Unknown is Unloved: The Heroes of Judicial Periphery

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Introduction

Civil justice is a complex universe, with its central galaxies being national civil justice systems. These systems traditionally revolve around courts as public venues for processing civil matters. In the solar systems of civil courts, the brightest suns are (or at least used to be) those who are ultimately responsible for decision-making: individual judges and their panels. Ulpian's statement, "*iurisdictio est etiam iudicis dandi licentia*," can be freely translated as: dispensing justice is the exclusive license of judges. It comes as no surprise that in many legal traditions, the 'judge' is synonymous with the 'court,' and the 'court' is synonymous with 'justice.' In the exploration of the actors and forces that shape civil litigation, scholarly treatises and doctrinal works on civil procedure have always given the most attention to judges as the central point of research.

However, the solar system of national courts consists of other parts as well. As representatives of the parties involved in the process, lawyers are the planets, bright enough to attract the attention of observers. In a separate, non-contentious space, bailiffs, process servers, notaries and (court or party appointed) experts have also formed their own galaxies, notable and appreciated in their own right.

Blinded by the light of these prominent figures, other actors in the shadows also deserve attention. Their roles are always significant and sometimes crucial for the effectiveness and quality of the judicial process. To these supporting actors, the heroes of the judicial periphery, we devote this book.

The goal is to focus on cooperation and interplay between judges and other professional actors. We do not wish to address the privatization of court services or the outsourcing of judicial functions. In the same vein, we would like to focus on court proceedings such as litigation or voluntary jurisdiction, disregarding enforcement and other proceedings transferred to other judicial professionals, such as bailiffs or public notaries. But, if such outsourced proceedings have a judicial epilogue (e.g. via appeals) and require cooperation, assessing their impact on court proceedings may be a matter of study as well.

Court staff

Even though adjudication is ultimately in the hands of judges, who decide based on submissions from the parties and their lawyers, the processing of civil cases in all national civil justice systems is a collective process requiring teamwork. This teamwork, though varying in form and extent across different systems, involves numerous supporting staff and other peripheral actors who often determine the pace, outcome, and nature of the judicial process. The papers collected in this book explore these understudied members of the team.

As the following chapters reveal, there is a rich diversity in the roles these shadow actors play within various national justice systems. However, two groups of "peripheral heroes" stand out, and they correspond to the first two parts of this book.

In Part One, we have gathered insights on higher forms of ancillary court staff. This group encompasses professionals who are typically employed by the court and work in collaboration with, and under the supervision of, judges and/or court administration. The focus here is on staff with legal qualifications. Mere administrative assistants, though important, are generally left aside.

Among higher echelons of court staff, we find a colorful variety. There are generally no uniform titles for such professionals. In this book, we analyze roles such as 'law clerks,' 'judicial advisors,' 'legal officers,' 'judicial secretaries,' 'judicial officers,' 'court registrars,' and 'judicial assistants,' among others. In native languages, they are known as *Rechtspfleger, greffiers des services judiciaires, secretarios judiciales, sudski savjetnici*, and so on. Sometimes, they are on a career track to a judicial position, sometimes not. They might be full-time professionals who work as part of the court staff until retirement with no intention (or prospects) for further promotion, or they might be bright young lawyers employed temporarily before embarking on a different career path in private or public practice. Sometimes, they are associated with judicial chambers, and sometimes they appear in novel organizational forms, such as part of the 'office for judicial proceedings' (*l'ufficio per il processo*) in Italy.

The common element for all 'shadow heroes' in this category is their indispensable role in the preparation of judicial work. It is also important to note that they enjoy some autonomy in handling particular judicial tasks—from drafting judgments to issuing rulings on simpler matters, such as decisions on costs. Nevertheless, their work is typically subject to guidance and revision by judges or administrative authorities to whom they are accountable. Another common aspect is the need for specialist training and education for professional members of the court staff, and such training can be quite substantial, as described in one chapter of this book.

