# Beyond Exceptionalism: The Illusory Ideal of Access to Justice

ALAN UZELAC[†]

Intervening in a lively discussion at the XIX Public and Private Justice (PPJ) Course and Conference,[1] Richard Marcus, with his proverbial vigor, suddenly exclaimed: "But there has never been access to justice!"[2]

Rick's startling insight came in response to a presentation on the calculation of lawyers' fees in Poland,[3] which demonstrated that the myth of Europe's adherence to the so-called "English" rule (loser pays: the defeated party compensates the winner's legal costs)[4] is fundamentally flawed. The presenter offered concrete figures showing that the "English" approach effectively applies only to minor claims, whereas in other cases, cost awards are so negligible that, in practice, the "American" rule (each party bears its own costs regardless of the outcome) governs most litigation.

This finding showed that a feature of civil justice, often considered to be exclusively "American," is not so exclusive after all. Presenting his results, Karolczyk concluded that, in Poland, courts are most expensive for minor claims and impecunious litigants, but relatively cheaper for wealthy claimants and major disputes—thus incentivizing litigation for all but the smallest claims. Other European speakers, addressing the PPJ Conference's main theme—law,

[†] Alan Uzelac, Full Professor of Law, Head of Department for Civil Procedure, Faculty of Law, University of Zagreb; Organizing Director of the Public and Private Justice Course. This piece is dedicated to Richard Marcus, Prof. Exceptional.

1. Public and Private Justice: Dispute Resolution in Modern Societies (PPJ) is a series of conferences at the Inter-University Centre (IUC) in Dubrovnik, Croatia. Richard Marcus has been one of the most devoted, engaged, and frequent guest speakers at this event, which has been ongoing since 2006. The XIX PPJ Course and Conference was held on May 26–30, 2025. *See* Pub. & Private Justice, *XIX PPJ Course and Conference*, INTER UNIV. CTR., DUBROVNIK, https://ppj.pravo.unizg.hr/course2025/Course%20outline_PPJ_XIX_rev.pdf.

2. Disclaimer: All citations of oral debates from Dubrovnik, in which I personally participated, are reconstructed from memory and may be partially fictional, though I would submit that they faithfully capture the spirit and meaning of our discussions.

3. The learned speaker was Dr. Bartosz Karolczyk, who was presenting his paper on the economics of litigation in Poland.

4. On "English" and "American" rules on allocation of legal costs, see generally KERSI B. SHROFF, L. LIBR. OF CONG., THE "ENGLISH RULE" ON PAYMENT OF COSTS OF CIVIL LITIGATION (1996); John F. Vargo, *The American Rule in Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567 (1993); James W. Hughes & Edward A. Snyder, *Litigation and Settlement Under the English and American Rules: Theory and Evidence*, 38 J. L. & ECON. 225 (1995).

money, and human rights—corroborated this pattern from the perspective of their own jurisdictions.[5]

For Rick, this suggested that, in practice, the European Union and the United States are not so different when it comes to access to justice. Access to justice—understood as the effective right of every person who believes his or her rights have been violated to approach the courts and obtain a final and enforceable judgment, in a fair proceeding and within a reasonable time—is often thought by Europeans to be hardly existent in America.

Rick did not dispute this perception. After all, not only Yale Law School Professor John H. Langbein,[6] but Rick himself has written about the demise of trials in United States civil courts, noting that "litigation romanticism" has more to do with Hollywood than with reality. In fact, Rick has shown that the aspiration of full access to justice belongs to the twentieth century, more precisely to the "mid-century commitment to broad access to court and significant discovery rights."[7] In the twenty-first century, the United States moved further in a direction that drives individual claimants away from courts, neglecting individual justice in favor of quick-and-dirty solutions brought by class actions, strategic and policy litigation (the private enforcement of public law), and alternative dispute resolution (ADR). For Rick, even the modest attempts to enable litigation by stimulating third-party litigation funding (TPLF) should be viewed through a "dark lens"—sustaining the American litigation industry more than promoting access to justice.[8] In this, Rick's conclusions and mine overlap.[9]

