Recommendation No. R (81) 7 on measures facilitating access to justice

(Adopted by the Committee of Ministers on 14 May 1981 at its 68th Session)

The Committee of Ministers,

Considering that the right of access to justice and to a fair hearing as guaranteed under Article 6 of the European Convention on Human Rights, is an essential feature of any democratic society,

Considering that court procedure is often so complex, time-consuming and costly that private individuals, especially those in an economically or socially weak position, encounter serious difficulties in the exercise of their rights in member states;

Bearing in mind that an effective system of legal aid and legal advice, as provided for under Resolution (78) 8 of the Committee of Ministers, may greatly contribute to the elimination of such obstacles;

Considering that it is nevertheless desirable also to take all necessary measures in order to simplify the procedure in all appropriate cases, with a view to facilitating access to justice of the individual whilst ensuring at the same time that justice is done;

Considering that, with a view to facilitating access to justice, it is desirable to simplify documents used in such procedures,

Recommends the governments of member states to take or reinforce, as the case may be, all measures which they consider necessary with a view to the progressive implementation of the principles set out in the appendix to this recommendation;

Invites the governments of member states to inform the Secretary General of the Council of Europe every five years of the measures taken or envisaged to follow up this recommendation, with a view to the circulation of this information to the governments of member states.

Appendix to the recommendation

Principles

Member states should take all necessary steps to inform the public on the means open to an individual to assert his rights before courts

and to make judicial proceedings, relating to civil, commercial, administrative, social or fiscal matters, simple, speedy and inexpensive. To this end member states should have particular regard to the matters enumerated in the following principles.

A – Information to the public

1. Appropriate measures should be taken to inform the public of the location and competence of the courts and the way in which proceedings are commenced or defended before those courts.

2. General information should be available from the court or a competent body or service on the following items :

- procedural requirements, provided that this information does not involve giving legal advice concerning the substance of the case ;
- the way in which, and the time within which a decision can be challenged, the rules of procedure and any required documents to this effect ;
- methods by which a decision might be enforced, and if possible, the costs involved.

B – Simplification

3. Measures should be taken to facilitate or encourage, where appropriate, the conciliation of the parties and the amicable settlement of disputes before any court proceedings have been instituted or in the course of proceedings.

4. No litigant should be prevented from being assisted by a lawyer. The compulsory recourse of a party to the services of an unnecessary plurality of lawyers for the need of a particular case is to be avoided. Where, having regard to the nature of the matter involved, it would be desirable, in order to facilitate access to justice, for an individual to put his own case before the courts, then representation by a lawyer should not be compulsory.

5. States should take measures to ensure that all procedural documents are in a simple form and that the language used is comprehensible to the public and any judicial decision is comprehensible to the parties.

6. Where one of the parties to the proceedings does not have sufficient knowledge of the language of the court, states should pay particular

attention to the problems of interpretation and translation and ensure that persons in an economically weak position are not disadvantaged in relation to access to the court or in the course of any proceedings by their inability to speak or understand the language of the court.

7. Measures should be taken in order that the number of experts appointed by the court for the same proceedings, either on its initiative or at the request of the parties, should be as limited as possible.

C – Acceleration

8. All measures should be taken to minimise the time to reach a determination of the issues. To this end steps should be taken to eliminate archaic procedures which fulfil no useful purpose, to ensure that the courts are adequately staffed and they operate efficiently, and to adopt procedures which will enable the court to follow the action from an early stage.

9. Provisions should be made for undisputed or established liquidated claims to ensure that in these matters a final decision is obtained quickly without unnecessary formality, appearances before the court or cost.

10. So that the right of appeal should not be exercised improperly or in order to delay proceedings, particular attention should be given to the possibility of provisional execution of court decisions which might lead to an appeal and to the rate of interest on the judgment sum pending execution.

D – Cost of justice

11. No sum of money should be required of a party on behalf of the state as a condition of commencing proceedings which would be unreasonable having regard to the matters in issue.

12. In so far as the court fees constitute a manifest impediment to justice they should be, if possible, reduced or abolished. The system of court fees should be examined in view of its simplification.

13. Particular attention should be given to the question of lawyers' and experts' fees in so far as they constitute an obstacle to access to justice. Some form of control of the amount of these fees should be ensured.

14. Except in special circumstances a winning party should in principle obtain from the losing party recovery of his costs including lawyers' fees, reasonably incurred in the proceedings.

E – Special procedures

15. Where there is a dispute about a small amount of money or money's worth, a procedure should be provided that enables the parties to put their case before the court without incurring expense that is out of proportion to the amount at issue. To this end, consideration could be given to the provision of simple forms, the avoidance of unnecessary hearings and the limitation of the right of appeal.