In Chapter 2, Nicolas Kyriakides and Athina Katsiantoni argue that the use of law clerks in the adjudicative process has gained interest due to the rising caseloads in courts all over the globe, which has led to long judicial delays. These delays are caused, inter alia, by a lack of support staff for judges. Their Chapter explores the role of judges and the use of law clerks in different European jurisdictions as well as the United States where they were first used. It then examines whether law clerks may provide relief in reducing delays in jurisdictions in the EU facing severe judicial delays such as Italy, Greece, and Cyprus. Finally, the Chapter explains that to maintain the integrity of the judicial decision-making process and to strike a balance that maximizes the benefits of the judge-clerk relationship, judges should bear the final decision and responsibility.

In Chapter 3, Elisabetta Silvestri argues that among the requirements Italy is supposed to meet in order to have access to the post-pandemic funds known as Next Generation EU, the improvement of the administration of justice is certainly the foremost. For improving the efficiency of the judicial system, a partially new structure of support has been established: the *ufficio del processo*, which can be translated as 'office for the judicial proceeding'. It is a form of judicial clerkship open to young law graduates that offers them the opportunity to work side by side with judges and prosecutors and to engage in a variety of tasks that – ideally – will

speed up the pace of Italian justice. But will the addition of these new forces to the outdated logistics of the court system achieve the goal of reducing by 40 per cent the delay of civil cases and by 26 per cent the delay of criminal cases by June 2026 as agreed with the EU Commission?

In Chapter 4, Juraj Brozović focuses on the role of judicial advisers in Croatia. First introduced as expert associates assisting judges in performing various administrative and preparatory tasks, judicial advisers slowly became an important part of the Croatian judicial system. Although they are formally not judges, not appointed as such, they perform many activities in first instance cases which are typically considered adjudicative tasks reserved for judges only. The intended career path for judicial advisers is set for them to potentially become a judge one day, although most of them spend their careers as advisers, higher advisers, or specialist higher advisers, never living up to a dream. It would not seem as appealing as a choice of career if one did not consider the salaries that, as the advisers climb the ladder, are close or even higher than the salaries of judges. This Chapter aims to compare their positions and status, thus exposing the absurdity of such personnel management within the judicial system, also taking into consideration the goals which such judicial organisation aims to achieve.

Chapter 5, written by Fernando Gascón Inchausti, focuses on the evolving role of judicial secretaries in the Spanish judicial organisation. At first sight, judicial secretaries play a major role, to the point that it can be said that there is a kind of «bicephaly» between the judge and the judicial secretary. The Chapter explains that there is some truth in this, but also that what lies behind it, at least at present, is the story of a collective frustration or, if preferred, the story of the frustration of a collective.

Chapter 6 shifts the attention to court staff training. Raf Van Ransbeeck states that the training of court staff in Europe seems like an obvious topic that is easy to map out, but that this is only an appearance. Each Member State has its own training structure for court staff, and often the concept of court staff is not always unambiguous either. His Chapter touches on some facets that can be inspiring for the definition of the concept of court staff and for the design of court staff training. The training of judicial staff in Belgium and the study on the training needs in EU law of European judicial staff completed by EJTN and EIPA in 2021 is also discussed.

In Chapter 7, John Sorabji examines the judicial assistants in England and Wales. The role of judicial assistant was first introduced in the late 1990s in the Court of Appeal. Since its introduction it has expanded into the High Court and the Supreme Court. The development and nature of this role is explored, primarily by reference to the Supreme Court and Court of Appeal schemes, not least in respect of the provision of Bench Memoranda on matters before the courts, legal research and discussions with the judiciary on live cases before them.

In Chapter 8, Álvaro Pérez Ragone starts from the question whether it is possible to measure and to analyze the influence of clerks on the judicial adjudication process? The Latin American answer seems to be complex because most former law assistants avoid giving information about their activities, especially regarding their assistance in the court decision making process. The Chapter begins with an approach to the rational organization of the courts and a description of the judicial assistant or clerk. Next, attention is paid to the specific tasks of the judicial assistant. Finally, the influence of the judicial assistant on the judicial decision making process is analyzed.

