

# SCULPTURING ADJUDICATION AS A PUBLIC GOOD: COMPETITION BETWEEN JURISDICTIONS AS A MODELING FACTOR

COMPETITION FOR ADJUDICATION IN EUROPE AND THE DILEMMA OF ADJUDICATION AS A  
PUBLIC OR PRIVATE GOOD

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## 1.1 INTRODUCTION

Human society has created many dispute resolution mechanisms. Among them, court adjudication is one of the most recognisable and most used mechanisms. For many, court adjudication and what it entails is a public good. Mainstream scholarship considers goods that are non-rivalrous and non-excludable as public goods. Since adjudication is considered a public good, it comes without saying that court adjudication is considered as non-rivalrous and non-excludable. However, recently court adjudication has been treated and advertised in a different way, apparently being influenced by the competition of civil justice systems. Competition of civil justice systems is a relatively new phenomenon in the EU, where some member states try to “sell” their court adjudication systems as they sell other goods such as their infrastructure and natural resources. If the competition of civil justice systems intensifies, it might affect the way court adjudication as a good is perceived and treated. Starting from here, the purpose of this paper is to explore what can happen in case the competition of civil justice systems intensifies, with a particular focus on the European Union (EU).

As mentioned above, adjudication is considered as a public good and therefore as being non-rivalrous and non-excludable. In case these characteristics are inherent, i.e. attributes which adjudication has without outside interferences, they cannot be changed or it would be extremely difficult to change them. In practice, these are not inherent characteristics of adjudication, but consequences of the stance of the governments towards “public goods”. Therefore, in order to change the nature of adjudication as a public good, it is not enough to change the non-rivalrous and non-excludable characteristics, but it is necessary to change the stance of the government. This paper argues that the competition of civil justice systems can influence the stance of the governments and therefore change the nature of adjudication.

To serve the general purpose, the first part of the paper attempts to further define and understand the meaning of *good* and *public good*. Mainstream scholarship has an

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objective approach to public goods, considering all non-rivalrous and non-excludable goods as public goods. To overcome these limits, this paper takes a subjective approach to consider the nature of goods and public goods. This approach is reflected in the definition of public good, which allows for more flexibility to its categorisation and study. Taking this position does not eliminate the non-rivalrous and non-excludable characteristics of public goods, but considers them as acquired rather than inherent characteristics.

The second part of the paper discusses the place of court adjudication in relation to other dispute resolution mechanisms. It is submitted that court adjudication has been privileged by governments by considering it a public good. This privilege has bestowed upon court adjudication its non-rivalrous and non-excludable characteristics. Court adjudication exercises three functions: conflict resolution, law creation and legal education. Not all of these functions have the same features. This division is important because in the competition between civil justice systems, conflict resolution would be the most attractive and most affected part of the court adjudication “package”.

The third part of the paper gives a brief description of the competition of civil justice systems in the EU. Countries such as Germany, France and England have been promoting their judicial system as venues for cross-border litigants in the EU. They create the supply side of the competition process, while the demand side is created mostly by companies and lawyers. It is submitted that cross-border litigants are interested only in the dispute resolution part of the court adjudication, and because of this governments consider court adjudication as a private good rather than a public good. It does not mean that court adjudication will cease to be a public good as long as the governments will consider it as such, but its non-rivalrous and non-excludable characteristics will be eroded at the expense of common citizens.

## 1.2 GOODS AND PUBLIC GOODS

In order to answer the research question, it is important to explore the concept of good and public good. The notion of *good*<sup>1</sup> is somehow axiomatic. Many have a notion of its meaning, but no definition is widely accepted. In very broad terms, *good* means everything that brings a utility to someone. This is contrasted by the notion of *bad*<sup>2</sup>, which is everything that diminishes utility to someone. In this regard, the person-*good* relationship is subjective and influenced among others by factors such as

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1. *Good* as a noun and not *good* as an adjective.

2. Some consider *bads* as *negative goods*. See: Foldvary, Fred F., ‘Global Public Goods’, *Encyclopedia of Global Justice* (2011) 434, 434.

time, space, emotive situation, wealth, politics and economy. Subjectively, something can be a good for A, but it can be neither a *good* nor a *bad* for B, and furthermore it can be a *bad* for C. Moreover, the relation to *good* is not fixed in time; it might change rapidly. Something that is a *good* now can become a *bad* later.<sup>3</sup> To consider something as a *good*, the personal relation to the *good* at a certain point of time should be taken into account.

In economics, a good is something that brings utility or an economic advantage. Many goods are vested with property rights while legislation is enacted to protect these rights and therefore the economic value of the goods.<sup>4</sup> It goes without saying that societies try to avoid bad, mitigate its effect or transform bad into good and therefore maximise benefits. The same subjective approach, as described above, is needed to assess whether or not something brings an economic advantage and therefore is a good. Moreover, economists distinguish between *goods* and *services*. With this distinction, *goods* are tangibles that bring economic utility, while *services* are intangibles that bring economic utility.<sup>5</sup> Usually, the term good refers to both *good* and *service* unless it is specified that is a *service*.

Goods can be divided in two categories, *public goods*<sup>6</sup> and *private goods*. In this bipolar division, all non-public goods are private goods. Mainstream scholarship defines non-rivalrous and non-excludable goods as public goods.<sup>7</sup> Opposite to this, private goods are subject to rivalry and are excludable. By “non-rivalrous” it is meant that

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3. Two examples: First, the case of aspirin which can be a *good* for a person in a particular medical condition, but it can become a *bad* if the dosage is exceeded; on the other hand, the same aspirin is neither a *good* nor a *bad* to a healthy person. At this point ownership is excluded. In case of ownership, the relation between the aspirin and the person changes again and therefore the person considers the aspirin as a *good*. In this example, aspirin is both *good* and *bad* for the same person but in different conditions. As a second example, consider a rainy day. Farmer A who has his lands uphill which are well drained benefits from rain and considers it a *good*, while farmer B with lands downhill which are not well drained suffers from inundation and considers rain a *bad*; far away, an observer looking the rain and not affected by it considers rain neither a *good* nor a *bad*. In this example, rain at the same time is considered both a *good* and a *bad* by different persons, based on their personal experience with it.

