a court”, of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect (Golder v. the United Kingdom, § 36 [1975]; Naït-Liman v. Switzerland [GC], § 113 [2018]).

• Referring to the principles of the rule of law and the avoidance of arbitrary power which underlie the Convention, the Court held that the right of access to a court was an inherent aspect of the safeguards enshrined in Article 6 (Zubac v. Croatia [GC], §§ 76 et seq. [2018]).
Golder [1975]

- Golder was a prisoner who was refused permission by the Home Secretary to consult a solicitor with a view to bringing libel proceedings against a prison officer. The court construed article 6 of ECHR, which provides that ‘in the determination of his civil rights . . everyone is entitled to a fair . . hearing’, as requiring a right of access to a solicitor. ‘Article 6(1) does not state a right of access to the courts or tribunals in express terms. It enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term. It is the duty of the Court to ascertain, by means of interpretation, whether access to the courts constitutes one factor or aspect of this right . . The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally ‘recognised’ fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6(1) must be read in the light of these principles . . It follows that the right of access constitutes an element which is inherent in the right stated by Article 6(1).’
Naït-Liman v. Switzerland [GC], § 113 [2018]).

• The applicant claimed he was tortured in Tunisia.
• He had been arrested in April 1992 by the police in Italy and taken to the Tunisian consulate in Genoa. He was then taken to Tunis by Tunisian agents, on the basis of an order qualifying him as a threat to security.
• After the alleged tortures in Tunisia, he fled Tunisia in 1993 for Switzerland, where he applied for political asylum; this was granted in 1995.
• In 2001 he learned that A.K., the man who tortured him, was in one of the hospitals in Switzerland!
• He filed a criminal complaint and applied to join the proceedings as a civil party.
The public prosecutor discontinued the proceedings on the grounds that A.K had left Switzerland.

In 2004 the applicant lodged a claim for damages against Tunisia and against A.K before the court in Geneva. The claim was declared inadmissible: Switzerland lacked territorial jurisdiction and did not have jurisdiction under the forum of necessity in the case at hand, owing to the lack of a sufficient link between, on the one hand, the case and the facts, and, on the other, Switzerland. Appeals were rejected.
Naït-Liman v. Switzerland [GC], § 113 [2018]).

- The Grand Chamber is asked whether – as a forum of necessity or as a matter of universal civil jurisdiction – the Swiss courts were required by Article 6 § 1 ECHR to examine the applicant’s civil claim for compensation against Tunisia.

- Solution?
Naït-Liman v. Switzerland [GC], § 113 [2018]).

- The Grand Chamber is asked whether – as a forum of necessity or as a matter of universal civil jurisdiction – the Swiss courts were required by Article 6 § 1 ECHR to examine the applicant’s civil claim for compensation against Tunisia.

- Like the Chamber, the Grand Chamber found that this was not the case, and considered that the Member States are under no international law obligation to provide universal civil jurisdiction for torture.
Naït-Liman v. Switzerland [GC], § 113 [2018]).

- Article 6 of the Convention was applicable in this case since, on the one hand, it concerned a “genuine and serious” dispute, and, on the other, the applicant could lay claim to a right which was, at least on arguable grounds, recognized under Swiss law.

- However, there was a restriction of the access to a court, but it had a legitimate aim: proper administration of justice, particularly in terms of the problems in gathering and assessing the evidence, the difficulties linked to execution of a judgment, etc.

- Proportionality of the restriction: the State enjoyed a certain margin of appreciation in regulating this right; the scope of this margin depended, *inter alia*, on the relevant international law in this area.

- Relevance of int’l law for jurisdiction: see Markovic And Others V. Italy [GC] 2006; Immunities (omitted) - Stichting Mothers of Srebrenica v. Netherlands 2013, etc.
The Supreme Court had refused to examine the appeal because the value of the subject matter of the dispute had been below the statutory threshold. The applicant, Ms Zubac, complained that she had therefore been prevented from having access to the Supreme Court.

The ECHR found that restricting Ms Zubac’s access to the Supreme Court had been justified. In particular, she had been responsible for making procedural errors in her case, which could have been avoided from the outset. Those errors had included her choice of legal representation when bringing her claim (a Montenegrin instead of a Croatian lawyer) and a failure to amend the value of the subject matter of the dispute before the case had gone to litigation, as required by law. Even though the lower courts had made an error when deciding Ms Zubac’s claim according to the increased value of the subject matter of the dispute (which would have brought the claim over the minimum threshold for lodging an appeal), the Supreme Court should not be bound by such errors. In its decision, the Supreme Court had thus ensured legal certainty and proper administration of justice. Unlike the Chamber, the Grand Chamber therefore found that the Croatian Supreme Court had not been excessively formalistic in refusing to consider Ms Zubac’s appeal on points of law.
Focus on restrictive procedural steps

- These rules should not prevent litigants from using an available remedy (Miragall Escolano and Others v. Spain, § 36; Zvolský and Zvolská v. the Czech Republic, § 51).

- In applying procedural rules, the courts must avoid both excessive formalism that would impair the fairness of the proceedings and excessive flexibility such as would render nugatory the procedural requirements laid down in statutes (Hasan Tunç and Others v. Turkey, §§ 32-33).