16. States should ensure that the procedures concerning family law are simple, speedy, inexpensive and respect the personal nature of the matters in issue. These matters should, as far as possible, be dealt with in private.

Explanatory memorandum

Introduction

1. The problems connected with access to justice have been a cause of concern to many governments for some time. They were one of the main themes of the 9th Conference of European Ministers of Justice which was held in Vienna on 30 and 31 May 1974.

Following a report by the Ministers of Italy and Austria, that conference recommended the Committee of Ministers of the Council of Europe "to instruct the European Committee on Legal Co-operation to study the problem of the economic and other obstacles to civil proceedings at home and abroad, in the light of the discussions at the 9th Conference, the examination of which might be entrusted to a committee of experts". This committee of experts was set up in 1974. Because the subject is of such topical importance the same matter was the subject of a report by the French Minister at the 11th Conference of European Ministers of Justice which met in Copenhagen on 21 and 22 June 1978. At this conference, the Ministers of Justice considered that it might also be desirable to undertake a study on expenses incurred in court proceedings and the suitable measures to reduce them.

2. The committee of experts set up in 1974, gave its main attention to legal aid and advice. It was at its initiative that the following instruments, recently adopted by the Committee of Ministers at the proposal of the European Committee on Legal Co-operation (CDCJ), were prepared:

I. Resolution (76) 5 on legal aid in civil, commercial and administrative matters, adopted by the Committee of Ministers on 18 February 1976, together with the accompanying explanatory memorandum.

This resolution sets out to establish minimum standards for the granting of legal aid to foreign nationals.

II. Resolution (78) 8 on legal aid and advice, adopted by the Committee of Ministers on 2 March 1978, together with the accompanying explanatory memorandum.

This resolution sets out minimum standards for legal aid and advice.

III. European Agreement of 27 January 1977 on the Transmission of Applications for Legal Aid.

IV. Additional Protocol to the European Convention on Information on Foreign Law, of 15 March 1978, in so far as it concerns requests made in the framework of legal aid and advice.

V. Legal aid and advice was also the subject of a questionnaire sent out to member states which was published, with the replies that were received, in 1978.

3. Furthermore, it was pointed out that at the 12th Conference of European Ministers of Justice, in Luxembourg (May 1980), the Austrian Minister of Justice presented a report on "A more effective justice". After a stocktaking of the activity "Access to justice" carried out within the Council of Europe, the report concluded that the time had now come to examine another aspect of the same problem, namely the functioning of the judicial system. The judicial machinery itself has to be examined by those responsible for devising and administering it, in order to improve the functioning and increase the efficacy of the courts. Resolution No. 2, adopted by the conference, recommends the Committee of Ministers to give priority to the study of ways of improving the functioning of justice.

This question will be considered by the CDCJ with a view to including it in the Work Programme of the Council of Europe.

General considerations

4. The committee could not have limited its work to legal aid and advice, as in the first place, there will always be a number of people for whom legal aid is not available; for some of these people obtaining justice involves a very considerable financial burden. In addition expense is not the only obstacle to access to justice. When procedure is so slow that it keeps some people waiting years for their cases to be decided, and so complex as to be unintelligible to the parties, it needs to be reviewed.

In all countries, the major obstacles to justice are in fact the same : complexity, duration and cost. Each of these aspects influences the other. The complexity of proceedings and the slowness which often is the consequence thereof may indeed entail an increase of cost.

5. In 1976, a detailed questionnaire on procedures facilitating access to justice was sent out to all member states. The replies, published in 1978, provide an extremely important source of information. They show that many countries have taken, or are planning to take, measures to bring justice closer to their citizens. Although these measures are of various kinds, one can see that, in most states, special procedures have been instituted to facilitate access to justice. Procedures of this kind have, for example, been introduced for the recovery of small debts and undisputed claims, as well as for cases relating to consumer protection, or family law.

6. However, the committee considered, firstly, that the publication of the questionnaire and of the replies was not enough ; the member states of the Council of Europe should be urged to take steps to ensure that everybody can more easily have access to the courts, irrespective of means, education or position.

In the committee's view, the best way to proceed would be the adoption of a recommendation inviting the governments of member states gradually to implement the principles set out in the appendix to the recommendation, in so far as their budgetary resources would allow.

7. In addition, the committee felt that the use of special procedures for particular matters was not the only method to consider, but that a number of improvements, based on measures already taken in certain states, should be made in all types of judicial proceedings, whether of general application or specially designed for disputes of a particular category.

8. The principles set out have been grouped according to their subject : information to the public ; simplification ; acceleration ; cost of justice ; special procedure.