4. Rubin, Paul, ‘Public Goods and the Evolution of Altruism: The Case of the Law’ (2008) 8 *Politics and Life Sciences* 26, 28.

5. A perfume is a *good* as it can be touched and used, while a haircut is to be considered a *service* even though the change of hairstyle or length can be touched and felt.

6. Public goods on their own can be divided into *goods*, *services* and *resources*. Sometimes, these three are called collective goods. See: Foldvary 2011, p. 434.

7. For definition of public good, please see: Van Aaken, Anne, ‘Trust, verify, or Incentivize? Effectuating Public Law Regulating Public Goods Through Market Mechanism’ (2010) *Proceedings of the Annual Meeting (American Society of International Law)* 153; Lemieux, Pierre, ‘Producing Private Goods Privately’ (2012) 35.3 *Regulation* 8; Rubin 2008, p. 26; Bratspies, Rebecca, ‘Global Public Goods: An Introduction’ (2010) *Proceedings of the 104th Annual Meeting of the American Society of International Law* 147; Foldvary 2011, p. 434; Kaul, Inge, ‘Global Public Goods’, *The Princeton Encyclopedia of the World*

the consumption of such goods does not diminish the quantity and the quality of the same good for other people. By “non-excludable” it is meant that it is impossible to limit the consumption of such goods and their availability.<sup>8</sup> This approach suggests that non-rivalrous and non-excludable are inherent characteristics of some goods and these goods are called public goods. This definition and categorisation creates some problems because it is difficult to define and agree on the consumption quantity (or quality) needed to meet the criteria of the definition. In some cases, just a small consumption of public goods can lead to scarcity for the rest of the population.<sup>9</sup> Furthermore, in a finite world, it is very difficult to have unlimited resources that can give the possibility to everyone to use them at their will. A simple inventory would indicate that not all public goods have both the characteristics of the definition. Some public goods have only one of the characteristics, for example, non-rivalrous and excludable goods are called *club goods*<sup>10</sup>, while rivalrous and non-excludable goods are called *common pool sources*. These kind of goods bear similarities with both private goods and public goods. However, while some of them are public goods others are private goods. If public goods are not strictly related to the non-rivalrous and non-excludable qualities, what is a public good? How could one define it?

As said before, the relation to goods is subjective. As regards public goods, non-rivalrous and non-excludable are not inherent characteristics of public goods, it is the government that decides to “label” something as a public good. Governments consider various goods as public goods, because they play an important role in society. As a consequence, the government obliges everyone within its jurisdiction or related to that government to consider that good a public good. Furthermore, the government tries to endow to this good the non-rivalrous and non-excludable characteristics. Given the non-excludable characteristics of public goods, it is difficult to exclude free-riders. This means that there are always persons who enjoy the utility of public

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Economy (2009) 550; Simon Marginson ‘Higher Education and public good’ <[www.cshe.unimelb.edu.au/people/marginson\\_docs/BERA\\_London\\_6September2011.pdf](http://www.cshe.unimelb.edu.au/people/marginson_docs/BERA_London_6September2011.pdf)> accessed 26 August 2015.

8. For some authors, non-excludability is not a necessary element for public goods. See: Foldvary 2011, p. 434.
9. Tiebout claims that there are many *public goods* which decrease in availability and quality if they are consumed by many other consumers. Examples of this are public schools or highways. He suggests that a *public good* is one which should be produced, but for which there is no feasible method of charging the consumers. This definition is given as a response to the concept of consumption in definitions similar to the mainstream one. See: Tiebout, Charles, ‘A Pure Theory of Local Expenditures’ (1956) 64/5 Journal of Political Economy 416, 417.
10. For more see: Bodansky, Daniel, ‘What’s in a Concept? Public Goods, International Law and Legitimacy’ (2012) 23 The European Journal of International Law 651; Foldvary 2011, p. 434; Van Aaken 2010, p. 153.

goods, but do not contribute to their costs. Some authors<sup>11</sup> consider national defence, the sun or air as good examples of this.<sup>12</sup> In case someone does not pay taxes, he still enjoys the national defence of that country. This means that he is taking a “free ride”. Because of this characteristic, public goods tend to be under produced, and as a consequence, they tend to be financed by governments by coercively collecting taxes.<sup>13</sup> The production of public goods faces two other challenges, market failure and government failure.<sup>14</sup> That is why their production needs collective and cooperative action and, while the costs are concentrated to the producer, the benefits are diffused to many.<sup>15</sup> This is important because court adjudication is considered to be a public good, but as it was shown the label “public good” is in the hands of the governments. Influential factors like the competition of civil justice systems might change the attitude of governments.

As a conclusion, it is submitted that when defining something as a public good the characteristics of the good itself do not play a role. The most important thing is the opinion of the government. If the government considers a good a public good, everyone should follow suit. Non-rivalrous and non-excludable are two desired characteristics that governments try to endow to public goods because of their merits in social, political and economic spheres.<sup>16</sup> One of these public goods is court adjudication. The next section describes the position of court adjudication in relation to other dispute resolution mechanisms and the reason why the government considers court adjudication as a public good.

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11. Rubin 2008, p. 26; Lemieux 2012, p. 8.

12. Public goods tend to be very abstract. As a concept, it can include general and wide concepts such as: social cohesion, social cooperation, nature, atmosphere, the Moon, knowledge, etc.

13. Lemieux 2012, p. 9.

14. Kaul 2009, p. 552.

15. The production of public goods faces difficulties even when the benefits outweighs the costs. See: Bratspies 2010, p. 147.