Still, during our last encounter in Dubrovnik, Rick seemed to relish this "Copernican twist" in assessing access to justice by contrasting the United States and the rest of the world. "Maybe there's more access to justice in America than in Europe?" he asked. In light of his skeptical position towards access to justice in his own country, this would indeed be a devastating conclusion. The whole legal ideology of civil justice in Europe revolves around access to justice, as the constitutive element of the most important panoply of procedural rights is

5. For Hungary, similar developments were reported by Professor Viktória Harsági (Budapest), who spoke at the same conference on the topic "Changes in the Rules on Litigation Costs in Hungary over the Past Decade."

6. *See generally* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L. J. 522 (2012); John H. Langbein, *The Demise of Trial in American Civil Procedure: How It Happened, Is It Convergence with European Civil Procedure?*, *in* TRUTH AND EFFICIENCY IN CIVIL LITIGATION 109, 119–164 (C.H. Van Rhee & Alan Uzelac eds., Intersentia 2012) (explaining the reality of American litigation).

7. Richard Marcus, *Reassessing the Essential Role of Public Courts: Learning From the American Experience*, *in* TRANSFORMATION OF CIVIL JUSTICE: UNITY AND DIVERSITY 173, 183 (Alan Uzelac & Cornelis Hendrick van Rhee eds., Springer 2018).

8. *See generally* Richard L. Marcus, *Through a Glass Darkly: TPLF Viewed Through a Procedural Lens*, 25 THEORETICAL INQUIRIES L. 165 (2024).

9. *See generally* Alan Uzelac, *Third-Party Litigation Funding as a Vehicle for Access to Justice: A Sustainable Avenue or a Dead End?*, *in* SUSTAINING ACCESS TO JUSTICE: NEW AVENUES FOR COSTS AND FUNDING 21 (Xandra Kramer, Masood Ahmed , Adriani Dori, María Carlota Ucín eds., Hart Publ'g 2025).

embedded in Article 6 of the European Convention on Human Rights (and reiterated in Article 47 of the European Union Charter of Fundamental Rights).[10]

In *Airey v. Ireland*, the European Court of Human Rights famously stated:

> The Convention is intended to guarantee *not rights that are theoretical or illusory* but *rights that are practical and effective*. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial.[11]

This 1979 judgment marked the beginning of an era of generous legal aid in Europe, at least in its Northern and Western parts, which continued until the early 2000s. Access to justice seemed to be the key reason behind the expanded investment in legal aid, as well as the idea that economic obstacles should never deter individuals from bringing well-founded claims to court. Many, if not most, civil proceduralists in Europe still subscribe to this idea.

Nevertheless, after the age of abundance, there came the age of austerity––another prominent theme covered by Rick's writings.[12] Maybe it was "Made in the USA," but it hit the whole world, and reversed the way of thinking about access to justice, even in the most generous legal aid jurisdictions. Was Richard Marcus actually right when he bluntly concluded that the whole concept, in the reality of European litigation, was a hoax?

To answer definitively would require a study of far greater length and gravity. Here, in celebrating Rick's academic and professional achievements, I can only suggest a few hints—expressed in the language of provisional findings.

The first is that a genuine comparatist (and Rick certainly is one) should never be satisfied with empty generalizations; rather, one must go beyond broad rules and models such as "English" or "American" cost allocation. The devil is in the details—and those details can decisively change the assessment.

But an accomplished scholar (as Rick surely is) can also strike an appropriate balance between legal realism and legal idealism, since ideals in civil procedure matter. Access to justice matters—whether or not it is effectively protected—in the United States, in the European Union, or elsewhere.

This leads to a second point: The ideals that form the normative and prescriptive fabric of procedural law require constant and vigilant reassessment, in light of their social role and context. A scheme that functions in one environment may prove fatal in another. Rick has often warned his non-American colleagues that American procedural devices and institutions do not transplant neatly into different legal cultures. His "lessons from America," as expressed in his recent papers, often ended with the following adagio:

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10. European Convention on Human Rights art. 6, Nov. 4, 1950, 213 U.N.T.S. 221; Charter of Fundamental Rights of the European Union art. 47, 2012 O.J. (C 326) 391.