The committee considered it appropriate to take as the first item of the recommendation, information to the public. It is clear that satisfactory information can in itself help access to justice ; on the one hand, by instructing interested persons on the extent of their rights and, on the other hand, by making it possible to avoid unnecessary proceedings.

Commentary on the principles in the appendix to the recommendation

9. The recommendation applies to civil, commercial, administrative, social and fiscal matters, excluding criminal matters, which because of their peculiarities require specific treatment. The committee did not consider it necessary to mention labour matters in the recommendation since they are wholly or partially covered by civil, administrative or social law of the different member states. The principles relating to information to the public (1 and 2), simplification (3 to 7), acceleration (8 to 10) and cost of justice (11 to 14) are general in scope, while those relating to special procedures (15 and 16) concern certain types of cases which frequently arise and may call for specific solutions : small claims and family law disputes.

10. The general statement which appears at the head of the appendix in the French version uses the expression "*faire valoir ses droits en justice*" while the English version employs the terms "to assert his rights before courts". The committee agreed to consider these expressions to be equivalent. Furthermore the term "court" means any authority or body exercising independent judicial functions in the above-mentioned matters ; it is the same for the term "tribunal" which appears in the French version of the principles.

11. The general statement mentioned above invites states to take all the necessary steps to remedy the three main obstacles to access to justice : complexity, duration and cost.

By "all necessary steps" the statement implicitly recognises that not only have some states already carried out reforms in the areas mentioned, but also that solutions may vary according to the nature of the subject matter.

A – Information to the public

Principles 1 and 2

12. An individual's lack of knowledge of the various ways in which he may have his claims dealt with by the court is undoubtedly a serious obstacle to access to justice.

The mass media take little interest in civil cases. A large section of the public knows nothing about court cases, except that they are expensive. Most citizens are not aware of the jurisdiction of courts in relation to their territorial competence or the subject matter of the case.

Steps should be taken to ensure that every member of the public may know which court is competent to deal with his case and what are the requirements for bringing an action before that court.

The need for information applies to defendants as well, as they must know where and to whom to reply. It would therefore be helpful if court documents could state clearly the competent courts, their address and the authorities from whom information can be obtained.

13. Although Principle 1 mainly applies to questions relating to domestic law, the committee considered that the state ought to ensure that information on the competence of a foreign court be provided when such a competence is determined by virtue of an international convention to which the state concerned is a contracting party. Furthermore it would also be desirable in the long term that states try to ensure that a system of information be set up on means to bring an action before a foreign court.

14. It is not sufficient for persons to know which courts to go to or how to bring their cases. They should be able to obtain additional information to enable them to take action. This information is referred to in Principle 2. In this respect, states have a specific duty and cannot rely entirely on lawyers. Litigants may quite legitimately wish to know in advance what steps have to be taken, especially if they conduct their cases themselves as they may be entitled to do under Principle 4. There are also cases where costs are needlessly increased by compulsory recourse to a lawyer.[1]

The need for information would not be met simply by providing the litigant with a copy of the Civil Code or the Code of Civil Procedure.

15. The way in which information is to be obtained is of course exclusively a matter for member states to decide. It could, for example, be supplied to the parties through the courts.[2] It could also be obtained from services attached to the courts; this is the case in Sweden and in Switzerland where the parties have the possibility of obtaining information from the court services on all procedural formalities which concern them, or in France and Luxembourg where court advice bureaux attached to the courts have been set up to inform the parties of the

1. The case of Cox versus De Wolf, which gave rise to Judgment 42/76 of 30 November 1976 of the Court of Justice of the European Communities, is significant in this respect. This was a case where a Belgian national wished to secure enforcement of a Belgian court decision in the Netherlands. The cost of proceedings and the lawyer's fees were far in excess of the amount at issue. As a result of this case, the Netherlands amended its law.

2. While in some countries the procedure may be adversarial in form, with the judge merely arbitrating the debates, in others it is inquisitorial. In some countries, the judge may lead the discussion and advise parties who are present but not represented (Austria, Federal Republic of Germany, Iceland, Norway and Switzerland).

nature and scope of their rights and of the procedural means of exercising them. Experience of countries where such systems operate shows no reason to believe that it will prove to be overburdensome.

This information may also be given by agencies outside the court which have been established or approved by the state and operate in connection with the court authorities, by the administrative services or publicised by means of the mass media.

Information of a general nature may be given in forms, or in brochures,[1] or folders, or on notices posted in the court office and, in some cases, orally.

16. This information should relate only to questions of procedure and should not constitute advice on the merits of the case.