In the final Chapter 9 of Part One Yulin Fu starts from the judicial reforms in China in the 1990s. These reforms have promoted the role of litigants and their procedural rights, procedural

transparency and judicial professionalization. In 2012, Chinese civil procedure was amended once again. These amendments significantly increased the independence and responsibility of judges to exercise trial power on behalf of the courts. One of the aspects was providing for judicial assistants, in the context of a so-called "judiciary classification". Court personnel was divided into "post judges", judicial auxiliaries (including judge assistants, court clerks and judicial police) and administrative personnel. This reform aimed to release judges from routine and trivial procedural affairs that should be left to judicial auxiliaries. Among the judicial auxiliaries, the role of judge assistants is the most important one.

Court experts

In Part Two, we examine another, apparently more homogeneous group of shadow actors, at least in terms of their name—court experts—which is more or less uniformly accepted. Still, there are numerous differences and variations in the status and use of experts across different national civil justice systems.

The common element among all experts is their role in assisting the court with their specialized knowledge and expertise, which supplements the legal experience and knowledge of judges. Generally, experts possess technical skills and knowledge from non-legal fields, though, as discussed in Chapter 11, they can also be engaged to report on legal issues of foreign law or other specialized legal fields. In any case, experts aid the court by providing persuasive explanations and assessments of issues that will ultimately form the factual (and, sometimes, legal) basis of court decisions.

Unlike court clerks, court experts are not directly subordinate to the court and individual judges. They are rarely, if ever, regular employees of the court. While they are expected to follow judicial instructions regarding their tasks and assignments, experts are independent and autonomous in their analysis of the matters submitted for their assessment. As life becomes increasingly dependent on complex assessments of various technical matters, expert views and assessments become invaluable. They ensure that final decisions are based on appropriate evaluations of factual and legal issues, avoiding unfairness and arbitrariness. However, this comes at a cost: experts are among the most expensive, complicated, and time-consuming means of evidence. Judges adjudicate, but where experts are involved, they have a decisive impact on the outcome of litigation.

The status and role of experts used to depend greatly on legal tradition. In civil law countries, experts are appointed and instructed by the court. They must be independent and impartial, akin to the judges who appoint them. While parties may challenge the expert's view, typically there will be only one expert on each issue, and the court will verify whether the expert has reached a plausible conclusion. In common law jurisdictions, experts are appointed and instructed by the parties, presenting a contradictory picture of two conflicting 'expert witnesses' from which the court should choose the more plausible one.

However, as several chapters of this book illustrate, the binary division between common and civil law experts is increasingly blurred. In civil law countries, experimenting with party-appointed experts is sometimes encountered in unexpected places, such as transition countries in Southeast Europe. In England and Wales, the Woolf reforms have limited the number and use of party-appointed experts in cases where they lead to disproportionate costs and expenses.

Nonetheless, legal frameworks and specific local rules and practices on the use of experts vary widely across different jurisdictions.

In Chapter 10, Eduardo Oteiza argues that experts are closer to the centre than to the periphery. The need for specialized expertise to delve into the technical and scientific complexities is crucial and a great challenge for our procedural culture. After a brief historical overview, the central questions of the Chapter are whether the expert witness is an assistant to the judge and how they can and should interact with the parties? Various divergences and convergences between the judge and the expert are analyzed. The Chapter concludes that it is essential to strike the right balance between the expert appointed by the judge and the one proposed by the party, by applying the principles of cooperation and proportionality and while ensuring an adequate relationship between the judge and the parties involved.

