Studies of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law

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Open Justice

The Role of Courts in a Democratic Society

Nomos

Max Planck Institute
LUXEMBOURG
for Procedural Law

Open Justice and the Principle of Public Access to Hearings in the Age of Information Technology: Theoretical Perspectives and Comparative Law

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1. *Preliminary Remarks*

The theme of the principle of open justice in the age of information technology is quite fascinating. It falls to me to consider this issue from a particular angle, that of public hearings in civil proceedings. I greatly thank the organisers for entrusting me with this subject which is quite original: indeed, the question of open justice is often considered through the written record of the proceedings and the digital handling or anonymisation of written judgements. Attention is less often given to the influence of these technologies on *public hearings* themselves, especially in civil matters. This is therefore the approach I shall adopt here, taking a comparative law approach.

1.1 *The Influence of the Principle of Public Access to Hearings*

Established by the French Revolution and made law as early as 16 and 24 August 1790,[1] the principle of public access to hearings is, even today, in vigorous health. The functions that Jeremy Bentham first assigned to the principle of publicity remain largely relevant today: firstly, to encourage the accountability of judges, secondly, to assist in the manifestation of the

1 Laws of 16 and 24 August 1790 on the organisation of the courts, article 14: 'En toute matière civile ou criminelle, les plaidoyers, rapports et jugements seront publics …' ('In all civil or criminal matters, the pleadings, reports and judgments shall be public'). See Sandrine Roure, 'L'élargissement du principe de publicité des débats judiciaires: une judiciarisation du débat public' (2006) Revue française de droit constitutionnel 737 ff; Séverine Ménetrey, 'L'évolution des fondements de la publicité des procédures judiciaires internes et son impact sur certaines procédures arbitrales internationales'(2008) 40 Ottawa Law Review 1, 495 ff.

truth and to educate people and, finally, to play a therapeutic role for citizens.[2]

These functions are no less essential in civil matters than in criminal ones, contrary to what one might first think. Indeed, as Dame Hazel Genn wrote, 'the civil courts *publicly reaffirm norms and behavioural standards* for private citizens, business and public bodies.'[3] Public civil hearings thus play an essential role in the social contract. Hence, 'It is not a sufficient reason for holding a trial in camera that this is the desire of all the parties. The rule of publicity exists not so much to safeguard the interests of individual litigants as to safeguard the administration of justice itself.'[4]

Recognised by the most important international treaties, the principle of open justice – and especially that of public access to hearings – is thus proclaimed in many national legal systems, sometimes in the constitution (as in Spain, Italy, or Australia), and sometimes in codes of civil procedure (as in France, Germany, or Luxembourg).

In common law legal systems, the principle of public access to hearings was set out with vigour in judgements that have stood the test of time,[5] from the famous decision in *Scott v Scott* in 1913 in England,[6] until a recent decision of the Supreme Court of Canada, which held: 'The open court principle is of crucial importance in a democratic society.'[7] And we should keep in mind the striking metaphor used by Justice Brandeis of the

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2 Judith Resnik, 'The Democracy in Courts: Jeremy Bentham, "Publicity", and the Privatization of Process in the Twenty-first Century' (2013) NoFo 10, 84.

3 Hazel Genn, *Judging Civil Justice* (Cambridge University Press 2009) 3.

4 John Anthony Jolowicz, 'Fundamental Guarantees in Civil Litigation: England,' in Mauro Cappelletti and Denis Tallon (eds), *Fundamental Guarantees of the parties in Civil Litigation* (Giuffrè, Ferry NY, Oceana ed 1973) 168; Joseph Jaconelli, *Open Justice: A Critique of the Public Trial* (OUP 2012) 2: 'The requirement of openness in the legislature is shaped by the demands of democratic accountability.'

5 On the historical emergence and the affirmation of this principle in common law, see Garth Nettheim, 'The principle of Open Justice' (1984) University of Tasmania Law Review 25; Neil Andrews, *On civil processes. Court Proceedings* vol I (Intersentia 2013) 28.01 ff; Adrian Zuckerman, *On Civil Procedure: Principles of Practice* (3rd ed Sweet and Maxwell 2013) para 3.108 ff.