17. Where failure to observe a procedural requirement would have serious consequences, member states must specially ensure that information to that effect is available. The first example that comes to mind is that of failure to observe a time-limit.

In most states if the party concerned does not take certain steps within a given time, this may lead to consequences prejudicial to his interests, in particular a judgment by default. Although remedies are usually available, this is an inadequate solution, particularly owing to the duration and costs of legal proceedings. Therefore, when a party is not represented by a lawyer, it is desirable that he should be informed about the consequences of failing to comply with certain time-limits. This information could be supplied, for example, in a document given to the parties. Where it is possible to appeal against a judgment, information could be given in this judgment or set out in a document notifying the party of such a judgment. When this information is not given, the party should, on request, be informed either by the court or by any competent service working with the judicial organisation. Where the judgment in disputed proceedings is oral, the judge or someone connected with the court should inform the losing party, either as a matter of course or if requested, of the possibilities of appeal.

18. In those states where judgments by default can be enforced without prior notification of the judgment to the losing party, particular care should be taken that if the losing party should wish at a later stage to

1. Examples of this method can be found in Austria, where a brochure has been made containing complete information on court organisation and functioning and ways to protect citizens' rights in the field, or in the Federal Republic of Germany where brochures have been published giving useful information for the parties on procedural formalities. In Sweden, as a part of a book with general information to the public, wide indications are provided on judicial matters.

challenge the judgment, information on how this is done should be readily available. Where appropriate this information could be given by the officer responsible for enforcing the judgment.

19. Furthermore, attention was drawn to certain circumstances in international relations which can lead to judgment by default or again deprive the interested party of the necessary information as to the means to assert his rights. In particular, where court documents are sent through the post, the defendant could fail to receive them, for instance if the address is written wrongly, or if he has changed his address. Where in an international context other means are used, for example diplomatic or consular channels, it is not unusual for legal documents to arrive too late for the interested person to arrange for his defence or introduce an appeal.

One remedy for this is contained in the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil and commercial matters; it institutes a more efficient system for the transmission of instruments and besides lays down in Articles 15 and 16 guarantees for the rights of the defendant when the defendant, served with a writ outside the country of the issuing court, does not appear before this court.

20. The case does not end with the judgment, since the successful party may still have to enforce the decision. Enforcement of a decision may give rise to new difficulties and entail further expenditure. For this reason, information on the methods of enforcement and their cost should be available, preferably before proceedings are commenced. In this way every litigant would know what it would cost for a judgment in his favour to be enforced, and every party would know what steps may be taken against him.

21. In the case of a judgment which may have to be recognised or enforced abroad, the party concerned should be able to obtain information about the procedure to be followed and its cost. Information about this is given in the *Practical guide to the recognition and enforcement of foreign judicial decisions in civil and commercial law* prepared under the auspices of the European Committee on Legal Co-operation of the Council of Europe and published by Morgan-Grampian Limited, London.

22. Furthermore, mention was made of Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities adopted by the Committee of Ministers on 28 September 1977 as

a pattern to be followed ; Principle V of this resolution recommends that administrative acts should indicate the normal remedies against them as well as the time-limits for their utilisation.

B – Simplification

Principle 3

23. An effective way of facilitating access to justice is to encourage the amicable settlement of disputes and conciliation. There is a distinction between means of preventing legal proceedings from taking place and means of bringing proceedings, once started, to a conclusion before judgment is passed, but it should nevertheless be possible for friendly settlements to take place at any time and for judges to be able to take any appropriate steps to reconcile the parties at all stages of the proceedings. For the sake of efficiency, purely formal and dilatory conciliation proceedings should be avoided.

Conciliation procedures, with different characteristics, exist in most member states.

24. One way of improving the course of justice would be to entrust the task of conciliation to people other than judges. In France, for instance, there are *conciliateurs* (conciliators) whose task is to attempt to bring about an amicable settlement of disputes between parties who do not wish to go to court. The role of these people is also to try to appease opposing parties and help them to find some common ground for an agreement.

Consumer protection bodies responsible for investigating consumers' complaints and reconciling the parties involved have also been set up.

25. States should examine in which cases a settlement reached before a recognised body of conciliation should become enforceable.

Principle 4

26. This principle preserves the right to consult a lawyer and be legally advised in all court proceedings. There are many disputes in which professional assistance is indispensable. The assistance of a lawyer before proceedings are commenced can lead to an amicable settlement or the abandonment of an unnecessary claim, so saving money, time and effort of the potential litigant. The principle does not, however, prevent those states, who have provided as a means of reducing costs of procedure that in certain cases the costs of a lawyer cannot be recovered, from continuing with these provisions.