In Chapter 11, Michael Stürner focuses on experts on foreign law in German civil procedure. The outset of the Chapter is that foreign law is law from a German perspective, but is treated as a factual question with regard to the process of establishing its contents. The responsibility for determining foreign law lies entirely with the court. The court is not completely relieved of this responsibility even if the parties agree on the foreign law. Based on a 2018 empirical study, the Chapter analyses how this plays out in German civil procedure

In Chapter 12, Branka Babović Vuksanović analyses the concept of party-appointed experts in Serbian litigation proceedings. The reason for introducing such experts was that in practice courts gave insufficient instructions and excessively relied on the expert's opinion when they themselves appointed the expert. To ascertain to which extent party-appointed experts really contribute to the resolution of those problems, the Chapter analyses the broader reform of Serbian civil procedure, a part of which was to introduce party-appointed expertise, including the role of court experts.

In Chapter 13, Tatjana Zoroska Kamilovska states that there has been much debate on the upsides and downsides of party-appointed and court-appointed experts. Macedonian civil procedure underwent major reforms as to expert evidence in 2010, by introducing the adversarial approach to expert evidence whereby the parties appoint and instruct their respective experts. It has replaced the previous court-centred approach to expertise. The changed position of experts has not lived up to the expected improvement in efficiency and cost cutting, which were the prime reasons for the change. That imposed the need for reconsideration of the concept during the drafting of the new Macedonian Civil Procedure Act (MCPA). The proposal of new MCPA provides for a mixed model of court-appointed and party-appointed expert evidence as a more promising one.

In Chapter 14, Magne Strandberg focuses on the appointment of experts in Norway, and more particularly the role of parties and judges in civil proceedings. The most important question concerns the competence to appoint experts. Is it for the parties to appoint experts, the judge, both parties and the judge, or is it a mix of all these? These questions are important, especially because of the limited capacity of the court to correct or overrule the expert's opinion, which can ultimately determine the outcome of a case. The Norwegian analysis in this Chapter may shed light on ongoing comparative tendencies, and may provide potential middle-way solutions between more famous and influential procedural traditions or paradigms.

In Chapter 15, Camilla Bernt states that expert evidence, especially from psychologists, plays an important role in child protection cases and in court disputes between parents on parental

responsibility, custody, and contact (custody disputes) in Norway. However, the use of experts in these cases is frequently debated. Considering the great importance of expert evidence, it is a paradox that to this date there is relatively limited research on the use of expert evidence in custody disputes and child protection cases in Norway. There is a pressing need for more systematic knowledge to ensure a suitable use of expert evidence and safeguard the legal rights of children and parents. In this Chapter the use of experts in child protection and custody cases is discussed, focusing on the purpose of expert evidence, issues that have been debated and findings in existing research.

In the final Chapter 16 of Part Two Danie Van Loggerenberg looks at the appointment and management of experts in South Africa. The functions of an expert witness are threefold. First, where they have themselves observed relevant facts, that evidence will be evidence of fact and admissible as such. Second, they provide the court with abstract or general knowledge concerning their discipline that is necessary to enable the court to understand the issues arising in the litigation. Third, they give evidence concerning their own inferences and opinions on the issues in the case and the grounds for drawing those inferences and expressing those conclusions. However, at the end of the day, their evidence remains a matter of fact on which the court will have to make factual findings. A novel shadow actor, namely an intermediary, has been introduced in South African civil procedure. An intermediary will, if necessary, be appointed by the court in order to enable a witness who is in need of doing so, to give his/her evidence through that intermediary if it appears to the court that the proceedings would expose such a witness to undue psychological, mental or emotional stress, trauma or suffering if he/she testifies at the proceedings.

Other actors

Apart from the two large groups of ‘heroes of judicial periphery’, we wish to attract readers’ attention to some further actors who are equally important but are difficult to classify and subsume under a single category. Therefore, under the designation ‘other actors,’ Part Three of this book discusses the ever growing role and impact of Artificial Intelligence (AI) on the role of court staff, the role of psychologists as a special kind of expert in child custody cases and the ever-growing role of third-party funders, especially in the context of collective litigation. Additionally, among the unusual and distinct hidden gems in individual galaxies of specific national civil justice systems, we include a chapter that discusses the role and function of the Brazilian Ministério Público.