6 *Scott v Scott* [1913] AC 417. Lord Atkinson writes: 'The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses … but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.'

7 *Canadian Broadcasting Corp. v Canada (Attorney General)*, 2011 SCC 2 [2011] 1 SCR 19 [*Canadian Broadcasting Corp*] Continuing: 'It ensures that citizens have access to

US Supreme Court to highlight the virtues of the principle of public access: 'Sunlight is said to be the best of disinfectants'.[8]

Fundamentally, the principle of public access to hearings is closely linked with the idea, which English law holds so dear, that it is 'of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'.[9] On the European level, it is one of the aspects of the more general principle known as 'openness': this term refers to the principle of governance by virtue of which institutions must conduct their activities in the manner that is most open and accessible to citizens, so that the latter may take a full part in democratic life.[10]

1.2 The new Implications of the Principle of Public Access to Hearings in the Information Age

Despite its well-established origins, the principle of public access to hearings is, in the digital era, confronted with new challenges.[11]

Firstly, the public hearing itself has profoundly changed. It includes more and more dematerialised or paperless matters. Even architects must take into account this dimension when they create the courts of the

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the courts and can, as a result, comment on how the courts operate and on proceedings that take place in them. Public access to the courts also guarantees the integrity of judicial processes inasmuch as the transparency that flows from access ensures that justice is rendered in a manner that is not arbitrary, but is in accordance with the rule of law'.

8 Louis Brandeis, *Other People's Money and How the Bankers Use It* (Frederick A Stokes Company 1914) ch 5 ('What Publicity can do'): 'Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman'.

9 *R v Sussex Justices Ex p Mc Carthy* [1924] 1 KB 256 at 259.

10 On this principle in European law, see Alberto Alemanno, 'Le principe d'ouverture en droit européen : d'un instrument de lutte contre l'opacité institutionnelle à un outil de démocratie participative', Revue de droit de l'Union européenne (2012) 627-653.

11 Richard Susskind, *Transforming the Law. Essays on Technology, Justice and the Legal Marketplace* (OUP 2007) 148. This metamorphosis affects all areas of the civil trial: see Cécile Chainais, Frédérique Ferrand, Lucie Mayer and Serge Guinchard, *Procédure civile. Droit interne et européen du procès civil* (Dalloz (Précis) 34th ed 2018) no 118.

twenty-first century; they must think of partly 'dematerialised' places of justice.[12]

Secondly, that portion of the public likely to attend a hearing has been deeply renewed and enlarged. Whereas, for a long time, open hearings went hand in hand with immediacy and physical presence, it is now possible to consider that the 'public' that should benefit from open justice is an indeterminate public: a public without borders, capable of attending a 'digital' trial, made available online, at any time of the day or night.[13] This is how the Supreme Court of Canada became in 2009 the first national Supreme Court to webcast its hearings, with the explicit goal of increasing awareness and transparency.[14]

1.3 Conflict between the Principle of Public Access to Hearings and other Fundamental Rights

However, this broad understanding of publicity is likely to conflict with other principles recognised as fundamental, such as the principles of the right to privacy, trade secrets, or the right to safety. Indeed, how can we reconcile unlimited access to civil hearings with respect for the privacy of the persons involved in the matter, whether they are parties, witnesses, or even judges? How can we avoid, particularly in commercial matters, contributing to a breach of commercial confidentiality by giving very broad access to a civil hearing?

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12 Antoine Garapon, 'Imaginer le palais de justice du XXIe siècle' (June 2013), *Notes de l'IHEJ*, Institut des hautes études sur la justice, no 5.

13 This change is linked to the metamorphosis in the relationship to *time*, induced by the rise of the communication and computer-driven society: indeed, a homogenous economic *time* emerges, without break or sacred moments, distinct from the *social time*, which follows the rhythm of a common calendar, distinguishing day and night, 'working' days and Sundays, etc: see Cécile Chainais (dir), *Le temps dans la jurisprudence de la Cour de cassation*, Study of the 2014 annual report of the Cour de cassation, *La documentation française, avant-propos*, 110. On this theme, see especially Alain Supiot, *Homo juridicus. Essai sur la fonction anthropologique du droit* (Le Seuil 2005) 105.

