

Access to justice

(A movement on the border of the human rights and the social and economic reality)

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Although the first theoretical examinations on the possibilities of facilitating an efficient persecution of rights for the poor can be led back to the 19th century, the systematical studies about this question appeared only after the World War II. The movement 'access to justice' hallmarked by the name of Mauro Cappelletti¹ has contributed to the fundamental reform of the justice system and it has extended the concept of the effective access to justice in many ways.

1. Starting thoughts about the terminology

In order to determine the goals and results of 'access to justice', at first, it is inevitable to introduce the different interpretation possibilities and to separate the relevant fields of analysis.

The first question is, which kind of meaning we assign to the concept of 'access to justice'. The most extensive approach says,² that access to justice does not only involve the enhancement of efficiency in the justice system: it also contains the different methods, that make the democratic participation³ of the individual in each territory of the legal system possible, especially at the decision-making process of the government concerning the situation of wide social groups.⁴

Although we do not deny the importance of these guarantees, the analysis should not be separated to much from the terminological characteristics. That is why I think that the concept of access to justice should only be used concerning the jurisdiction, especially the access to the judiciary and non-judiciary solutions of legal problems.⁵

This interpretation is in accordance with the thesis of Hazel Genn about legal needs and justicable events. We mean by these expressions all forms of legal problems without reference to the fact, whether the parties are aware of this character or whether legal steps were taken in the case or not.

¹ Mauro Cappelletti: *Access to justice and the Welfare State*. European University Institute, Florence, 1981. p. 4.

² A report of the UNDP uses the concept of 'access to justice' in connection with the Millennium Goals of the United Nations and means all forms of legal reforms by this expression, that supports the representation of interests for the needy and the poor, guarantees an effective legal protection and strengthens the formal and informal methods of social help for these groups. Access to justice, UNDP Practice Note № 9/3/2004. p. 3.

³ Access to the Courts, Equal Justice for all In: *Issues of Democracy*, August 2004. p. 2.

⁴ Rosette C. Librea–Valentino G. Baac: *Legal empowerment of the poor (LEP): A project case study using HRBA perspective*, 2010. p. 1.

⁵ Hazel Genn: *Paths to Justice. What people do and think about going to law?*. Hart Publishing, Oxford, 1999. p. 12.

After circumscribing a limited concept of access to justice, it is inevitable to determine the personal scope of it. It is also in this case possible to use an extended approach: This can be characterised by the fact, that it does not only include the circle of the financially needy people, but all those social groups as well, whose persecution of rights is difficult because of social circumstances. That is why the access to the justice system can be problematic for people with low qualification, with some kind of disabilities⁶ or for children. At the same time this means, that the situation of these groups is extremely worth supporting.

In my opinion, the extension of the personal scope sidetracks the analyses less in the false direction as in the case of the firstly mentioned material scope. It rather demonstrates, that access to justice is not an isolated problem, but it concerns the effective legal protection of wide social groups.

Some authors⁷ refer to the fact, that the more effective system of justice does not only help the needy, but it also supports the market-economy. The increasing efficiency means at the same time, that the decisions about the legal demands occur quickly and the judgements can be enforced efficiently. This means for the actors of the economy less loss at the production and investments. It can namely not be denied, that the unpersecuted demands – especially in the civil law – cause primarily material, financial loss. Secondly, the cost-volumen-profit analysis during the process can be the basis for a judiciary or non-judiciary settlement.⁸ That is why the efficiency of the legal system does not only have an impact on the economic position of the single companies, but it can influence the trust in the economic and legal system of the state in international relations as well.⁹

Without denying the importance of these consequences, we should put the emphasis rather on the fact, that the original meaning of access to justice is to assure effective methods for the persecution of rights for the needy, connecting the principles of the legal systems and social solidarity.¹⁰

⁶ Access to justice for the disabled is hindered not only by the deficiencies of the ruling: Firstly, the legal society is less familiar with how to deal with the physically or psychologically disabled. Secondly, it is not clear, whether the financing of the procedures in their cases is regulated by the general procedural norms or by special rules of the social law. This question is also in the literature underrepresented, although the common opinion is concerned, that the disabilities of the individual cannot be left out of attention even in a legal process.

Gordon Ashton: *Equal Access to Justice*. In: *The Liverpool Law Review* Vol. XIX(I), Springer, Liverpool, 1997. p. 30–36.