- The essence of the right of access to a court is impaired when the rules cease to serve the aims of “legal certainty” and the “proper administration of justice” and form a sort of barrier preventing the litigant from having his or her case determined on the merits by the competent court (Zubac v. Croatia [GC], § 98).
Focus on restrictive procedural steps

• The domestic courts

• must **avoid** both **excessive formalism** that would impair the fairness of the proceedings and **excessive flexibility** such as would render nugatory the procedural requirements laid down in statutes

• should take sufficient account of the particular circumstances of the case and not apply the relevant rules and case-law too rigidly

• strike a fair balance between the interests of the authorities and of the persons concerned, in particular by affording the parties a clear, practical and effective opportunity to challenge the decisions
Focus on apprising [notification] of proceedings

- It is the domestic authorities’ responsibility to act with the requisite diligence in ensuring that litigants are apprised of proceedings concerning them so that they can appear and defend themselves; notification of proceedings cannot be left entirely at the discretion of the opposing party (for a summary of the case-law, see Schmidt v Latvia, §§ 86-90, 92 and 94-95 [2017])
Impairment by the prohibitive cost of the proceedings in view of the individual’s financial capacity:

- excessive amount of security for costs in the context of an application to join criminal proceedings as a civil party (*Aït-Mouhoub v. France*, §§ 57-58; *García Manibardo v. Spain*, §§ 38-45);

Focus on impairments by issues relating to time-limits:

- The Court held in *Ivanova and Ivashova v. Russia* that the national courts should not interpret domestic law in an inflexible manner with the effect of imposing an obligation with which litigants could not possibly comply. Requiring an appeal to be lodged within one month of the date on which the registry drew up a full copy of the court’s decision - rather than the point at which the appellant actually had knowledge of the decision - amounted to making the expiry of the relevant deadline dependent on a factor entirely outside the appellant’s control. The Court found that the right of appeal should have become effective from the point at which the applicant could effectively apprise herself of the full text of the decision.
Impairment

by issues relating to time-limits:

- limitation periods for bringing a claim (Howald Moor and Others v. Switzerland, §§ 79-80; Yagtzilar and Others v. Greece, § 27). For example, the Court has found a violation of the right of access to a court in a number of cases in which the discontinuation of criminal proceedings and the resulting failure to examine a civil claim were due to a lack of diligence on the national authorities’ part (Atanasova v. Bulgaria, §§ 35-47). Excessive delays in the examination of a claim may also render the right of access to a court meaningless (Kristiansen and Tyvik AS v. Norway).
Impairment

by issues relating to time-limits:

• the granting of leave to appeal out of time and the resulting acceptance of an ordinary appeal lodged after a significant period of time, for reasons that do not appear especially convincing, may entail a breach of the principle of legal certainty and the right to a court (*Magomedov and Others v. Russia*, §§ 87-89, where late appeals benefiting the competent authorities were accepted following the extension without any valid reason of the time-limit for appealing).
Impairment

- by the existence of procedural bars preventing or limiting the possibilities of applying to a court:
- a particularly strict interpretation by the domestic courts of a procedural rule (excessive formalism) may deprive applicants of their right of access to a court (*Pérez de Rada Cavanilles v. Spain*, § 49; *Miragall Escolano v. Spain*, § 38; *Sotiris and Nikos Koutras ATTEE v. Greece*, § 20; *Běleš and Others v. the Czech Republic*, § 50; *RTBF v. Belgium*, §§ 71-72 and 74; *Miessen v. Belgium*, §§ 72-74; *Zubac v. Croatia* [GC], § 97)
Access to appeals

- The conditions of admissibility of an appeal on points of law may quite legitimately be stricter than for an ordinary appeal (Zubac v. Croatia [GC] [2018])
**Trevisanato v Italy [2016]**

- An employee with IBM for 32 years was dismissed and brought proceedings against the company before the Milan Labour Court asking it to declare his dismissal null and void or ineffective.
- The claim was dismissed and an appeal was rejected by the Court of Appeals.
- The applicant appealed to the Court of Cassation.
- The Court of Cassation declared the appeal inadmissible in the absence of an appropriate formulation of the point of law in accordance with Article 366bis of the Code of Civil Procedure. A request for revision was also declared inadmissible.
Trevisanato v Italy [2016]

- The Court observed that the purpose of Article 366bis of the Code of Civil Procedure (CCP) had been both to protect the party’s interest and to preserve the role of the Court of Cassation in ensuring the uniform interpretation of the law.
- The limitation pursued a legitimate aim, meeting the requirements both of legal certainty and of the proper administration of justice.
- The inadmissibility decision could not therefore be regarded as an excessively formalistic interpretation of the ordinary rules such as to preclude an examination on the merits of the applicant’s case. Additionally, the rule applied by the Court of Cassation was not judge-made but had been introduced by the legislature.
- Given the special nature of the Supreme Court’s role, the procedure followed in the Court of Cassation may be more formal.
Waiver of access to courts

- Arbitration v ADR
- Settlements
- [Omitted]
European Court of Human Rights
The Right of Access to a Court

Raffaele Sabato, Judge, European Court of Human Rights