14 The latest supreme court to have taken this step is the Supreme Court of India, which recently approved the live streaming of court proceedings: Indian Supreme Court (26 September 2018) writ petitions No. 1232 of 2017, No. 66 of 2018, No. 861 of 2018, No. 892 of 2018. The Supreme Court specified that only cases of constitutional and national importance that are being argued at a final hearing before the Constitutional Bench may be live-streamed initially.

These questions were already being asked when there was a narrow interpretation of publicity. For this reason, most European legislation traditionally provides for statutory exceptions to the principle of public hearings, in instances where the case involves privacy, trade secrets, safety or grounds of public policy. The ALI-Unidroit Rules of Transnational Civil Procedure, that are prospective and comparative in their approach, contain a similar type of provision.[15] Similarly, international treaties provide for exceptions to the principle of public access, such as Article 6 (1) of the European Convention on Human Rights[16], which reads in part:

> Judgment shall be pronounced publicly *but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice*.[17]

1.4 Acuteness of the Question

But these questions are even more acute at a time when information technology allows an unlimited virtual audience to be reached. Technology is indeed acting as an echo chamber: It amplifies the effects of each breach of these individual rights[18].

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15 Art 20.1: 'Ordinarily, oral hearings, including hearings in which evidence is presented and in which judgment is pronounced, should be open to the public. Following consultation with the parties, the court may order that hearings or portions thereof be kept confidential in the interest of justice, public safety, or privacy'. Article 20.3: 'In the interest of justice, public safety, or privacy, if the proceedings are public, the judge may order part of them to be conducted in private'.

16 See Serge Guinchard, Cécile Chainais, Constantin Delicostopoulos and others, *Droit processuel* (Dalloz 2017) paras 409 ff.

17 See also art 14 (1) of the International Covenant on Civil and Political Rights and art 8 (5) of American Convention on Human Rights.

18 The question, considered here through the prism of public access to hearings, has previously been discussed mainly as an issue of public access to court records: see Peter A Winn, 'Online Court Records: Balancing Judicial Accountability and Privacy in an Age or Electronic Information' (2004) 79 Washington Law Review 307; Andrew D Goldstein, 'Sealing and Revealing: Rethinking the Rules governing Public Access to Information Generated through Litigation' (2006) 81 Chicago-Kent Law Review 375; from the perspective of the criminal justice system: Caron Myers-Morrison, 'Privacy, Accountability and the Cooperating Defendant:

This partly explains why some of these individual rights are being redefined: When confronted with a *de-territorialised* world created by the internet[19], the restrictive conception of privacy – arising out of the common law tradition, which sees the right to *privacy* as a mere extension of *property* rights – is being progressively abandoned.[20] In its place is preferred the conception arising out of the civil law tradition, which is more extensive and thus protective, as it anchors privacy in the person itself.

It is remarkable that sometimes the echo-chamber effect of technology may affect the internal equilibrium of the proceedings. There are several examples. Where a party to civil proceedings starts turning the platform of court proceedings into an advertising hoarding for his commercial or private activities; or where judges are the subject of repeated aggressive tweets throughout the hearing available online: The serenity of the proceedings and the impartiality of the judges could be compromised;[21] or where the witnesses fear that they will be the victims of cyber-bullying: They could be discouraged from testifying.

These situations raise delicate questions. How can we avoid the risk of proceedings suffering from overexposure in the media, with hype or even hysteria facilitated – for instance – by a live webcast? How do we prevent the intrusion of electronic devices (like smartphones, cameraphones and other devices) from disturbing the rituals of the courtroom? It is entirely foreseeable: Through these questions, the very notion of a fair trial is threatened.

1.5 Counterproductive Effects of Open Access

If we do not take the full measure of this risk, then open access could have a counterproductive effect and infringe upon the *integrity* of proceedings.

Towards a new role for Internet Access to Court Records' (2009) 62 Vanderbilt Law Review 92. See Arthur R Miller, 'Confidentiality, Protective Orders, and Public Access to the Courts' (1991) 105 Harvard Law Review 427.