16. *Common goods* are another example of goods that are not defined by their characteristics, but by the subjective stance of the government. Common goods refer to everything that benefits all members of a community. For example, when governments save or give incentives to some private companies (private goods), they do it because they consider them so important that they are labelled as common goods. For more see: Moltchanova, Anna, ‘Common good’, *Encyclopedia of Global Justice* (2011) 165. An example of goods that are defined strictly as a result of their characteristics are *credence goods*. Credence goods are those that are provided by an expert who also determines the buyer’s needs. Buyers of these kinds of goods cannot assess how much of these goods they need, cannot assess how good the good is or even whether or not it exists. Markets of this kind of goods are characterised by fraud and prices not corresponding to costs. For more see: Hadfield, Gillian K., ‘The Price of Law: How the Market for Lawyers Distorts the Justice System’ (1999-2000) 98 *Michigan Law Review* 953, 968, which illustrates the concept with the market for lawyers.

### 1.3 COURT ADJUDICATION AND ITS NATURE

#### 1.3.1 *Court Adjudication: Definition and Elements*

Court adjudication is a mechanism used to resolve conflicts that otherwise might result in fractures and troubles for individuals and the society. It has been argued that court adjudication's purpose is to find the truth, to bring social harmony or to protect social values.<sup>17</sup>

Different definitions have been used for court adjudication during the last century. The term was initially used in bankruptcy proceedings, to refer to the final declaration of the debtor to be bankrupt.<sup>18</sup> Dexter refers to court adjudication as "the application of general principles to concrete instances by recognised authorities, with the purpose and probable result of determining what shall happen to specified persons, property, or institutions."<sup>19</sup> This definition is important because it is created by a sociologist and therefore departs from the legal stand point. It puts court adjudication in the position of a mechanism created by the society to resolve disputes and not in the position of a legal mechanism. Moreover, a sociological standpoint offers the insights of the social control theory where adjudication plays an important role.<sup>20</sup> This definition contains some elements that are important to the functioning of court adjudication.<sup>21</sup> First, court adjudication functions based on general principles that are applied to specific situations. "General principles" is an umbrella term that includes laws, court decisions or opinions, social norms or other sources of law recognised in a jurisdiction. These principles regulate the general behaviour in society and are recognised and accepted by the parties before the dispute arises. Second, a recognised authority must exist. This authority is represented by the judge and is organised by the state making it universally recognisable. In many cases, conflicting parties do not need to assign or accept the jurisdiction of this authority before the conflict arises. Third, court adjudication determines

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17. Weckstein, Donald, 'The Purposes of Dispute Resolution: Comparative Concepts of Justice' (1988) 26 *American Business Law Journal* 605, 606-615.

18. See the voice 'Adjudication' in Henry Campbell Black, 'Law Dictionary: Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern (West Publishing Co. 1891 St. Paul, MN).

19. Dexter, Lewis A., 'The Sociology of Adjudication: Who Defines Mental Deficiency' (1960) 4 *American Behavioral Scientist* 13, 13.

20. This is important in view of the discussion in 1.3.2 where the privileged position of the court adjudication in the eyes of the government is discussed.

21. Another definition of court adjudication is "a procedure for determining a dispute involving a claim of legal or customary right in which a third party is invested with the authority to make a decision that is recognized as binding, except that under some systems of adjudication that parties have the right to reach a different disposition by contract after an adjudication".

For the definition and the elements it contains see: Hazard Jr., Geoffrey C., 'Adjudication as a Private Good: A Comment' (1979) 8 *The Journal of Legal Studies* 319.

what shall happen to specified persons, property, or institutions. This element is the decision of the court which tries to quell the dispute between the parties.

Some elements of court adjudication are missing from this definition. First, this definition does not provide for any mechanism that would allow the enforcement of court decisions, despite the fact that one of the reasons why court adjudication is used is to give the possibility to use coercive force to enforce the decision. It can be argued that the recognised authority that decides upon the dispute is the same person invested with coercive power to enforce this decision. This is not always true. In countries where power is allocated to different branches, coercive power is applied by the executive branch and not by the judiciary. Court adjudication offers only a binding decision; its enforcement is left in the hands of other authorities. Second, an element that should be added is rationality. The decision-making process is based on a rational consideration of facts and regulations related to the case. Without rationality it would be enough to toss a coin and decide based on the result; after all, the coin is impartial and cheap. Adjudication is not a desultory process and cannot be decided by tossing a coin. It should give the participants the possibility to influence the discussion by presenting proofs and exposing arguments in their favour.<sup>22</sup> This is the third missing element, i.e. the possibility to be represented and to present proofs and arguments.

After collecting the elements from above, in this paper court adjudication will have the following meaning: A rational process between two or more parties where a concrete state instance uses logic to apply general principles and regulations; provides the parties with the possibility to be represented and to present proofs and arguments; and decides what shall happen to specific persons, property or institutions in order for coercive power to be used by a competent authority.

Some authors have distinguished the following functions of court adjudication: a dispute resolution function, a rule creating function and a clarification of existing laws (education) function.<sup>23</sup> This set of functions, resulting from a law and economics perspective, are considered not just functions but goods as well. Other perspectives might be different, but still contain the conflict resolution element.<sup>24</sup> It is evident that

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22. Fuller, Lon L., 'Collective Bargaining and the Arbitrator' (1963) *Wisconsin Law Review* 3, 19.

23. In this paper, these functions will be used. For more see: Landes, William and Posner, Richard, 'Adjudication as a Private Good' (1979) 8 *The Journal of Legal Studies* 235, 236; Wagner, Gerhard, 'Dispute Resolution as a Product: Competition between Civil Justice Systems' in Horst Eidenmüller (ed.), 'Regulatory Competition in Contract law and Dispute Resolution' (C.H. Beck, Hart, Nomos 2013 Munich, Oxford, Baden-Baden) 353, 353.