27. While it is useful, not to say indispensable in many cases, for each of the parties to be represented by a lawyer throughout the proceedings, the principle recognises that there are cases where a litigant should be entitled to put his own case before the courts.

The compulsory recourse to a lawyer in all cases could lead to the impression that access to justice is obstructed.

Even if there is a comprehensive legal aid scheme, the services of a lawyer have to be paid for, and this may be expensive. There are, however, cases where a lawyer's services do not seem absolutely necessary.[1] The judge might well take a more active part in such proceedings, and the procedure could be simplified. Where the litigants are not sufficiently experienced to conduct their own cases, the judge could invite them to obtain the assistance of a competent person.

28. In some states the parties must have recourse to the services of several members of the legal profession for the same case. When this requirement is simply and solely for the purpose of keeping to traditional rules of procedure and is not based on an objective need, there is every reason to change these rules in order both to simplify cases and to reduce costs.[2]

Principle 5

29. This principle is concerned with the form and language of the documents used in court proceedings; the form also includes the contents of the document. The recommendation would be incomplete if states were not encouraged to make progress in this respect.

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1. In several countries, the parties are entitled to conduct their own cases. This is the situation in Belgium (with certain exceptions), Cyprus, Denmark, Iceland, Ireland, Norway, Sweden, Switzerland, Turkey and the United Kingdom. This is also the situation in Austria before the local (district) courts in all matters and before the regional (provincial, circuit) courts in matrimonial cases at the first instance. In France it is possible, in particular before the commercial courts. The same possibility exists in the Federal Republic of Germany before the local courts with the exception of matrimonial cases and certain other related cases – lower and higher state administrative and labour courts, lower state social courts, and higher state social courts. In Belgium and Iceland, the parties may be represented by close relatives before certain courts. In Sweden a party may be represented by whomever he chooses, provided that the court finds him suitable. In some countries (Belgium, Federal Republic of Germany, France, Luxembourg, Norway and Switzerland) parties may be represented and assisted by trade union officers in cases involving labour law. In Luxembourg the assistance of a lawyer is required in all matters before the court of first instance, the court of appeal and the Supreme Court. However, such assistance is optional before the *juge de paix* which is the competent instance for some special matters such as leases and generally for any civil or commercial dispute where the amount of the claim does not exceed 30 000 Luxembourg francs. This is also the situation before the district court (*tribunal d'arrondissement*) dealing with commercial matters and also before courts dealing with social and labour law, in which cases parties may be assisted by trade union officers in Switzerland, where there is no obligation to use a lawyer's services; the assistance of a lawyer is not permitted in the labour court in certain cantons. In the Netherlands the parties may act for themselves before the district courts and before all administrative, social and fiscal bodies; however, in fiscal matters the assistance of a lawyer is necessary if an oral statement is to be made before the highest court (*Hoge Raad*).

2. In this respect, Belgium abolished the office of the *avoués*, as well as France, except for cases brought to the court of appeal.

The archaic and formalised nature of many court documents clearly constitutes an obstacle for the ordinary citizen. It is therefore preferable to avoid the use of obsolete, foreign or unnecessarily complicated or technical terms. There is no reason why comprehensible language should not be used.[1] This would apply particularly to any document informing the defendant of the steps he must take in particular to ensure that judgment is not granted by default. The document should state clearly the facts alleged by the opposing party and the specific procedures which allow the recipient to protect his interests.

30. It is of considerable importance that the parties to a dispute should fully understand any judgment and reasons given by the court for its decision. For the majority of people appearing as parties in a case, it may be their first and only contact with the court system.

To comply with this principle it would be desirable that states encourage the law professionals at all levels of the court system to use a simple language in their relations with the public. The education and training of the lawyers should take this need into account.

Principle 6

31. A failure to understand the language used by the court is a serious obstacle to access to justice. The states should therefore take measures to remedy this situation.

Provisions should be made not only for assistance by interpreters at the hearings but also for information to be given to the persons concerned on how to obtain translations of documents.

Officials responsible for giving information should, so far as possible, be assisted by interpreters when dealing with persons who do not have a sufficient understanding of the language of the court and who are not accompanied by another person who knows both languages.

It would also be helpful to prepare foreign-language translations of documents giving procedural information.

32. The principle does not stipulate who shall ultimately bear the cost of interpretation or translation. Even so, any risk of incurring such costs and so deterring anyone from asserting or defending his rights before

1. A questionnaire on measures to simplify the form and language used in judicial and extrajudicial documents was sent out to member states in 1977. It appears from the answers that several states, such as Austria, Cyprus, Denmark, France, Federal Republic of Germany, Norway, Portugal, Sweden and the United Kingdom, have undertaken activities in this field.

the courts should be avoided as far as possible. In this context, it should be recalled that Resolution (78) 8 on legal aid and advice, adopted by the Committee of Ministers on 2 March 1978, recommends in particular that legal aid should provide for the cost of translation.