19 José Eduardo de Resende Chaves Junior, 'Proceedings on the web', in Miklós Kengyel and Zoltán Nemessányi (eds), *Electronic Technology and Civil Procedure: New Paths to Justice from Around the World* (Springer 2010) 121.

20 Karen Eltis, 'The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context' (2011) 56:2 McGill Law Journal 312.

21 For a description of this risk of 'Sensationalisation and Distortion', see Beverley Mc Lachlin, 'Courts, Transparency and Public Confidence - To the Better Administration of Justice' (2003) no 8 Deakin Law Review 5.

If we are not careful, a poorly controlled application of open justice could even divert people away from public forms of justice, in favour of private justice. The right to access a judge could therefore be compromised. This is even more paradoxical given that in some countries, such as Australia, open access is considered by the Constitution as an essential element of the *integrity* of the court.[22] Two forms of integrity begin to compete.

Worse yet, people could be tempted to return to forms of *private vengeance*. In Aeschylus' Oresteia, the institution of a court rendering its decisions in public, the Areopagus, allowed the Greek city to chase the goddesses of vengeance, the Erinyes, from within their walls. Let us be careful that a poorly managed understanding of public access to that same court does not provoke, in the digital era, the return of the Erinyes to our modern societies…

1.6 Against an outdated Interpretation of Publicity

At the same time, we must avoid an outdated interpretation of publicity. Denying the contributions made by the development of technology would be nonsensical. The vision of public access to hearings that prevailed at the beginning of the twentieth century, limited to the public that was physically present in the room, or to the accounts then provided by journalists, is obviously outdated.

Carefully conceived, the modernised principle of open justice, which is fundamental in a democracy, should be able to draw on all the strengths of technology. Digital access to hearings could thus support the educational function of the trial. In the same way, it could usefully meet the public demand for quality and transparency in justice. This could be precious at a time when the courts can be the subject of great public distrust.

Chasing information technology from the courts would therefore be a fruitless and anachronistic position.

1.7 Seeking a balanced Solution

We therefore need to seek balance between these various concerns. Two series of questions arise. What are the consequences of the technological

22 Emma Cunliffe, 'Open Justice. Concepts and Judicial Approaches' (2012) 40 Federal Law Review 388.

(and cultural) revolution of the end of the twentieth century for the principles of publicity and open justice?

How, then, can we reconcile the principle of public access to hearings as it is now conceived, with the protection of certain fundamental individual rights such as trade secrets, the right to privacy, or the right to safety? How do we regulate this conflict?

1.8 Plan

This paper will attempt to provide answers to these issues. Firstly, the implementation of new technologies within civil proceedings has an important influence upon the principle of public access to hearings. To use a theatrical metaphor, I would say that the *internal* use of electronic technologies (within the technical parts of the proceedings themselves) is giving rise to a new kind of courtroom drama: the show to which the audience is invited is different (section 2). Secondly, at the same time, the *external* use of these technologies creates a new worldwide audience for this drama (it affects *who the public audience is*). We are now witnessing the birth of a new kind of courtroom, conceived as a new global *panopticon*, which raises many questions (section 3). Finally, this finding makes it necessary to seek out a new statutory framework capable of handling this new state of affairs (section 4).

2. Towards a Rethink of Civil Public Hearings: a Renewed Judicial Ritual?

2.1 The Use of Technology within Proceedings profoundly modifies them.

Firstly, submissions are more and more frequently dematerialised and written. Secondly, modern changes to civil procedure affect public hearings in more or less radical ways.

2.2 Purely and simply dispensing with Hearings?

Sometimes, the public hearing is *radically* affected, since it is simply abandoned: in certain countries and for certain types of dispute, new online procedures are being created, which dispense entirely with the need for the judge and parties to be physically present. A court therefore rules without

a public hearing and on the basis of a purely digital case file. The space that this form of justice occupies is destined to increase in line with progress in predictive justice and the deployment of open data: It is these that risk encouraging the mass processing of certain disputes. In this way, in the United Kingdom, the Online Dispute Resolution Report of February 2015 suggested that low value civil claims, below twenty-five thousand pounds, could be resolved directly online, sometimes without any hearing at all, and most of the time with a telephone hearing or a video-conference.

