Frontiers in Civil Justice – An Online Debriefing

Conference 'Frontiers in Civil Justice' held on 16 and 17 November 2020 (online)

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As announced earlier on this blog, the Conference Frontiers in Civil Justice organized by the ERC team together with Ilja Tillema of Erasmus School of Law in Rotterdam, took place on 16 and 17 November 2020.

The conference addressed four key issues in civil justice, which require a deeper and renewed reflection in light of their contribution to facilitating access to justice. Those concern the shaping of the interaction between formal and informal justice (panel I), the digitalization of consumer dispute resolution (panel II), the collectivizing and monetizing of civil litigation (panel III) and justice innovation and frontier developments in civil justice (panel IV). Renowned speakers and selected speakers following a call for papers gave their views during the two-day conference that, although set up previously as a blended event with online as well as live attendance at Erasmus University in Rotterdam, was forced to move fully online due to the tightening of Covid-19 measures in the Netherlands.

The Needs and Challenges of Digitizing Justice in Europe (Keynote 1)

The first day of the conference was kicked-off by the keynote speech of **Hrvoje Grubisic** (DG Justice and Consumers, European Commission). Grubisic underlined the necessity of digitalisation in the justice field in order to guarantee Europe's citizens access to justice. The EU's efforts of furthering the employment of digital technologies in the justice area is particularly warranted by the persistent increase in cross-border activities in civil and commercial matters. Grubisic pointed to the importance of the principles contained in the Tallinn ministerial declaration in framing and guiding the Commission's strategy of the digitalisation of justice in the EU. The current COVID-19 crisis has accelerated the Commission's activities. On the basis of its roadmap setting out the need to

steer and coordinate the digitalisation of justice at EU level, the Commission plans to publish a communication of its policy priorities by the end of 2020. In practical terms, the Commission intends to employ a toolbox approach, starting with the identification of cross-border judicial procedures that can be digitised, ascertaining the appropriate IT tools (e.g. e-CODEX based systems) and ensuring funding sources for the Member States.

Shaping the Interaction between Formal and Informal Justice (Panel I)

Subsequently, **Elisabetta Silvestri** (University of Pavia) introduced the first panel dealing with the interaction between formal and informal justice. Silvestri stressed the importance of understanding how formal and informal justice can coexist in a balanced relationship that is able to grant individuals access to justice. According to her, the need for a fruitful cooperation between courts and ADR providers in the best interest of stakeholders became even more pronounced in the current pandemic. The presentation of **Diana Wallis** (Hull University; former ELI president) reflected on the differing nature of formal and informal justice. Wallis traces how the EU has promoted the shift of the delivery of justice away from the nation states' courts to ADR bodies. While the ELI Statement addressed the practicalities of the relationship between private and public justice, the deeper question about how to address the dangers and drawbacks of privatized justice remains unresolved. **Anna Nylund** (The Arctic University of Norway) submitted in her presentation that many ADR processes fail to deliver on their promises of improved access to justice. Nylund sees ADR to be based predominantly on individualistic values, expecting citizens to exercise self-determination, and as such therefore geared towards the highly educated middle class. The gap between theory and practice contributes to the reluctance towards ADR processes in Europe. She therefore proposed a step-by-step approach of re-designing ADR according to context-dependent goals. The following two presentations provided insights into the relationship between formal and informal justice by drawing on the concrete experiences of two national legal systems: **Masood Ahmed** (University of Leicester) presented the experience of the English civil justice system with compulsory ADR. While compulsory ADR has been traditionally dismissed by the English judiciary, a divergent judicial approach has emerged which impliedly obliges the parties to engage with ADR. Ahmed criticises the persistence of the traditional approach and calls upon the courts to fully embrace their case management powers in making ADR orders. **Stefaan**

Voet (KU Leuven) reports how informal justice has been introduced by a number of procedural reforms in Belgium. Voet's presentation addresses five critical issues regarding informal justice processes, namely (1) their possible mandatory nature; (2) their quality; (3) the procedural guarantees offered by them; (4) the enforcement of their outcomes; and (5) the interaction with the formal justice process.

Digitalization of Consumer Dispute Resolution (Panel II)

The second day of the conference started with a panel, chaired by **Burkhard Hess** (Max Planck Institute Luxembourg), focusing on online dispute resolution (ODR) for consumer claims, using case-studies as a starting point to discuss how different types of cODR procedures can contribute to consumers' access to justice. **Martin Ebers** (University of Tartu) presented on the promise and challenge of AI based techniques in cODR and its impact on due process. Giving an overview of current uses of AI in different phases of disputes, from case management and automated anonymisation to data inference and automated decision-making, Ebers laid out the framework for future regulation of the use of AI in European ODR. Subsequently, **Marco Giacalone** (Vrije Universiteit Brussels) used examples from the US, Canada, Australia and Slovakia to zoom in on the concept and application of e-negotiation. Reflecting on the potential of this mode of assisted and automated negotiation in resolving disputes, Giacalone considers EU practices of e-negotiation for consumer dispute resolution as significant yet insufficient, with considerable room for improvement in enhancing consumer access to justice in the EU. **Eline Verhage** (Leiden University) presented on the recent experience of the Dutch Foundation for Consumer Complaints Boards (Geschillencommissies) in responding to the Covid-19 crisis. Presenting very recent data on the move to online hearings she reflected on the impact on the 'voluntariness gap' in these out-of-court alternative dispute schemes, concluding that virtual hearings seem a promising cODR tool for enhancing business participation, due to the increased option and lower costs. Finally, **Emma van Gelder** (Erasmus University Rotterdam) discussed observations from empirical research on Klachtencompas (a free online complaint platform of the Dutch consumer protection organization Consumentenbond) and the in-house dispute resolution platform used by Paypal, to discuss the benefits and drawbacks of these 'first-line' complaint resolution mechanisms. The main point of discussion following the various examples presented during the panel was

on the applicability of Article 6 ECHR and Article 47 of the EU Charter, and on the question of how to apply the notions of fair trial and due process to both certified and uncertified ADR schemes in the EU.