⁷ Francisco Cabrillo–Sean Fitzpatrick: *The Economics of Courts and Litigation*, Edward Elgar Publishing, Northampton, 2008. p. 1.

⁸ David Marshall Evans: *Access to justice*. In: *The Liverpool Law Review* Vol. XIX(I), Springer, Liverpool, 1997. p. 37–38, 41.

⁹ Juan Luis González A. Carrancá: *El efectivo acceso a la justicia: un requisito para el desarrollo con estabilidad social* In: *Anales de Jurisprudencia*, Tribunal Superior de Justicia de Distrito Federal, C. d. México, No 247, 2000. p. 404.

¹⁰ The movement toward a more active involvement of the judge in controlling litigation reflects the growing pressure for public intervention in private life which is a feature of our epoch. Indeed, this renewed clash between the adversarial and the inquisitorial approaches to litigation is but one aspect of the major challenge of our time: to reconcile private freedom with social justice.'

Mauro Cappelletti: *Social and Political Aspects of Civil Procedure – Reforms and trends in Western and Eastern Europe* In: *Michigan Law Review*, Michigan, 1971. p. 884.

These intentions are at the same time the source of debate in this field: at constructing the legal reform in the sense of access to justice the legislator does not only have to be aware of the social tendencies but of the performance of the national economy, that finances the costs of the different forms of legal aid as well.

2, 'Access to justice' and the Welfare State

It can not be left out of consideration, that the large interest at the topic of 'access to justice' is not only connected to the ratification of the most important human rights conventions, but to the concept of the welfare state as well. Namely, this system does not only include the assurance of the basic freedoms and political rights – according to the concept of T. H. Marshall – but the statal responsibility to maintain the economic and social rights and through this, the contribution to the restriction of the inequality of the citizens as well.¹¹

So, the statal intervention does not only affect the economy: its aim is to ameliorate the economic and social position of certain disadvantaged social groups. As a part of these efforts the equally effective legal protection has to be guaranteed for the people with different financial background.

At the elaboration of the institutions of 'access to justice' on the basis of the welfare state, we have to take care of the following theoretical danger: If we put too much emphasis on the principle of equality¹² and the connection to the basic human rights, the legal aid can be understood as an evidence and the system would be characterised by automatisms. This way, the concept would lose its connection to the social solidarity and become an institutionalised mechanism.¹³

This tendency leads to those problems that are named by the critics of the welfare state even against legal aid: The overcharged courts would get by introducing the new institutions of legal aid further competencies (to decide about the demands for legal aid), which would lead to further delays and the process load would increase as well. In a system based on automatisms it is possible that legal aid is granted even in those cases, in which the demand would prove itself as causeless if the conditions would have been controlled in details. Finally, it could lead to an enormous financial load to the state budget and would not support the abolishment of social differences, because legal aid would not only be granted for those, who are in the worst financial situation. At the same time, from the government's point of view such an ideologically overloaded system means the restriction of the consideration possibilities.¹⁴

In order to avoid such anomalies from the original aims, is it important to look at 'access to justice' in an objective way without ideological exaggerations. That is why I concern the procedural and institutional way of thinking for the most adequate method to analyse this movement.

¹¹ Bóhm Antal: *Az ezredvég magyar társadalma (Die ungarische Gesellschaft am Ende des Jahrtausends)*. Rejtjel Kiadó, Budapest, 2003. p. 173.

¹² A detailed analysis of 'access to justice' from the point of view of the principle of equality: Juan E. Méndez: *El Acceso a la Justicia, un enfoque desde los derechos humanos*. Foro. Internacional 'Acceso a la Justicia y Equidad en América Latina'. San José, Costa Rica, 2000.

¹³ Luis Moreno: *Ciudadanía, desigualdad social y Estado del bienestar* In: Giner, Salvador (ed.): *Teoría sociológica moderna*, Editorial Ariel, Barcelona, 2003. p. 527–538.

¹⁴ Cappelletti, Mauro: Access to justice... p. 21–22.

