



Open Justice Conference (Report)

Report drafted by Ana Koprivica, Max Planck Institute Luxembourg for Procedural Law.

On 1st and 2nd February 2018, the Department of European and Comparative Procedural Law of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law hosted a conference “[Open Justice](#)”, organised in cooperation with Saarland University (Saarbrücken, Germany).

The conference was attended by around 100 participants and brought together judges and representatives of the highest European and national courts, academics, legal practitioners, and legal journalists. It provided them with a platform to explore a variety of issues pertaining to the problems of open justice and to re-examine traditional ideas of the open court principle in light of modern day challenges (especially the growing use of information technologies).

Thursday, 1st February: Day One of the Conference focused on one aspect of open justice, namely: the right to a public hearing and public access to a hearing. The emphasis was on the scope, content, and the practical application of this right across various jurisdictions and different types of procedures.

Panel I: Right to a Public Hearing according to Art. 6 ECHR and Art. 47 Charter of Fundamental Rights of the EU: Constitutional Perspectives

Following the opening remarks by *Prof. Burkhard Hess*, the Director of the Max Planck Institute Luxembourg, the first panel addressed the constitutional foundations of the right to a public hearing in Europe. *Advocate General Maciej Szpunar* (Court of Justice of the European Union) examined the scope and content of the right to a public hearing as enshrined in Article 6 ECHR and Article 47 Charter of Fundamental Freedoms of the EU, with a particular emphasis on the legal framework and practice pertaining to public proceedings at the Court of Justice of the European Union. His talk was commented on by *Judge Angelika Nußberger*, the Vice-President of the European Court of Human Rights, and *Judge Andreas Paulus* (German Federal Constitutional Court; Bundesverfassungsgericht), who provided an

insight into the practices and experiences of their own courts. The diverging practices of these courts were highlighted, in particular with respect to the frequency of holding of oral hearings (a rule at the CJEU; an exception at the ECtHR), the use of technologies in extending the publicity of those hearings (webcasting a ten-year practice at the ECtHR; FCC subject to special rules for the media compared to courts of ordinary jurisdiction), and the possibilities of issuing dissenting opinions. While acknowledging the importance of complying with the requirements of open justice, the speakers wondered how far courts should go in this respect. The consensus was that caution should be applied and that courts should reflect on what goals are to be achieved with more transparency and what values ought to be safeguarded at the same time.

Panel II: Public Hearings in Criminal Proceedings

Prof. Katrin Gierhake (University of Regensburg) examined the open court principle in the context of criminal proceedings, with an emphasis on the situation in Germany. After providing the audience with an extensive overview of the background of the principle in general terms, she focused on the special role that the open court principle plays in the context of criminal proceedings. Subsequently, she used the specific legal construct in German criminal procedural law - “negotiated agreements” (or “deals”), as an example of a violation of the principle of publicity of criminal proceedings. In addition to these developments in the area of “negotiated justice”, *Prof. Katalin Ligeti* (University of Luxembourg) highlighted other areas of criminal law in which similar tendencies – toward more secrecy and exclusion of the public – are observed (e.g. terrorism and organised crime). In this respect, a particularly worrying trend is the increased use of exceptions to the general principle and requirement of publicity. *Prof. Ruth Herz* (Birkbeck, University of London, former judge in Cologne) shared her judicial, media, and academic experience, and explored the relationship between the media and the courts where criminal proceedings are concerned, with a special focus on the television images in and of courts. Prof. Herz warned of the dangers that may arise from the way in which justice is portrayed in the media, and concluded that due to their different objectives and priorities “the law and the media simply do not speak the same language”.

Panel III: Public Hearings in Civil Proceedings

The last panel of Day One dealt with the right to a public hearing in civil proceedings. More specifically, *Prof. Cécile Chainais* (Université Paris 2 Panthéon-Assas) reflected on the

principle of public access to hearings in the age of information technology. In assessing the potential impact of this technological and cultural revolution for the principle of public hearings, and for open justice in broader terms, Prof. Chainais drew the distinction between the internal (within the technical parts of the proceedings themselves) and the external use of electronic technologies (outside the proceedings and beyond the courtrooms). Prof. Chainais then examined the ways in which these practices modify the public hearings themselves and the perception of trials by the public. While acknowledging the necessity of embracing new technologies, it was concluded that balance is essential. There is a need for a statutory framework for publicity in “chiaroscuro”; the issue is to ensure that justice is manifestly and undoubtedly seen to be done, while preserving legitimate areas of obscurity. In a similar tone, *Judge Jean-Claude Wiwinius* (Président de la Cour Supérieure de Justice Luxembourg) recognised the relevance of the new technologies in constituting a contemporary understanding of what a transparent court means. He advocated for a more proactive approach of his court towards the media, a broader publication of its judgments, and expressed the view that the broadcasting of proceedings should be limited to the public pronouncement of the judgment. It was concluded that there is a great deal to win and little to lose from being transparent. A German perspective on the use of modern technologies within the courtroom (both concerning the video-conferencing and video-interrogations of witnesses and experts, and the use of electronic devices by the audience) and outside the courtroom (dissemination of information about the proceedings and the work of the courts beyond the courtroom) was given by *PD Dr Robert Magnus* (Institute for Foreign and International Private and Economic Law, Heidelberg University).