In Chapter 17, Seyedeh Sajedeh Salehi and Gina Gioia look at the integration of artificial intelligence (AI) as an emerging actor into civil proceedings AI in its analytical capacity has a considerable potential to assist court staff with performing tasks such as evidence analysis and document and case management. This Chapter explores the impact of AI implementation – as an assistive analytical tool – on the role of court staff in civil proceedings. It highlights that AI can assist court staff in the automated processing of documents, such as e-filings, natural language processing, and legal research, to reduce their workload and optimize the efficient administration of civil justice. AI can also be utilised by court staff to analyse evidence to, for example, identify relevant information and patterns. Finally, the Chapter also examines several challenges in integrating AI into civil proceedings. These challenges include ensuring transparency of data processing methods by court staff while using AI to conduct tasks.

In Chapter 18, Maurício Magalhães Lamha focuses on the supporting actors of the Brazilian courts, the so-called 'auxiliaries of the Court'. Despite their multiple ordinary daily tasks and activities, regarding in particular international child abduction cases (which are processed exclusively by Federal Courts in Brazil), those auxiliaries have a double role that makes their function significant. They are not only important to the due process and the accuracy of the final decision, but support the Court in the most sensitive stage of the proceeding, that is, the possible return of the child to his/her habitual residence in another country (the return order enforcement). The Chapter concentrates on three specific supporting actors/auxiliaries – the *Oficial de Justiça*; the Mediator; and the Court Appointed Psychologist Expert.

In Chapter 19, Hermes Zaneti Jr examines the evolution and current role of the Brazilian *Ministério Público* as both a supervisory and a supportive entity within the governmental framework, essential to the justice system, independent and autonomous from the other branches of power. The Chapter explores the Public Prosecutor's Office transformation into a vital pro-accountability agency, especially after the 1988 Constitutional reform, which marked a significant turning point. The analysis delves into the institution's constitutional and legal foundations, highlighting its specialized functions in protecting collective rights and addressing public interest issues. Furthermore, the Chapter presents contemporary data, offering a comprehensive portrait of its structure, functions, and its pivotal role in safeguarding homogeneous, diffuse, and collective rights in Brazil.

In the final Chapter 20, Adriani Dori and Xandra Kramer discus the role of commercial funders in light of the development and regulation of Third Party Litigation Funding (TPLF) in Europe, in particular in collective actions and strategic litigation. They also address the concerns about TPLF, including those voiced by the European Parliament that adopted a Resolution on 'Responsible Private Litigation Funding' urging the European Commission to propose a directive, implementing regulation for third-party funders as regards governance, oversight and transparency, and capping of the fees. In particular, they look at the role of funders and debate their role both at the forefront and in the shadow of the procedure.

Conclusion

This book is based on the discussions held at the XVII Public and Private Justice Conference, which took place in May 2022 at the Inter-University Centre in Dubrovnik. At that occasion, legal scholars from Europe, America, Africa, and Asia jointly concluded that different jurisdictions have different rules and habits but inevitably recognize that securing adequate support for judges is essential for the proper functioning of courts. How this support should look is debatable. Sometimes judges command a whole team of clerks and lawyers; sometimes many of them share a secretary or a clerk. But in all cases, the assistance provided to judges in their daily work has a decisive impact on the fairness, effectiveness, and quality of the judicial process. Optimizing the use of court staff and other ancillary actors may be the key to successful judicial reforms in the future.

We hope that this book contributes insights that may shed new light on the 'actors in the shadow.' Unknown is unloved; conversely, with new knowledge on the importance of judicial periphery for the quality and speed of judicial proceedings, we hope that supporting actors will obtain their deserved place in scholarly research and policy studies and become proper heroes of judicial reforms in the universe of civil justice.