3. Fields of action in the sense of 'access to justice'

The next question is in which fields of the legal system 'access to justice' has contributed to the reforms. A possible starting point provides those categories that were elaborated at the conference 'Access to Justice After the Publication of the Florence Project: Prospects for Further Action'. These topics are in accordance with the basic aim of 'access to justice', namely to assure the procedural equality of the parties at the courts. Of course, the participants recognised that this aim cannot be reached at once, but the legal steps have to support the reduction of those barriers that make the persecution of rights for the poor more difficult.¹⁵

That is why the following fields of action were nominated: the legal services for the poor, the support of isolated and underrepresented legal interests and alternative procedural methods.¹⁶

This way of thinking is in accordance with the development history of access to justice: In the history of the movement we differ three phases, which can be led back to the tendencies in the USA. The first phase began in 1965 by the foundation of the 'Office of the Economic Opportunity's neighbourhood law firm programme', that provided legal services for the needy and reacted this way to the demand for professional legal advice. In the second wave, in the 1970s was the importance of the representation of sporadic interests of fragmented groups recognised in the fields of environmental protection and consumer protection.¹⁷ This recognition was followed by the foundation of 'public law firms'. The third station was the development of informal mechanisms of mediation and alternative ways of the protection of rights.

Another perspective provides those analyses that do not concentrate on the fields of legal aid, but conceptualise those problems, because of which the efficiency of the legal system has to be increased. Since the Interim Report of Lord Woolf was published, the following factors are named as the causes for the inefficiency in the justice system: the costs of the procedure – that can exceed at bagatelle cases even the value of the claim –, the unnecessary delays and the long duration of the proceedings¹⁸, as well as the uncertainty of the process and inequality of the parties, as a consequence of the two former factors.¹⁹

¹⁵ José Ovalle Favela: *Cappeletti, Mauro y Garth, Bryant, El acceso a la justicia*. In: Boletín Mexicano de Derecho Comparado, Instituto de investigaciones Jurídicas, C. d. México, № 54, Sección de Bibliografía, 1985. p. 1109.

¹⁶ The fourth category is the connection between access to justice and the welfare state. This problem is, however, rather a question of the legal theory and is less connected to concrete legal norms.

¹⁷ Ross Cranston: *Access to justice for consumers, A perspective from Common Law Countries*. In: Journal of Consumer Policy, Vol. 3, № 3–4, Springer, 1979. p. 291.

¹⁸ As the problem of the duration of the process is elaborated in details in the literature, in the following more attention has to be paid to the question of the procedural costs. Example: Peter Gilles (Ed.): *Effiziente Rechtsverfolgung*. C. F. Müller, Heidelberg, 1987.

¹⁹ Resumed in: Lord Woolf's Inquiry: Issues Papers, Medical Negligence Cases In: Journal of Information, Law & Technology, 1996/1, Electronic Law Journals, University of Warwick, 1996.

The intentions, to solve these problems and to achieve the main goals, did get the attention of the economic sector as well, especially because of the new way of thinking: This problem, if it was analysed at all, then only with the classical descriptive methods of the jurisprudence, while the method of Cappelletti was based on the complete analysis of the reality. This means, first of all, that empirical studies were launched that did not only describe the different legal institutions, but evaluated them from the point of view of the efficiency²⁰ as well.

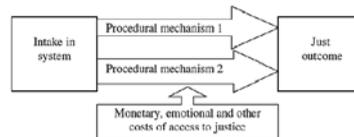
4. The Hague Model and 'path to justice'

The next step in the development of access to justice is the Hague Model. These researches start from the thesis, that in the modern legal systems the legal problems can be solved on more, different but equivalent ways that can have another level of efficiency from case to case.

The parties in a legal conflict often have to take use of the insitutions of the legal system in other countries or make a choice between alternative procedural methods, although they are not familiar with the possible consequences. The situation of the courts and other organisations involved in the process of the persecution of rights is hindered by the cumulation of the applicable law and the cross-border procedures.

So, the question, whether and how legal claims can be realised and executed, depends on the chosen path to justice. This 'path' means the combination of the legal question or legal need with the legal institutions, which offer the way of solution in the concrete case. Path to justice expresses also the probability with which a certain legal question can get to that legal institution that offers the most efficient solution.²¹

A graphic description of the problem of 'path to justice' offers this figure:



1. Figure

Source: *Measuring Access to Justice in a Globalising World*
The Hague Model of Access to Justice, Measuring Access to Justice, Tilburg, 2003. p. 3.