Principle 7

33. This principle, which recommends limiting the number of experts in the proceedings, meets several needs. Firstly, those of simplifying proceedings and reducing their cost. Secondly, the Committee wished to maintain a certain balance between the parties, for instance in cases opposing a private individual to a large company able to bring a large number of experts into the proceedings.

However, it should be made clear that the recommendation applies directly only to experts appointed by the judge or the court, whether as a matter of course or at the request of the parties, and not those appointed by the parties themselves.

There are various ways of reducing the number of experts called in for any one case. The court may, for example, appoint an expert from an approved professional body ; the parties can be encouraged to accept the assistance of a single expert or a limited number of experts, or the court can be allowed to advise the parties for the purposes of deciding on the number of experts required.

C – Acceleration

Principle 8

34. This principle, which complies with Article 6, paragraph 1, of the European Convention on Human Rights, is concerned with the speed at which a decision is reached. This is especially important in certain types of proceedings, for instance in custody of children cases. It is also important that in personal injury cases the question of liability should be settled quickly, even though the assessment of damage must await the medical experts' final conclusions. Delays in some of these cases can be very serious, as the parties and the witnesses may forget the essential details. In addition the longer the proceedings take, the greater may be the costs.

35. A number of ways are indicated in the principle for shortening proceedings. It is suggested that the usefulness of procedural rules of a purely formalistic nature be reviewed and that those which no longer measure up to the present-day concepts of proper administrative efficiency be revoked.

But procedural alterations are not enough unless combined with improvements in the judicial machinery itself. There is little point in having procedural rules which solve the problems of cost, complexity and time, if cases take years to reach the courts because of a shortage of judges and staff, or because courtrooms are not available. The states are therefore invited to ensure that the courts are adequately staffed and equipped. Rational organisation of work could also bring improvements at little extra cost. For example, on the basis of realistic listing, a balanced timetable for hearings could be drawn up to enable all court officials to use their time efficiently.

36. Further to this, with the aim of accelerating the procedures by alleviating the burden on the legal apparatus, it has been suggested that slates study the possibility of relieving the courts in appropriate cases of certain tasks which have been traditionally assigned to them. For example, in some countries (Iceland, Norway) competence in matters of divorce has been assigned to the administrative authorities.

37. Lastly, as cases frequently drag on as a result of obstruction or inertia by parties, it was pointed out that an effective remedy which would speed up proceedings might be to give the judge a role other than that of passive arbiter and to make him responsible for directing proceedings, giving him the power to control the progress of the case from its commencement, and enabling him to lay down time-limits for the completion of various steps in the proceedings. Such a system would appear to have produced worthwhile results, for example in France where a particular judge, now known as *juge de la mise en état*, has been made responsible for controlling the progress of proceedings. In many member states, for instance Austria, France, Federal Republic of Germany and Switzerland, judges have wide powers as regards the handling of the proceedings. It would be desirable if judges had the possibility to limit the number of expert witnesses proposed purely for dilatory purposes by one of the parties (see Principle 7).

Principle 9

38. When a debtor falls to meet his obligation, it is often because he is not solvent or because he is trying to obtain credit and not because he disputes the claim as such.

When the claim is undisputed or seems to be established, by the proofs submitted to the judge, there should be provisions enabling the creditor to obtain an enforceable decision with a minimum of formalities

and costs. The principle is also to the debtor's advantage in so far as he runs the risk of having to refund the costs of the recovery procedure to the creditor. In fact, in most member states, the law already makes provision for simple procedures whereby creditors, once their claim is established, may obtain an enforceable decision without the personal appearance of the parties in court. The arrangement by which the sum claimed may be recovered varies considerably from one country to another. The arrangements normally depend on the court which has jurisdiction, whether the amount of the claim is limited, and whether or not a lawyer's services are required.

In these proceedings, the use of forms seems particularly appropriate, and in at least one member state (Federal Republic of Germany) computers are used to expedite such proceedings.

39. Nevertheless, the debtor's rights must be safeguarded, and he should therefore be given an opportunity to dispute the claim by bringing the case before the court.

Principle 10

40. Although the right of appeal is generally regarded as a fundamental right, nevertheless in most states some restrictions are imposed on this right. The justification for such restrictions may be found in the desirability of finality in litigation and in limiting the cost of litigation, especially where only a moderate sum may be at stake.