11. 32 Eur. Ct. H.R. (ser. A) No. 6289/73, at 24 (1979) (emphasis added) (citations omitted).

12. *See* Richard L. Marcus, *Procedure in a Time of Austerity*, 3 INT'L J. PROC. L. 133, 133 (2013).

> For the rest of the world, then, it may be that the first lesson provided by the American experience is: Be careful about adopting US litigation techniques.[13]

Contextualization and holistic evaluation are recurring themes in Rick's work. Assessing seemingly equal and fair procedural tools across different settings, he has always been able to detect, with keen accuracy—in a style almost resembling Marxist legal critique—the points where procedural rights become twisted or abused, whether by "patent trolls"[14] or other actors. Nor has he shied away from tackling the most recent and controversial issues, from e-discovery to Elon Musk.

Yet despite his sharp critiques, Rick's scholarship has never been cynical or value-free. On the contrary, while Rick sometimes concluded that access to justice is, in reality, illusory despite self-congratulation on both sides of the Atlantic, this never meant he abandoned the ideal. His commitment to access to justice shines in his unequivocal statement that "the whole fabric of any society ultimately depends in part on an effective, sensible, and fair way for government to resolve disputes."[15] Translated into Kantian terms: Access to justice may be an illusory ideal, but it is also indispensable. What Kant said of "perpetual peace" applies equally here: It is "a task, which, although it may never be completely realized, must nevertheless be steadily approximated."[16]

I believe that this relentless pursuit of a universal objective has always driven Rick Marcus to maintain dialogue with colleagues worldwide. He has been a tireless traveler, a kind of apostle of comparative civil procedure. On his academic missions, he emphasized the exceptionality of American civil justice, but never idolized it. He spoke frankly of its challenges and flaws—another point of convergence between us, thematically and even geographically. Consider, for example, his paper on the "Balkanized American Legal Profession."[17]

Thus, paradoxically, Rick's insistence on American legal and procedural exceptionalism[18] never distanced him from his global colleagues; in some ways, it brought him closer. Yes, in civil procedure, America and Europe can seem like different worlds, even antagonists or antipodes. However, like in Jorge Luis Borges's tale of traitors and heroes,[19] these antipodes—the hero and the traitor—

13. Marcus, *supra* note 7, at 195.

14. *See* Richard L. Marcus, *How to Steer an Ocean Liner*, 18 LEWIS & CLARK L. REV. 615, 625 (2014).

15. Marcus, *supra* note 7, at 195.

16. IMMANUEL KANT, *Zum Ewigen Frieden*, in 8 KANTS GESAMMELTE SCHRIFTEN 386 (Königlich Preußische Akademie der Wissenschaften ed., 1923) (Alan Uzelac trans.).

17. Richard L. Marcus, *The Balkanized American Legal Profession*, *in* THE LANDSCAPE OF THE LEGAL PROFESSIONS IN EUROPE AND THE USA: CONTINUITY AND CHANGE 3–35 (Alan Uzelac & Cornelis Hendrick van Rhee eds., Intersentia 2011).

18. *See generally* Richard L. Marcus, *Putting American Procedural Exceptionalism Into a Globalized Context*, 53 AM. J. COMPAR. L. 709 (2005); Richard L. Marcus, *'American Exceptionalism' in Goals for Civil Litigation*, *in* GOALS OF CIVIL JUSTICE AND CIVIL PROCEDURE IN CONTEMPORARY JUDICIAL SYSTEMS 123, 123–141 (Alan Uzelac ed., Springer 2014).

19. *See generally* JORGE LUIS BORGES, THEME OF THE TRAITOR AND THE HERO (1944).

are, in the eyes of the learned observers (and, as Borges adds, perhaps even in the eyes of God), one and the same, in the end. So too is American exceptionalism: Merely another distinctive path in the pursuit of the illusory yet indispensable ideal of access to justice.

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