It is to be noticed, that the deciding factors between the singular paths to justice are the costs of the process, the efforts and each other kind of expenditures connected to it.

²⁰ The fact, that the efficiency is one of the most important indicators at the different comparisons in the modern times, can be led back to the technical development and on the upgrading of the economic point of view in scientific analyses. That is why the legality of the institutions is not the only indicator for the jurisprudence any more: the efficiency plays an important role as well. Albert Calsamiglia: *Justicia, eficiencia y derecho*. In: Revista del Centro de Estudios Constitucionales, Nr. 1, Centor de Estudios Constitucionales, Madrid, 1988. p. 307. Manuel García Pelayo: *Burocracia, tecnocracia y otros escritos*. In: Obras completas, Alianza Editorial, Madrid, 1982. p. 1423

²¹ Martin Gramatikov: *Methodological Challenges in Measuring Cost and Quality of Access to Justice*. TISCO Working Paper Series on Civil Law and Conflict Resolution Systems 2007/10, p. 11.

The 'Measuring Access to Justice' project has developed an evaluation method, with which the singular paths to justice can be analysed according to these factors. The first step is to determine the personal experiences of the individual about the costs, the quality and the outcome of the process. These three elements provide the background for the construction of a general index: the Access to Justice Index. This indicator helps to characterise a concrete path to justice from the individual's point of view.

The scientific value of such an index can be discussed, but it is sure that it makes a comparison of the possible procedural forms in a given legal conflict possible on a relative basis. It is namely connected to the individual needs and expectations of the person, involved in the legal conflict.²²

That is why, the theoretical analysis has to concentrate on the task of introducing the possible paths to justice and their problematic elements, contributing this way to the development on the field of the effective access to justice.

5. The Methods of 'Access to Justice'

Concerning the question of the methods of access to justice, the starting point is to look at the legal procedure as a social system, as a system of actions. In order to reach the social context of the procedural norms, they have to be understood as determinants, which have their source in different social fields.²³ These determinants can be classified according to several theoretical points. One of the most often quoted methods makes difference between economic, social, ideological²⁴ and psychological²⁵ factors. The problem of this concept is that it concentrates first of all on the subjective experiences of the person concerned and the objective, institutional and statutory statements are neglected.

The other – in my opinion more consistent – method²⁶ distinguishes three different points of view: the legal one (that includes the analysis of the norms and institutions), the economic one (that is based on the examination of the costs and infrastructure) and the cultural-sociological one, that concentrates on the experiences of the different groups and the social judgments.

²² Martin Gramatikov–Malini Laxminarayan: *Weighting Justice: Constructing an Index of Access to Justice*. TISCO Working Paper Series on Civil Law and Conflict Resolution Systems, No. 10/2008, Dezember 2008. p. 6–7.

About the individual evaluation of the quality of the process:

Laura Klaming–Ivo Giesen: *Access to Justice: the Quality of the Procedure*. TISCO Working Paper Series on Civil Law and Conflict Resolution Systems, No. 002/2008, Februar 2008.

²³ Edward Kininger: *Theorie und Soziologie des zivilgerichtlichen Verfahrens*, Duncker&Humblot, Berlin, 1980 p. 15-16.

²⁴ Under ideological factors Kininger means the sharing of the control on the process between the parties and the judge and how this sharing determines the behaviour of the parties at the court. Edward Kininger: *Theorie und Soziologie...* p. 16.

²⁵ The psychological factors are – according to Kininger – those, that characterise the relationship of the parties involved in the process to each other and to the process as a whole. Edward Kininger: *Theorie und Soziologie...* p. 17.

²⁶ Fabián Hernández García: *Acceso a la justicia*, Revista Ágora, Edición del Tribunal Electoral del Estado de Hidalgo, No 26 Carretera México–Pachuca, 2007.

The complex analysis of these determinants is the foundation for the reform recommendations of 'access to justice' that considers not only the social attitudes but the realistic possibilities and consequences of following a certain path to justice as well.

6. Additive statements to the sociological studies

The first problem at the examination of these studies is that these data are difficult to analyse and that in some of the scientifically important fields there are no empirical studies at all. It is often the subject of critics, that the most studies in this field only undermine those facts with statistical data that follow from the reasonable way of thinking as well. For example, that those legal systems, that can reduce the procedural delays, are much more accepted by the society than those, that have to fight with the long process duration.