The number of appeals made merely to gain further time could be reduced if judgments were enforceable notwithstanding any pending appeal, provided that the court had a discretion to order a stay of the execution of the judgment in appropriate cases.

41. One of the reasons why the right of appeal is sometimes exercised for purely dilatory purposes is the low interest rate used in legal decisions. Accordingly, it would probably be possible to limit abuse of this right on one hand by setting this interest rate at a reasonable level in the light of circumstances, and on the other hand by establishing a flexible system able to adapt easily in relation to some objective indicators of economic activity, as, for instance, the official rate of discount. This is the case in Denmark, in the Netherlands and in Sweden where, the judicial interest rate is linked to the discount rate of the respective central banks. This adjustment operates *ipso facto* in Denmark and Sweden while in the Netherlands it requires a governmental decision.

D – Cost of Justice

Principle 11

42. The costs which a person may face in taking or defending court proceedings may be divided into two major categories: the amounts payable to the state and the fees of lawyers and other persons called to participate, such as in France the *auxiliaires de justice* as well as experts, witnesses, etc.

43. A litigant's knowledge that he might be required to pay sums to the state in advance could constitute a serious obstacle to access to justice. Consequently, it is desirable that, where states consider that they should not abolish such duties altogether the competent authorities should have the power to reduce or waive the amount taking into consideration such factors as the nature of the case, the importance of the interests involved, the personal circumstances of the parties, etc.

44. Frivolous litigation must be discouraged. If this is to be achieved by requiring the payment of a sum in advance that sum should not be unreasonable. On the other hand the same aim may be achieved by the method introduced in France, for example by fines and damages. In Portugal, a party which entered into frivolous litigation can be sentenced to a fine and also, on the request of the other party, to the payment of damages including lawyer's fees as fixed by the judge. In other words, the states should protect the defendant without obstructing access to justice.

Principle 12

45. The court fees payable to the state should be as low as possible. As the French delegation to the 11th Conference of European Ministers of Justice pointed out in a memorandum, the resultant loss of state revenue could be offset from other resources. In the case of France, for instance, an Act of 30 December 1977 provides that no court fees are payable, but at the same time provision is made for a considerable increase of certain fines in criminal cases. However, this recommendation is not concerned with any tax payable on a judgment, since the type and amount of such a tax is too closely linked with the general taxation schemes of the states concerned.

46. A number of other countries have systems, whereby no court fees are payable in certain cases, for instance, in disputes between employers and employees, in landlord and tenant cases, in different types of

family cases and in social insurance cases, small claims, etc. States which deem that they cannot abolish such fees altogether, might reduce them as much as possible.

47 Furthermore, some states have a complex system of legal costs which increases the number of administrative procedures and measures. Any simplification in this area is to be recommended, with the twofold aim of reducing costs and removing the obstacles to access to justice. This has been done in Sweden, where only one court fee of a reduced amount still remains.

Principle 13

48. The fees paid to lawyers and experts are by far the largest item in the cost of legal proceedings. The burden of such fees often bears particularly hard on persons of moderate means to whom legal aid is not available and sometimes deters them from instituting proceedings and defending their rights. It is therefore in the public interest that these fees should be kept at a reasonable level.

49. In many states some degree of control is, or can be, exercised over lawyers' fees. There are set scales in Austria, Federal Republic of Germany and Switzerland, while recommended scales or guidelines exist in Denmark, the Netherlands and Norway. Sometimes these fees can be reviewed, by the Ministry of Justice, as in Norway, or by a court or administrative official, either automatically or at the request of one of the parties, as is the case in Austria or Switzerland, or by the *Conseil de l'Ordre des Avocats* in Luxembourg. This is particularly important when the losing party is ordered to pay his opponent's costs (see Principle 14). In the United Kingdom the courts are allowed considerable discretion in such matters. In France, when it seems unfair that one party should have to bear the burden of sums laid out but not included in costs (e.g., lawyers' fees), the judge may fix an amount which the other party is ordered to pay. In Sweden there are, besides the private lawyers, public lawyers' offices, which are supposed to cover their own costs but not to make any profit. The client is free to choose a private or a public lawyer; their qualifications are the same and they are both entitled to act within the legal aid scheme. This system makes for a certain competition between private and public lawyers, which is intended to serve as a control of the fees. Minimum scales for lawyers' fees are set up in Turkey. The fees in these scales are taken as a basis for determining the lawyers' fees to be paid by the losing party to the other party and where is no agreement between the lawyer and the client.

50. It is important that, as far as possible, the client should always be advised in advance of the likely cost of proceedings and in particular of the lawyers' fees, for instance by bringing to his attention the professional scales. Often the sums demanded by lawyers cover both their own fees and the legal costs payable to the state. For the sake of clarity it is desirable that in future these different sums should be stated separately.