24. A philosophical set of functions for the courts is: *Resolving specific conflicts between individuals or groups in a manner, which may have some chance of being acceptable even to the loser; serving as a social controller on behalf of the regime; serving as an extension of the administration, performing a variety of administrative tasks not involving inter-personal/group conflict.* See: Tate, C. Neal and Haynie, Stacia L., 'Authoritarianism and the Functions of the Courts: A Time Series Analysis of the Philippine Supreme Court 1961-1987' (1993) 37 *Law & Society Review* 707, 713.

resolving conflicts is the most important function and result of court adjudication. Without this function, court adjudication would not be adjudication. The rule creating function is accepted in common law countries and it is becoming significant for other legal traditions as well. The function of clarifying the existing law has a double purpose: the first is to clarify the law for users; the second is to help the development of legal sciences in general. Clarifying the law helps users to apply the laws better and allows courts and the adjudication system in general to proclaim a certain way of deciding. The knowledge that judges adjudicate in a certain way enables the volume of adjudication to be contained.<sup>25</sup> This happens because parties know in advance how the judge will decide in certain cases and therefore do not go to court for those cases or change their behaviour in such a way that they do not end up in court. This function has a social control effect as well.

### 1.3.2 *Position of Court Adjudication among Other Conflict Resolution Mechanisms: A Privileged Position*

This section shows that court adjudication is one of the dispute mechanism that societies have. While this mechanism is important for governments, a society without court adjudication is still possible and functional.

Resolving conflicts is done primarily by fighting or talking. Fighting involves the use of violence to ascertain one's opinion. Fighting and the use of violence challenge the monopoly of power of the (ruling class) government and might become very costly. To restrict fighting and violence, governments apply sanctions to perpetrators of such acts and criminalise their behaviour. Despite restrictions and the criminal character of fighting, there are many instances where fighting is used to resolve conflicts. "Bullies" in schools create and resolve conflicts by using violence or threat of violence. Illicit businesses create conflicts that are resolved by violent acts. So even though fighting is not recognised as a conflict resolution mechanism by the state, it is still present in society.<sup>26</sup>

The other main approach to resolve conflicts is by talking. This implies the use of verbal or written communication and dialogue between rival parties in a conflict.

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25. For the contribution to science, see: Wagner 2013; Freeman, Michael, 'Lloyd's introduction to Jurisprudence' (Sweet & Maxwell 2008 London).

26. According to Weckstein, different types of societies have different objectives as regards conflict resolution. He makes the distinction between societies that put the individual in the center of the conflict and societies that put the welfare of the society in the center of the conflict. The first one tries to understand whether or not the rights of the individual have been violated and takes measures to mitigate them. The second one tries to safeguard the interest of society in general, which is sometime different from the interest of the individual. Modern societies resemble more the first type, while ancient and primitive other resemble the second type. Even in modern societies, there are different groups that resemble the second type of societies and that put the interest of the group before individual interests. They have their own mechanisms of dispute resolution. This section considers only the first type of societies. See: Weckstein 1988, p. 605.



By talking, conflicts are resolved through bilateral consultation between the parties in conflict, or with the intervention of a third party. Bilateral consultation includes conflict resolution methods like negotiation and reconciliation. In case a third party is involved, the dispute resolution process develops into mediation, arbitration or court adjudication (litigation). In the following paragraphs, the different forms of conflict resolution by talking are discussed.

Reconciliation as a dispute resolution mechanism<sup>27</sup> was diffused in ancient and primitive societies. Through reconciliation, parties tried to find a common language to overcome the conflict before it escalated. Reconciliation presupposes the existence of a situation before the conflict (where the parties were in amicable or not so diverging paths) that can be restored. Without this situation and this possibility, reconciliation cannot exist.<sup>28</sup> Going back to the pre-conflict situation was beneficial to the parties and to society because additional costs and further social conflicts were avoided.<sup>29</sup> For the same reasons, reconciliation is appreciated in modern societies.<sup>30</sup> Despite the lack of a universally accepted definition, some elements of reconciliation can be highlighted: unforced willingness of the parties to admit their responsibility and fault to the other party, self-confession, apology and absolution.<sup>31</sup> Reconciliation differs from other conflict resolution mechanisms, as it tries to end animosities between parties and to restore a normal relation between them. In this sense, it is different from other forms of conflict resolution, which are interested in finding a perpetrator for the wrongful act and make that person pay or respond according to the rules.<sup>32</sup>

Negotiation is another form of conflict resolution which does not require the involvement of a third party. Through this process, parties establish a dialogue to overcome the dispute. This dialogue can terminate in four different ways: 1. no agreement; 2. victory for one party; 3. simple compromise; 4. a win-win in which parties achieve a higher joint benefit than would be possible with a compromise agreement.<sup>33</sup> The outcome of a negotiation process would depend on the limits and goals of the parties. If limits and goals are unreasonable, the outcome would be a non-agreement.

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27. Bar-Tal (2000) considers reconciliation not as a conflict resolution but as an alternative to it. See: Bar-Tal, Daniel, 'From Intractable Conflict through Conflict Resolution to Reconciliation: Psychological Analysis' (2000) 21 *Political Psychology* 351.

28. Kingsolver, Ann E., 'Everyday Reconciliation' (2013) 115 *American Anthropologist* 663.

29. Joyner, Christopher C., 'Reconciliation as Conflict Resolution' (2010) 8 *New Zealand Journal of Public and International Law* 39, 43.

30. The General Assembly of the United Nations proclaimed 2009 as the International Year of Reconciliation. International Year of Reconciliation, 2009 GA Res 61/17, A/RES/61/17 (2007).

31. Joyner 2010, pp. 39, 42.

32. Reconciliation is also called "restorative justice"; while the other forms of conflict resolution are called "retributive justice".