Keynote Speech:

The first day of the conference was concluded by the keynote speech on “Securing Open Justice” by *Sir Ernest Nigel Ryder*, Senior President of Tribunals in the United Kingdom. In his speech, Sir Ryder examined the principle of open justice as encompassing: the principle of equal access to court, the openness of the courts to public scrutiny and the media, and the requirement of accessibly-written public judgments. He specifically addressed the issue of digital courts, stating that “[our] digital courts must be open courts”. In fact, the process of digitisation is seen as “an opportunity to broaden and deepen the commitment to open justice”. Consequently, Sir Ryder further insisted that judges should lead the judicial reform, and emphasised the importance of training for judges in management and digital skills. Full text of the speech may be accessed [here](#).

Friday, 2nd February: The second day of the conference was devoted to other aspects of open justice: the transparency of the selection and appointment of judges; and, the expanding landscape of private dispute resolution, and the phenomenon of vanishing trials. The conference was concluded by a roundtable on the topic of the communication of justice between the courts, the media, and the public.

Panel I: Transparency and the Appointment of Judges

The first panel of the day examined different judicial selection and appointment procedures. At the outset, *Prof. Thomas Giegerich* (Europa-Institut, Saarland University) gave a wide-ranging comparative overview of the level of transparency of the selection and appointment procedures at the European Court of Human Rights, the Court of Justice of the European Union, the United States Supreme Court, and the German Federal Constitutional Court. It was concluded that, although all four jurisdictions demonstrably reconcile the conflicting popular demands for transparency and effectiveness, the need for improvement is discernible in all of them with regard to different aspects of the judge-selection procedure. *Judge Síofra O’Leary* (European Court of Human Rights) shared her own experience in this respect. More generally, she acknowledged the risk of transparency becoming an end in itself; it is the purpose of transparency that needs to be kept in mind at all times, which is to produce a high-quality bench: it is not about the “external beauty of the process”. *Prof. Alberto Alemanno* (HEC Paris, NYU School of Law) advocated for a more transparent process at the two European courts, arguing that the quality check on these bodies is crucial given their profound transformative impact on the national selection processes. Full publicity might, according to Alemanno, actually strengthen the authority of both courts. The optimal level of disclosure given the interests at stake, such as: privacy, data protection, reputation of, and potential chilling effect on, future candidates, was debated among the speakers and the audience.

Panel II: Privatization of Justice and Transparency: Arbitration, ADR

In her speech, *Prof. Judith Resnik* (Yale Law School) addressed a number of themes pertaining to the privatisation of justice: the “vanishing trial” phenomenon as a consequence of the relocation of the places of decisions away from courthouses, the underlying political economy of procedural and substantive rules of law, the roles played by “repeat players”, the functions of publicity. After outlining the distinction between “doctrinal openness” and “functional privatization” and following the analysis of the dynamics of the emergence of the

new processes, Prof. Resnik provided the conference with an extensive account of the situation in the United States with regard to mandatory arbitration and the preclusion of collective actions therein, and therewith coupled problems of resource asymmetry and lack of possibilities for public scrutiny of such processes. The importance of the role of the third-party involvement through “collectivity” and public observation was highlighted. Such public accounting was argued by Prof. Resnik to be necessary in order to create a forum in which to explore if the process and the law are just. In her comment on Judith Resnik’s presentation, *Prof. Maxi Scherer* (Queen Mary University of London) provided the audience with an overview of the transparency efforts and trends in the areas of international commercial and investment arbitration. In this context, transparency is reflected not only in the publication of the decisions and the information about the proceedings, but also in the third-party involvement and the publicity of oral hearings. *Dr John Sorabji*, Principal Legal Adviser to the Lord Chief Justice and Master of the Rolls, addressed the privatisation of justice from the perspective of England and Wales, with an emphasis on the issues of legal aid and third-party funding in civil justice. He demonstrated the philosophical shift that has occurred in the role of the state that does not bear the primary responsibility to fund courts anymore (“the consumer-driven model”) and the implications of such shift on equal access to justice. *Ana Koprivica* (Max Planck Institute Luxembourg for Procedural Law) outlined the various privatisation processes (both “internal” and “external”) and the implications of such processes for the rule of law and the traditional idea of a court, while demonstrating similar outsourcing tendencies which presently exist in Europe.

Roundtable: Communicating Justice: Courts in a Democratic Society

Judge Ferdinand Kirchhof, Vice-President of the German Federal Constitutional Court (Bundesverfassungsgericht), *Prof. Dame Hazel Genn*, Director of the Centre for Access to Justice at the University College London, *Joshua Rozenberg QC (hon)*, Legal Commentator and Journalist, *Prof. Jan Henrik Klement* (University of Mannheim), and *Advocate General Michal Bobek* (Court of Justice of the European Union) were the participants of the roundtable moderated by *Dr Joachim Jahn* (Neue Juristische Wochenschrift). The participants emphasised the importance of using the notions of openness, transparency and publicity with precision. Whether transparency is an intrinsic value or instrumental was the topic of the discussion. The supporters of the latter stressed that the aim and the purpose of transparency need to be identified in a particular setting: depending on this, different practical solutions can be envisaged. It was further argued that the discussion on open justice reopened

due to the emergence of new technologies and, with that, the new dispute resolution processes. Concerns were voiced in this respect over the lack of data needed in order to evaluate the contents and outcomes of such new processes. Additionally, it was argued that there is too little information about what contributes to confidence in justice. While one of the arguments in support of digitisation is that of better accessibility, a major question is: will digitisation also increase access to all? During the discussion among the participants, the differences in the way communication takes place between the judges and the media (UK - Germany) surfaced. The difficulties the press and the public are confronted with when obtaining information about proceedings at the CJEU (compared to the ECtHR, the German FCC, or the UK Supreme Court) were also expressed. Similarly, the differences in the way judgments are drafted (in terms of the reasoning) were discussed, as well as the diverging attitudes towards the deployment of modern technologies in the dissemination of information about court proceedings to the public.