Another problem is the lack of analyses, especially in the civil process,²⁷ about which kind of help the parties involved would consider as an advancement for their persecution of rights. This means, that we can only look at the offer-side of these institutions, but not the question, whether offer and request are in accordance with each other or not.

In some studies it seems to be necessary to undermine with the help of results from questionnaires that the claims of the civil law are very much present and dominant in the everyday life and that is why the persecution of them has to be supported by similarly intensive measures as in the criminal law.²⁸

The majority of the studies in this field concern only the question of the process duration and the success quotes of the alternative solving methods of legal conflicts.²⁹ It is however neglected, how many demands cannot be persecuted because of the lack of financial sources or inadequate legal advice.

In the following we can examine a study³⁰ that shows, how a society can react to problems concerning the civil law, especially how determined they are to take legal steps in the direction of the execution of their claims. From this follows, that 23% of the people questioned did not take any steps at all to realise his demand: 6% of them said, that it was not worth following at a court. The question arises in which relation was the demand not important enough: in relation to the process costs, to the time expenditure or to the inconveniences caused by the process? These are namely the problematic points that were nominated among the reform recommendations of access to justice. Also 'Lord Woolf's Report' considers as an important goal to assure the effec-

²⁷ The studies quoted in the sources are primarily connected to the penal processes, especially in the conflict areas of Africa.

Adedokun A. Adeyemi: *A demand-side perspective on legal aid: What services do people need?* In: Access to justice in Africa and beyond: Making the Rule of Law a Reality, Penal Reform International, London, 2007. p. 119–120.

²⁸ Ab Currie: *The Legal Problems of Everyday Life* In: Sandefur, Rebecca L. (ed.): *Access to justice*, Emerald Group Publishing, Bingley, 2009. p. 4.

²⁹ Ross Cranston: *The Rational Study of Law: Social Research and Access to Justice* In: Zuckermann, A. A. S.–Cranston, Ross (ed.): *Reform of Civil Procedure. Essays on 'Access to Justice'*. Clarendon Press, Oxford, 1995. p. 31–50.

³⁰ Ab Currie: *The Legal Problems...* p. 11.

tive access to the courts even in the case of bagatelle procedures. In order to avoid that the expenses of the process seemed high in relation to the value of the claim an alternative, quick and simple process way has to be offered.³¹

Those, who considered their claim as important, even though did not choose the civil process (17%) argued by the high process costs, the uncertainty, whether the claim is justified, the uncertainty in the necessary legal steps, etc. With the help of the different forms of legal aid these concerns can be eliminated.

This means, that according to the data of this study, the institutions of legal aid could contribute to the fact that not only 12% of the people with civilian claims would persecute their rights, but 34% (not considering other psychological factors against the process). At the same time the importance of the judiciary and alternative, non-judiciary conflict solution methods would increase, and the high number of the unpersecuted claims would not be a danger to the rule of law.

On the border between the economic and the sociological aspect, the question arises, which kinds of methods the state can choose in order to organise the system of legal aid. There are namely three groups of methods,³² that could contribute to the better access to justice:

The first possibility is to offer more pieces of information about the legal norms and the process to the public, which would enlighten their decision about the persecution of the claims. The problem with this is, that a layman cannot understand the complexity of the legal system by brochures or simplified electronic data on internet sites. So the original problem and the question of the process costs would stay unsolved.

The second group is the foundation of such institutions that provide free legal advice and representation, for example legal clinics. These are able to solve the problem of the need for legal advice efficiently and in a qualified way. However, the principle of voluntary can overstrain the staff, and that is why it can reduce the efficiency of the whole system. It is also possible, that the state budget overtook the costs, this means, that the services of the courts and the lawyers are not free, but they are financed by the budget.

But even this solution can reach its aim and be in accordance with the expectancies of the society, when it is applied together with the fourth method. The needy should not be helped by paternalistic methods to persecute their rights: they should be brought into a position in which they could finance the costs of the procedure themselves.

7. The economic point of view

The next aspect of the efficient persecution of rights are the economic characteristics, that can be examined from two further points of view: from that of the party involved in the legal conflict and from that of the state. Concerning the first one the most important question is the relation of the value of the claim to the costs of the process.