33. Carnavale, Peter J. and Pruitt, Dean G., 'Negotiation and Mediation' (1992) 43 *Annual Review of Psychology* 531, 535-550.

Mediation is a method of conflict resolution that requires the assistance of a third party to resolve the conflict between two other parties.<sup>34</sup> Scholarship suggests that when parties are in conflict about certain goals but share some others, mediation increases the chances of success in overcoming difficulties.<sup>35</sup> Due to its form, it is used by parties that want to continue their relationship after the resolution of the dispute. During mediation, the dispute and its resolution are treated as private goods which exclude everyone not involved in it.

Another method of resolving conflicts is arbitration. Arbitration is a process where the parties in conflict agree to appoint one or more persons to evaluate upon their claims over a dispute. The decision delivered through this process can be executed and enforced in many jurisdictions. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been accepted by the majority of UN member states since its adoption in 1959.<sup>36</sup> This shows that arbitration is considered as a reliable and effective source of conflict resolution. Negotiation, mediation and arbitration allow the parties greater control over the procedures and the identity of the decision makers compared to court adjudication.<sup>37</sup> Disputes in arbitration proceedings are considered private goods. Even when one of the parties in the arbitration proceeding is a national government, it is not allowed to disclose details from the proceeding. The public interest in dispute is considered as a *private good* by the government and treated as such in the arbitration proceeding. It could be said that everything that enters arbitration becomes private.

Court adjudication, on the other hand, has been a mechanism of conflict resolution since early in human history. Compared with other conflict resolution mechanisms, court adjudication is not very different. However, court adjudication's characteristics (as defined above) make it appropriate to resolve a great variety of conflicts, including criminal conflicts. People are familiar with it and can recognise it throughout the world. These characteristics made governments recognise the importance of court adjudication and consider it as a public good.<sup>38</sup> The reasons why governments chose court adjudication as their default conflict resolution system can be traced to some circumstances: first, during the evolution of the state, governments wanted to have

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34. The involvement of a third party might facilitate asymmetric concessions that parties cannot achieve through a bilateral dialogue. In bilateral negotiations, parties make more symmetrical concessions to each other. See: Beardsley, Kyle and Nigel Lo, 'Third-Party Conflict Management and the Willingness to Make Concessions' (2014) 58(2) *Journal of Conflict Resolution* 363.

35. Weckstein 1988, p. 605; Beardsley and Lo 2014, p. 363.

36. The text of the Convention and some useful links can be found at the website of the United Nations Commission on International Trade Law (UNCITRAL): <[www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html)> accessed 26 August 2015.

37. Weckstein 1988, p. 605.

38. The definition of court adjudication does not give any clue whether or not it is a public good or a private good.

some reliable conflict resolution mechanism, which they found in court adjudication<sup>39</sup>; second, the elements and functions of court adjudication offer many advantages for governments; third, court adjudication is effective for many types of conflicts, including criminal conflicts.

### 1.3.3 *Conflicts, from Private Good to Public Goods and Adjudication Provided by Private Parties*

Conflicts revolve around either a public or a private good. The conflict that arises does not follow the nature of the good necessarily. Some conflicts involve a public good, but are considered a private good. For example, many conflicts between governments and private companies involving public goods are resolved by arbitration tribunals.<sup>40</sup> Those conflicts are treated as private goods by the parties interested and the tribunal, even though the character of the *good* is different.<sup>41</sup> Other conflicts involve private goods, but are considered public goods. The reason why these conflicts are public goods is that governments consider them important for the cohesion and tranquillity of the society. In order to filter between the multitude of cases, governments and courts use material and procedural law. If a claim passes the procedural filters and is accepted by the court to be judged, the conflict becomes a public good. Conflicts accepted by the court take the non-rivalrous and non-excludable characteristics of public goods as well. The non-rivalrous character is manifested in the fact that these cases do not have consumption problems. The public can be present at their hearings and attend every phase of dispute resolution. Theoretically, no matter how many cases a court has, it will always deliver the same quality of justice. In other words, the use or disuse of the court will not create problems to consumers. The non-excludable characteristic is manifested in the fact that the outcomes of these cases do not exclude anyone.<sup>42</sup>

After the end of the World War II, many researchers were trying to show that private parties can take over the role of the state in providing services and goods. In 1979, Landes and Posner published a paper where they examined the possibility of private court adjudication from an economic stand point.<sup>43</sup> Their paper starts with the presumption that the court system produces two goods. One is dispute resolution and the other one is rule creation. These two goods can be, and often are, produced

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39. D'Amico (2010) gives an historical example of how court adjudication for criminal offences went from being private to being public. See: D'Amico, Daniel J., 'The Prison in Economics: Private and Public Incarceration in Ancient Greece' (2010) 145 *Public Choice* 461.

40. Landes and Posner 1979, pp. 235, 245.

41. Furthermore, the stance of the government towards the good does not change. The good remains a public good, but the conflict is still a private one.

42. The law creation function and the education function are shared with the whole society, while the dispute over the good is solved between the parties in conflict.

43. Landes and Posner 1979, p. 235.

separately. Precedents play an important rule creation role in the Anglo-American legal system, but they are less important in other countries, while dispute resolution is universally accepted as the most important function of the courts system.

In case court adjudication is privatised, public intervention would be necessary in two cases: first, to ensure compliance with the decision of the private judge; and second, to compel submission to adjudication. In this private system, parties would have the right to choose the judge they think is the most appropriate. The rule creation function would face two problems: first, it would be difficult to establish property rights<sup>44</sup> over a precedent and as a consequence judges would have little incentive to produce it; second, precedents of different judges might be inconsistent with each other and thus diminish or destroy their value. For these reasons, Landes and Posner conclude that it would be more likely to see the emergence of a private market for the dispute resolution function than for the rule creation function. This problem would invite the intervention of the public sector in this private market.