Current Issues in Access to Justice: An English Perspective (Keynote 2)

In the second keynote of the conference, professor **Dame Hazel Genn** (University College London) provided a very timely insight into current developments in the English civil justice system in the context of the Covid-19 pandemic. Bringing together the most recent insights from (some unpublished) rapid reviews of the rush to mostly online justice administration and reflecting on the impact of online courts and tribunals on access to justice especially for those that are in most dire need of legal assistance and resolution. Quite in contrast to previous discussions about the great potential of technological innovations in the areas of small claims and consumer dispute resolution, Professor Genn stressed the need to also look at what we potentially lose in procedural and substantive terms when hearings are undertaken remotely or on paper. Contrasting the great benefits of technology in terms of convenience, economy and efficiency with its downsides apparent in both the experiences of litigants as well as the judiciary, Genn ended on the pertinent question: Are we processing cases or are we doing justice?

Collectivizing & Monetizing Civil Litigation (Panel III)

The third panel chaired by **John Sorabji** (Barrister, 9 St John Street; University College London) turned attention to collective redress via adjudication and, specifically, the funding of civil litigation. **Ianika Tzankova** (Tilburg University) drew lessons for the funding of collective redress in global disputes from the Dutch experience. In particular, Tzankova explored and compared the financing of collective civil litigation on the basis of the Dexia case which was the first major consumer mass claim in the Netherlands and the investor litigation in the Fortis collective action, which resulted in the first global collective settlement that can be considered 'EU-originated'. **Astrid Stadler** (University of Konstanz) explained in her presentation the German situation regarding litigation funding of collective actions. In particular, Stadler presented on how the judiciary dealt with third-party funding arrangements and funding by legal tech companies and SPVs in recent case law. The judiciary's strong aversion against entrepreneurial litigation endangers the effective enforcement of the law. Stadler concluded that

third-party funding must be available for representative claimants and should be regulated by the legislator. Complementing Tzankova's presentation, **Ilja Tillema** (Erasmus University Rotterdam) reflected on the rise of entrepreneurial mass litigation in the Netherlands. Particularly in the last decade, spurred by the potential of large earnings, entrepreneurial parties have started to diversify the Dutch mass litigation landscape. Tillema reflected on the pros and cons of their involvement, presented empirical material of the amount and types of cases in which entrepreneurial parties are involved, and evaluated the way that the legislator and courts have dealt with this development. **Catherine Piché** (Université de Montréal) elucidated Quebec's experience with public forms of financing class litigation. According to Piché, the Canadian province of Quebec's Fonds d'aide aux recours collectifs (the assistance fund for class action lawsuits) serves not only as an effective class litigation funding mechanism, but also as a mandatory independent oversight body. Piché evaluates that financing class actions publicly through assistance by such entities is the most appropriate and effective way to finance class action litigation and could therefore serve as a model for other legal systems.

Innovations in Civil Justice (Panel IV)

Chaired by professor **Alan Uzelac** (University of Zagreb) the final panel brought together speakers following a call for papers. The call invited submissions on topics relating to justice innovation, specifically about the development of initiatives aimed at bringing justice closer to citizens, their relevance for access to justice and the judicial system, and the challenges they may pose for judicial administration, litigants and other stakeholders. The presentation of **Iris van Domselaar** (UvA) kicked off with legal philosophical reflections on civil justice innovations that aim to 'bring justice closer to the citizen', and posed the question to what extent the 'pragmatic turn' in civil justice systems is reconcilable with courts being objective justice-affording institutions, as such setting the scene for the specific examples of innovation and developments that were to follow. **Pietro Ortolani** (Radboud University Nijmegen) & **Catalina Goanta** (Maastricht University) and next **Naomi Appelman** & **Anna van Duin** (UvA) presented to the audience two specific examples that raised divergent questions about the frontier civil justice development playing out in the realm of online social media. The former, by comparatively analyzing reporting systems and underlying procedural rights of users related to content moderation by four social media

platforms (Facebook, Twitch, TikTok and Twitter), presented an example where innovation may actually pose a threat to access to justice. While the latter, reporting on the findings of empirical research on the need for procedural innovation in the Netherlands to quickly take down online content that causes personal harm, presented how innovations in civil justice could contribute to the effective protection of rights in the digital realm. The final topic of this panel was presented by **Nicolas Kyriakides** & **Anna Plevri** (University of Nicosia) who, taking Zuckerman's predictions on AI's role in guaranteeing access to justice as a starting point, presented their own evaluation on this matter, encouraging further debate on AI's role in adjudication. By elucidating the potential of AI to render the familiar open-court, multi-party process of justice completely unrecognisable, they warned about the potential loss of perceived legitimacy of the justice system as a whole, should AI systematically penetrate the entire justice system.

Although the conference was forced to move fully online, the digital setting did not stifle the interaction with the audience. Through the use of the chat function and live chat moderators the speakers were able to answer questions from the audience in the chat and the chairs were able to open up the floor to members of the audience. This led to lively discussions very much resembling a live setting.

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