2.3 A New Form of Hearing or the End of the Traditional Judicial Ritual?

Sometimes, *less radically*, the use of communication technologies within civil proceedings modifies the very physiognomy of the public hearing, without challenging its existence. The many dematerialised exchanges between the parties before the hearing lead to a reduction in the number of questions discussed in public during the hearing. In addition, the broadcast during the hearing of recordings of witness or expert evidence, and, to an even greater extent, video-conferencing, destabilise the symbolic economy of justice and the traditional 'judicial ritual;'[23] as highlighted by William Arnold in the US,[24] and Antoine Garapon in France.[25]

In particular, they compromise the rule of three unities (time, space, and action). The broadcast of a recording (by definition, a past event) breaks the unity of time. And videoconferencing (which is now used in many courts, in an ever-increasing number of countries) breaks the unity of space. As a corollary, videoconferencing challenges the standard of physical presence – which requires witnesses and parties to be physically present in the room: the traditional court becomes a virtual court[26]. In

23 On this idea, see Fabien Gélinas and others (eds), *Foundations of Civil Justice. Toward a Value-Based Framework for Reform* (Springer 2015) 13 ff.

24 Thurman W Arnold, *The symbols of government* (New Haven: Yale University Press 1935).

25 Antoine Garapon, *Bien juger. Essai sur le rituel judiciaire* (Odile Jacob 1997).

26 Richard Susskind (n 11) at 111: 'In a virtual court, one or more judges sit in some kind of hearing room, dispensing in the traditional manner. The break from tradition is that some participants appear virtually across some video link rather than in person.'

addition, it compromises the principle of immediacy:[27] by virtue of this principle, which is dear to the Italian procedural experts Chiovenda,[28] Calamandrei,[29] and Cappelletti,[30] the judge should be *directly* in the presence of *all* the *physical* spectacle and the body of actors who make up the hearing. The hearing should be held *coram partibus et in praesenti*, the parties and witnesses being physically present; and the judge should, on this occasion, benefit from a direct relationship (visual and auditory, as the case may be) with the evidence.

2.4 The Preservation of an Oral Hearing within a New Judicial Ritual

The intrusion of technology into the trial, generally mandated by the desire to make budgetary savings, thus leads to the modification of symbols and judicial rituals. This innovation is not without danger. The alteration of the quality of exchanges and a loss of information linked to the absence of physical contact may legitimately be feared – doubtless even more so in criminal matters than civil ones.

Nevertheless, it must be acknowledged that the choice of the authorities to use videoconferencing also demonstrates a *positive* reaffirmation, in the digital era, of the irreplaceable role of the public hearing. Despite its partial dematerialisation, this continues to be seen as an occasion for meetings, debates, and discussions. Indeed, as Laurence Dumoulin and Christian Licoppe showed, videoconferencing, as compared to predictive justice

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27 Masanori Kawano, 'Electronic Technology and Civil Procedure. Applicability of Electronic Technology in the course of Civil Procedure', in Miklós Kengyel and Zoltán Nemessányi (eds), *Electronic Technology and Civil Procedure: New Paths to Justice from Around the World* (Springer 2010) 21; Peter Gilles, 'Civil Justice Systems and civil procedures' (2014) II Russian Law Journal 47-48: 'the rapidly ongoing electronification of court procedures, accompanied by more and more so called 'e-procedure-law' forces us to reconsider nearly all of our trusted procedural principles, like the principle of accessibility, … the principle of directness, the principle of presence, the principle of publicity, the principle of effectiveness, and others'.

28 Giuseppe Chiovenda, 'Sul rapporto fra le forme del procedimento e la funzione della prova (l'oralità e la prova)', in *Saggi di diritto processuale civile* (vol II, Roma 1931) 201 ff.

29 Piero Calamandrei, 'Oralità nel processo' in *Novissimo digesto italiano* (vol IX, Torino 1939) 178-179.

30 Mauro Cappelletti, *Procédure orale et procedure écrite* (Giuffrè 1971) 89-99.

on the papers, keeps the human dimension of justice.[31] This supposes, of course, that strict quality assurance controls are implemented over the exchanges and that the rights of those being questioned remotely are respected.