In the end, the authors conclude that private courts have limitations for both dispute resolution and rule creation. The authors have an objective view on goods and evaluate them based on their characteristics and not based on the subjective considerations. Critics to Landes and Posner have underlined that they fail to show how a private party would be compelled to submit to adjudication.<sup>45</sup> The authors give some hints on how to resolve this situation, but the assistance of a third party remains the only feasible alternative. This third party would have to review the case, at least as regards the right to submit to adjudication.<sup>46</sup> Two situations can emerge here. First, in case this authority is public, the process of privatisation of the court system would not be finished and the production of dispute resolutions would be, at least partly, a public affair,<sup>47</sup> while the final good will be considered as such by the government. Second, in case this compelling authority would be private,<sup>48</sup> it will suffer from monopoly problems and it might evolve into a public authority.<sup>49</sup>

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44. Property rights on precedents would allow judges to extract rent from the precedents they created in case they are used by other judges. In a certain way, a precedent can be viewed as a work of art, for which the judge needs its copyrights, and relative royalties.

45. Hazard 1979, p. 319.

46. If this third party does not make such a review, its role would be stained by abuses.

47. Carrington, Paul D., 'Adjudication as a Private Good: A comment' (1979) 8 *The Journal of Legal Studies* 303, 303.

48. The question as how and who to appoint such third party remains.

49. On the one hand, there is the example given by D'Amico, which describes how adjudication in Ancient Athens developed from privately owned to public owned. See: D'Amico 2010, p. 461.

On the other hand, Cowen and Friedman discuss the feasibility of an anarcho-capitalist society to build stable private institutions. Cowen concludes that these institutions would evolve into governments. See: Cowen, Tyler, 'Law as a Public Good: The Economics of Anarchy' (1992) 8 *Economics and Philosophy* 249; Friedman, David, 'Law as a Private Good: A response to Tyler Cowen on the Economics of

Furthermore, Landes and Posner do not have a definition for adjudication. Therefore they fail to recognise the element of “binding” in adjudication.<sup>50</sup> If a private party can decide on a dispute but cannot make this decision binding, then it is not adjudication.<sup>51</sup>

In their paper, the authors claim that the state behaves like a common seller in the market for dispute resolutions and tries to sell as much as possible. In my view the contrary is true; the state tries to make the parties resolve their conflicts away from courts and use courts only as a last resource and only if the conflict is a public good. In a certain way, state courts are interested more in the protection of public interest than in the interest of a particular party.

As regards rule creation, the authors fail to recognise some aspects of it. First, not all the parties to the adjudication are interested in it.<sup>52</sup> For this reason, it is only the state that is interested in creating rules from adjudication and therefore this is always a public good. Another negative aspect of rule creation in the hands of privates is related to democracy. How can a rule created by a private judge for two private parties be applied to the public in general? Is this contrary to the democratic principle of division of power? Should the rule creation be a prerogative of a publicly elected body? These are some of the dilemmas that should be dealt with in case the creation of rules by privates is considered.

As a conclusion, governments decide which conflict should be resolved by the courts. This transforms private conflicts into public conflicts that can be resolved by courts. Furthermore, the majority of the parties are interested in resolving the conflict and only in rare cases in the other functions of court adjudication. If a government would try to privatise court adjudication, they will partially fail since court adjudication will need public presence in furthering its functions.

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Anarchy’ (1994) 10 *Economics and Philosophy* 319; Friedman, David, ‘The Machinery of Freedom, Guide to a Radical Capitalism’ (2nd Edition La Salle, Open Court 1989 IL)

See also: Stringham, Edward, ‘Overlapping Jurisdictions, Proprietary Communities, and Competition in the Realm of Law’ (2006) 162(3) *Journal of Institutional and Theoretical Economics (JITE)/Zeitschrift für die gesamte Staatswissenschaft* 516; Caplan, Bryan and Stringham, Edward, ‘Privatizing the Adjudication of Disputes’ (2008) 9 *Theoretical Inquiries in Law* 503.

50. Hazard 1979, p. 319.

51. The authors explain organisational aspects of the private court system, but they do not explain how these decisions would be binding. If the arbitration example would be used, it would need the help of a public authority to make the recognition of the decision. Private bailiffs can be used to avoid using a public authority, but private bailiffs might create even larger conflicts with powerful parties that do not accept the decision of the court.

52. Carrington 1979, p. 303.

## 1.4 COMPETITION FOR ADJUDICATIONS IN THE EU

### 1.4.1 *Competing Countries*

In recent years, Germany, France and England have been actively promoting their jurisdictions as venues for adjudication proceedings. The impression is that these countries are competing to attract litigations. So far competition has evolved in a “war of brochures”.<sup>53</sup>

In Germany, several associations with the help of the Ministry of Justice have formed an alliance to promote German law and institutions. So far, they published a brochure that explains the benefits of German courts and the efficiency of German law and institutions, with the clear intention to attract parties in their jurisdictions.<sup>54</sup> Similar to the German move, France has created a *Foundation* for the promotion of French law in general and continental law in particular.<sup>55</sup> The aim of the *Foundation* is the promotion of the continental law system *vis-à-vis* the common law system from a purely academic stand point. However, a second aim for the existence of the *Foundation* can be discerned. This second aim has to do with the desire of France and other European continental countries to take part in the British share of the legal market. In England and Wales, the Law Society, with the help of the Ministry of Justice, has been promoting English law as a mechanism for dispute resolution. Part of the ongoing promotion was the publication of a brochure<sup>56</sup> that promoted, among other things, English courts as flexible, efficient and reliable.