51. It is difficult to lay down general rules governing experts' fees on account of the wide variety of situations likely to arise in practice, since expert opinions may prove necessary in virtually any sphere of social life. Furthermore, the level of qualifications required and the manner in which experts are paid can vary considerably. The recommendation therefore merely advocates that states should exercise some form of control over such fees, along the lines, for instance, of the supervision of lawyers' fees : statutory or recommended scales or rates, guidelines provided by professional bodies, review by the court or a court official, etc. In Austria and the Federal Republic of Germany, experts' fees as well as lawyers' fees are fixed by the law.

Principle 14

52. Not all member states allow the successful party to recover costs incurred during the proceedings, particularly his own lawyer's fees, from the other party, and in those which do, the rules applied differ. Thus in Belgium, France, Luxembourg and Portugal, lawyers' fees are in principle borne by the party who calls on the lawyer's services. It is the same in Switzerland as far as the assistance of a lawyer is not admitted before courts judging labour law disputes. By contrast, these same fees are included among the costs recoverable from the losing party in Austria, Cyprus, Denmark, the Federal Republic of Germany, Iceland, Ireland, Italy, Norway, Spain, Sweden, Switzerland, Turkey and the United Kingdom and, in part, in the Netherlands.

53. In any event, a party in a civil case will find that the economic risks involved are less if he can be sure that if he wins he will be able to recover his costs from the losing party. Moreover, a system whereby the losing party is normally ordered to pay the costs of the successful party serves as a deterrent against frivolous litigation.

54. For these reasons the recommendation advocates the principle whereby the costs incurred by the successful party are to be recovered from the losing party. This principle, however, cannot be considered

absolute. On the one hand, it must be applied "except in special circumstances", these being either objective (type or subject of dispute, economic interests at stake, amount of costs incurred) or subjective (cases that have no real merit). Obviously, it is up to the states to decide in what types of circumstances the general principle should not be applied, but it is likely that the courts will have discretion to assess whether such circumstances exist and what effect they have. On the other hand, only sums which the successful party has "reasonably incurred in the proceedings" are recoverable. This means that expenditure which is excessive or unessential, having regard to the nature and seriousness of the dispute, is not recoverable. Here again, the decision will rest with the courts in individual cases.

E – Special procedures

Principle 15

55. Those states which have investigated the problem of very small claims have found that the ordinary procedure of their courts can be an obstacle, as its complexity is daunting for the man in the street. The problem arises particularly for such claims involving sale and hire contracts, road accidents, accidents at work, disputes between neighbours, consumer problems, etc.

56. This principle calls upon member states to provide a procedure which is as inexpensive as possible. Many member states have found that the only way to solve the problem of the small claim is to devise a procedure which is so simple that a plaintiff can pursue his remedy without a lawyer and defend his own case in court. This is done in various ways. In the Scandinavian countries special consumer complaints boards have been set up which receive written evidence but seldom hold oral hearings. In England and Wales and in Sweden, there is a simplified procedure before the lower courts which encourages a litigant to argue the case himself before courts. Other states have simplified the formalities or the way in which cases are heard, or have thus dispensed with the necessity for the parties to be represented by a lawyer in the lower courts or in some specialised courts (Belgium, France, Luxembourg, Netherlands, Switzerland). In Austria summary proceedings (*Bagatellverfahren*) are characterised by simplification, reduced cost and limitation of the possibilities of appeal.

57. No pattern is suggested for states to follow, although it is recommended that forms could be placed at the disposal of litigants, the

number of hearings reduced, which would lower costs, and the right to appeal restricted, which would prevent proceedings becoming too long.

Principle 16

58. Access to justice is indispensable in family cases. The states are therefore specially requested to ensure that their courts are able to deal with family disputes in accordance with a procedure that complies with the principles included in this recommendation, taking into account the serious consequences that the decisions in these cases have on persons' private life and economy. Particular attention should be paid to ensure that these judgments are given expeditiously.

59. In view of the sensitive nature of these cases, the parties often find it difficult to discuss all aspects of their family problems in public. The rules of procedure should therefore be designed so as to take this into account.

In some states (Austria, Denmark, France, Federal Republic of Germany, Iceland, Ireland, the Netherlands and Norway) all such hearings are now held in private and this has served as an encouragement to people to bring their cases to court. These cases clearly concern people who, prior to the general introduction of private hearings, would not have been able to face the ordeal of exposing these strictly personal matters in public.

The desirability of holding proceedings in private in the interests of individual privacy must, however, be reconciled with the principle to be found in the constitutions of certain countries that justice shall be done in public.