³¹ Nick Armstrong: *Making Tracks In: A.A.S. Zuckermann– Ross Cranston(ed.): Reform of Civil Procedure. Essays on 'Access to Justice'*. Clarendon Press, Oxford, 1995. p. 98.

³² Шабельников Д.Б., Шепелева О.С.: *Программы убыдируемой юридической помощи в контексте доступа к правосудию и обеспечения эффективности правового регулирования: Основные условия успеха*. Public Interest Law Institute, Moskau, 2010. p. 11–12.

Theoretically, access to justice would be guaranteed only if the decision about the persecution of the claim did not depend on the expectable costs at all. On the other hand, we should not forget, that the procedural costs are not the gain of the state or a third party: they compensate actual expenditures. That is why legal aid means a load to the state budget, and why the state has to initialize such institutions that bring the efforts for an effective access to justice for all in accordance with the financial possibilities. But the problem is not only restricted to the aim of minimising the procedural costs and reducing the number of people receiving legal aid. This analysis of the costs can be executed by the classical methods of the economy. The question is rather: are there any possibilities to connect the process costs, the process duration and the efficiency of the legal institutions in a way, that can be financed by the state budget.

But the effective alternatives, recommended by the science are usually not the cheapest ones. Such a recommendation³³ is the establishment of special procedural forms or courts, that would not only assist to minimise the procedural load but to assure the representation of specific interests as well. This is the point at which the methods of the economy can be made use of: a detailed comparison has to be made between the financial consequences of these alternatives and legal aid. In the case of some special, but in the praxis typical conflicts of interests (for example of neighbours or consumers) the introduction of the simplified process forms would lead to the limitation of the costs. This would also contribute to the decrease of the number of the needy and the reorganisation of the assignment of cases between the courts would not cause much difficulties either. This is, however, hindered by the lack of economic examinations: As it is not the task of such a theoretical paper to elaborate these data, the only possibility is to analyse the present system.

However, the accentuation of the efficiency should not lead to the loss of the most important factor: namely, that these institutions have an intensive connection to the social needs and expectations.

8. The Effects of 'Access to Justice'

'Access to justice' as a reform movement has contributed to the acceptance of the necessity to support the effective persecution of rights by active estatal measures. The actual possibilities of bringing a concrete claim in front of the court are not only a goal of a reform movement of the justice system but an important indicator of the development of the legal system in a given state as well. The better paths to justice mean at the same time that the society is capable to offer better social services to its members. This leads to a new definition of the connection between state and society.³⁴ That is why the data

³³ José Ovalle Favela: *Acceso a la justicia en México*. In: Anuario Jurídico de México III-IV/1976–1977, UNAM, Instituto de Investigaciones Jurídicas, C. d. México, 1978. p. 171.

³⁴ María Dakolias: *El sector judicial en América Latina y el Caribe. Elementos de reforma*. World Bank technical paper, Doc. 319S, Washington, 1997. p. 42. f.

about the persecution of rights are used as indicators by international organisations to characterise the legal systems.³⁵

Although this movement has lost its attraction by the critics on the welfare state, the scientific findings have contributed to the reform of justice especially in the American and Western-European countries. At the times of financial crisis and in those countries, which constantly have to fight with financial problems, the efforts of 'access to justice' play an important role again and again. However, the practical realisation of the aims of this reform movement is not only important from the point of view of the jurisprudence: if these reforms are omitted, in countries characterised by economic problems and social inequality it can lead to a general disaffection: the rule of law and the democracy as a whole, could be questioned by large social groups.³⁶

³⁵ These data were published in the reports of human rights committees (like: The Report of the Inter-American Commission on Human Rights about Bolivia, OEA/Ser.L/V/II. ,Doc. 34, 28. Juni 2007, p. 14–16.) or of financial organisations, like the World Bank or the Interamerican Bank. Quotation from: Héctor Fix-Fierro–Sergio Lopez-Ayllón: *El acceso a la justicia en México. Una reflexión multidisciplinaria* In: Justicia (Memoria del IV Congreso Nacional de Derecho Constitucional; Tomo I); Editorial UNAM, México. p. 113

³⁶ William C. Prillaman: *The judiciary and democratic decay in Latin-America: declining confidence in the Rule of Law*. Praeger Publishers, Westport, 2000. p. 18.