These might seem to be indicia rather than proofs for the competition of civil justice systems, but the attention of the government to this process is increasing for some reasons. One of the reasons why these countries compete is because they believe they can make some profit from the fees parties pay to the court. This is not completely true since many courts are subsidised by their governments and therefore are not a source of profit. Another reason for competing can be the revenues that an increased number of cases can bring to the local legal practitioners community. The higher the number of cases the more work for lawyers and other related professions. This is a rather indirect revenue for the government in form of taxes extracted from lawyers, but a better source compared to the direct one. Its importance in the general economic framework is debatable, since the revenues extracted from lawyers might be too small for a

53. Vogenauer, Stefan, ‘Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence’ (2013) *European Review of Private Law* 13.

54. This initiative is called “Law Made in Germany”. For more, see the website: <[www.lawmadeingermany.de](http://www.lawmadeingermany.de)> accessed 26 August 2015.

55. The Foundation is called *Fondation pour le Droit Continental*. For more, see link to the website of the Foundation: <[www.fondation-droitcontinental.org/en/](http://www.fondation-droitcontinental.org/en/)> accessed 26 August 2015.

56. The brochure is titled “England and Wales: The jurisdiction of choice”. It was not possible to find the brochure on the website of the Law society. However, the brochure can be downloaded from this website: <[www.haitz-rechtsanwaelte.de/de/newsarchiv/data/newsarchiv\\_56\\_2.pdf](http://www.haitz-rechtsanwaelte.de/de/newsarchiv/data/newsarchiv_56_2.pdf)> accessed 26 August 2015.

government to bother with the competition. Nevertheless, in the times of economic distress, no source of revenues can be neglected by the government. In the EU context, it can be argued that competing countries are too big for the competition of civil justice systems to be lucrative to them.<sup>57</sup> But, it is also true that lawyers are a powerful interest group in some of these nations and are pushing these governments to enter the competition “game”.<sup>58</sup> In a more strategic and long-term view, governments would be interested in having a competitive court that is attractive to investors and guarantees a good investment climate. In the long-term, this would be beneficial for the government and the economy of that jurisdiction in general. However, the real reasons are not clear and can be very well a combination of all the above-mentioned reasons. All these reasons, combined with the general will of the EU to enhance cross border transactions, free movements of goods and services and the abolition of barriers points at an increasing interest from Member States of the EU at competing with each other in attracting litigants and legal businesses in their jurisdictions.

#### *1.4.2 Aspects of Competition and the Influence to the Nature of Adjudication*

The EU is facilitating competition by abolishing barriers and enhancing cross border trade and cooperation. This has increased the number of transactions over the years and therefore the number of conflicts arising from these transactions. To facilitate cross-border conflict resolution, the EU has enforced among others, the Brussels I Regulation<sup>59</sup>, which delineates jurisdictional rules in case of cross-border disputes.

These regulations allow parties to choose the court where the conflict will be resolved after it has arisen. Furthermore, parties can use their party autonomy to stipulate in contracts, which court will have jurisdiction over their future disputes. Parties have different criteria to choose a court before and after the conflict has arisen. If a party knows that it will be a plaintiff, that party will choose a jurisdiction that will be favourable to their position. In the case the parties do not know their position in the future, they will be inclined to choose a jurisdiction that is perceived as neutral and impartial

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57. In the literature about the competition for incorporation, some authors argue that large states do not find competitions for incorporation attractive. This happens because the revenues derived from this competitions are dwarfed by revenues from other sources. In this situation, large states remain inactive and do not participate in competition. On the contrary, for small states the revenues derived from the competition for incorporations are large enough to be lucrative for their budgets. As an example, the revenues derived from attracting firms to incorporate are important in Delaware, but would be negligible for California. For statistics and a theoretical approach to this, see: Bebchuk, Lucian, Alma Cohen and Allen Ferrell, ‘Does the Evidence Favor State Competition in Corporate Law?’ (2002) 90(6) *California Law Review* 1775.

58. The cases of the German and British brochures are a typical example.

59. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, pp. 1-32.



to both parties. The exact reasons and their value to the parties is not yet extensively researched.<sup>60</sup> Governments are interested in attracting as many parties as possible, therefore they would try to look as neutral as possible, not to scare away any potential party.<sup>61</sup> Taking into account some of the reasons mentioned in Section 1.4.1, countries would be more attractive if their jurisdiction was perceived as neutral rather than as favouring the defendant or the plaintiff. It should be clear that governments would be more interested to attract companies that could bring more lucrative cases and not individuals who have simple and unprofitable cases. Furthermore, individuals are less mobile and less inclined to choose a court other than the court of their jurisdiction. The Brussels I Regulation regulates exactly this aspect by giving to vulnerable parties, in many cases individuals, the privilege to litigate in their jurisdictions or even be able to choose a jurisdiction that is favourable to them.

In the market for court adjudication, litigant parties form the demand side. Countries, which compete to attract litigations in their courts, form the supply side. The good in this market is court adjudication. In theory, to win a competition race the adjudication mechanism of a state should excel institutionally and legislatively. Institutionally means that courts should be more effective, cheaper and faster than rivals. To show differences between courts, the EU is already assessing the performance of the judicial systems in its Member States.<sup>62</sup> Furthermore, laws and procedures should be attractive for parties by showing impartiality, stability and a good historical record. The competitive race is hampered by the characteristics of legal services as a good,<sup>63</sup> by the psychology of choice-making process<sup>64</sup> and more often by political implications.

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60. Analysing an empirical research, Durand-Barthez suggests that lawyers are psychologically influenced by the perceived independence of courts, familiarity with the law, and stability of legislation and institutions. See: Durand-Barthez, Pascal, 'The "governing law" Clause: Legal and Economic Consequences of the Choice of Law in International Contracts' (2012) (5) *International Business Law Journal – Revue de Droit des Affaires Internationales* 505, 510. In another analysis, Vogenauer suggests that indeed familiarity with the systems and perceived sophistication of the system are important factors for the choice of court by the lawyers. See: Vogenauer 2013, pp. 13, 77.

61. Wagner analyses the different type of demand for dispute resolution and different supply in offer. The interaction between supply and demand would create different with different focuses, e.g., favouring the plaintiff or favouring a more neutral approach. In my opinion, neutrality is more important because apart from attracting parties, improves the reputation of the jurisdiction. Wagner 2013.

62. In 2014, the European Commission for the Efficiency of Justice published the 5th edition of the Evaluation of European Judicial Systems. See: <[www.coe.int/t/dghl/cooperation/cepej/evaluation/default\\_en.asp](http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp)> accessed 26 August 2015.

63. Hadfield 1999-2000, p. 953.

64. As regards psychology of choice making in law, see: Durand-Barthez 2012, p. 505; Low, Gary, 'A Psychology of Choice of Laws' (2013) 24(3) *European Business Law Review*; Posner, Eric A., 'The Questionable Basis of the Common European Sales Law: The Role of an Optional Instrument in Jurisdictional Competition' (2013) 50(1) *Common Market Law Review* 261. On the theory of choice in general, see: Salecl, Renata, 'Self in Times of Tyranny of Choice' (2010) 48(50) *FKW // Zeitschrift für Geschlechterforschung und visuelle Kultur*; Salecl, Renata, 'Society of choice' (2009) 20(1) *Differences* 157; Schwartz,



As a good in the market, adjudication should be treated by separating its functions of dispute resolution, rule creation and clarification of existing laws (education). As said, all these functions are public goods. It is predicted that the parties in conflict will be interested only in the dispute resolution function. These parties are not interested in rules created by the courts as they follow an immediate interest and do not always have future stakes.<sup>65</sup> The parties are interested even less in the clarification of existing laws (education) function. While the state considers it a public good that increases the utility of the society, private parties involved in the dispute have little interest in it. As a result, the interest of the parties and the market will be directed only at the dispute resolution function of the court.

With the intensification of competition, the nature of adjudication might change as well. Competing states in the EU would offer their court adjudication in the market. They would be receptive to the requests of the market and shape their adjudication system accordingly. It is reasonable to think that competing countries would agree to adjudicate as many disputes as possible and even disputes not strictly related to their jurisdictions. This is also facilitated by Article 25 of the Brussels I Regulation, which allows parties to choose the courts of Member States before the conflict arises. By doing this, states fictitiously consider these disputes as public goods in their own jurisdiction, because they are interested only in the benefits related to attracting litigation and not in the case itself. These disputes do not have any of the desired elements of public goods: they exclude the population of that state because they are not related with that state and the consumption from the disputing parties completely eliminates the population of that jurisdiction. Furthermore, ambitious jurisdictions might offer privacy during adjudication and restrain the public from the courtrooms. While this can be an appealing move for litigating parties, it is a drawback for the public nature of hearings and access to records or publications. Another negative side of this would be the creation of non-transparent precedents with repercussions in the interpretation of law.

The rule creation element of adjudication might be affected by competition as well. So far, rule creation from court decisions in continental Europe is not as important as it is in England. Competition would mean that cases not related or faintly related to the state would be accepted for adjudication as well. Rules that derive from those cases might be difficult to be generalised for the country where the case is being adjudicated for two reasons. First, the applicable law might be that of a different country.<sup>66</sup> Secondly, the interest involved does not relate to the interest of the population in that

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Barry, 'The Tyranny of Choice' (2004) 290(4) *Scientific American-American Edition* 70; Schwartz, Barry, 'Self-determination: The Tyranny of Freedom' (2000) 55(1) *American Psychologist* 79.

65. Landes and Posner 1979, pp. 235, 260.

66. Rome I Regulation on the law applicable to contractual obligations and Rome II Regulation on the law applicable to non-contractual obligations are the main instruments that designate the applicable law in the EU.

country. For these reasons, the state that organises adjudication might renounce the rule creation function of court decisions. This would look more democratic as it would concentrate law making on the legislative body, but maybe not most suitable move. The problem of non-transparent precedents (mentioned above) will undermine their credibility and value.

The function of clarification of existing laws (education) might get its drawbacks from the competition for adjudication as well. Since disputes attracted by competition contain many foreign elements, they might not be appropriate to be used as education or clarification of the local law. Clarification of law and contribution to the science of law could then be rendered mostly or only by the academic world. Furthermore, education and social standardisation can be achieved by other means and with different approaches. The problem here will be that law's development or its analysis will be deprived from an important source of innovation and practice.

In other words, in a competitive environment adjudication risks becoming a form of arbitration. States will put adjudication in a market and treat it as a private good. Competing states will offer court adjudication to foreign parties only for dispute resolution and for cases that have little to do with their jurisdictions. This way two court adjudication functions will be lost, while the dispute resolution functions (even though regarded as a public good) will have fewer of the characteristics associated with public goods. This situation would decrease the distinction between arbitration and adjudication and would remove elements of adjudication that have been its trademark for a long time.

## 1.5 CONCLUSION

The relation to a *good* is subjective. What is good for someone is not a good for another. A *good* is a *public good* when it is considered as such by a government authority regardless of the opinion of private parties. In general, governments try to give non-excludable and non-rivalrous properties to public goods.

Adjudication is one of several dispute resolution mechanisms in use in many societies. It involves, among others, the use of logic, state coercion and intervention, and a dispute that is a public good. It has been considered as a public good by many governments because of its peculiarities. Adjudication has three functions that are considered as public goods: a dispute resolution function, a rule creating function and a clarification of existing laws (education) function.

There are signs of competition for adjudication in the EU. Countries have shown signs of competition and are expected to be more aggressive because of the benefits related to attracting cross-border litigants. An intensification of competition in the future can

overwhelm the nature of court adjudication as a public good. Even though some of the dispute resolution function of adjudication would be formally called public goods, its nature would be private. Other elements of adjudication such as rule creation and education, and clarifying the existing law, can be detached from adjudication to make it more flexible and more manageable for competition purposes. Competition of court adjudication can make adjudication look more like arbitration and therefore more like a private good.