In some regards, the increasingly dematerialised case file, around which the hearing unfolds, is enriched. It is no longer only written, but includes sound, images, and even films: it implements that which Resende Chavez calls 'intermediality'. This leads to a phenomena of 'radicalization of orality' and of hyper-realisation of the case through the public hearing.[32]

In quite a dizzying claim, Paul Carrington suggested that, in the future, a trial might become a movie presentation:

> Trial counsel may become co-producer of a multi-media presentation. Testimony will be recorded in advance of trial and reviewed by opposing counsel. … All evidentiary issues not resolved by agreement of the parties would be resolved by the court at pre-trial conferences.[33]

He concluded: 'The possibility of tactical surprise at trial would be completely eliminated.'[34] This author even considered the possibility that the jurors themselves could remain at their home or workplace and become a virtual jury![35]

2.5 Recording Hearings

Without going to this extreme, one can imagine that the hearing itself could be subject to audiovisual recording, capable of becoming evidence in the procedural file. This step was recently taken in Spain. All public

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31 Laurence Dumoulin and Christian Licoppe, 'Grasping the Discrete Link between Filming and Videoconferencing in the Courtroom. Reflections from the French Case' (2017) Revista Crítica de Ciências Sociais <http://rccs.revues.org/6608> accessed 26 October 2018.

32 José Eduardo de Resende Chaves Junior, 'Proceedings on the web', in Miklós Kengyel and Zoltán Nemessányi (eds), *Electronic Technology and Civil Procedure: New Paths to Justice from Around the World* (Springer 2010) 116-117.

33 Paul D Carrington, 'Technology and Civil Litigation in the United States in the Twenty-First Century', in Miklós Kengyel and Zoltán Nemessányi (eds), *Electronic Technology and Civil Procedure. New Paths to Justice from Around the World* (Springer 2010) 57-60.

34 Ibid.

35 Paul D Carrington, 'Virtual civil litigation: a visit to John Bunyan's celestial city' (1998) no 98 Columbia Law Review 1527.

hearings are officially videotaped, thanks to a public recording organised by the courts themselves.[36] The parties and their representatives may ask the clerk for a copy of the filmed hearing. At the same time, when cases are heard on appeal, the judges will be able to watch the first instance proceedings and better exert their jurisdiction of review. According to the Spanish authors, the judges' awareness that they are being filmed tends to increase their sense of accountability and to raise the quality of the hearing.[37]

But in a very interesting way, following this reform, a debate has arisen in Spain: Should the video recording of the hearings, originally for the parties to the case, not be made available to any citizen who requests it, by virtue of the constitutional guarantee of publicity?

This question provides us with a perfect transition from the internal use of new technologies, to their external use.

3. *Towards a New Conception of Publicity: the Courtroom, a New Panopticon?*

Progressively, a new conception of publicity is emerging (3.1.). Interestingly, it conflicts with a conception of privacy that is itself being renewed, which raises a certain number of difficulties (3.2.).

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36 Art 147 of the LEC: 'Las actuaciones orales … se registrarán en soporte apto para la grabación y reproducción del sonido y la imagen y no podrán transcribirse.' ('Oral proceedings ... will be recorded in a format suitable for the recording and reproduction of sound and images and may not be transcribed.').

37 Fernando Gascón Inchausti, 'Oralidad o escritura como factores de eficiencia del proceso civil en España,' Conference available online <https://eprints.ucm.es/26700/>, 15: 'También se produce un refuerzo de la publicidad, como garantía del proceso: el juez ya no se encuentra solo ante las partes y ante los eventuales asistentes al acto del juicio, sino que se encuentra también frente a todos aquellos que podràn ver en un futuro la grabación'('There is also a strengthening of publicity, as a guarantee of the trial: the judge is no longer before the parties and any possible spectators of the trial, but is also before all those who might view the recording in the future.'); Miguel Garre, 'Captation vidéo des audiences en Espagne et droit à l'oubli : forces et faiblesses de l'acte électronique' (2014) 100 Revue Lamy de Droit de l'immatériel no 3337, 98 ff; Imma Baral and Emilie Reissier, 'Vidéoconférence et principes fondamentaux du procès : publicité et inmediación en Espagne. Décryptage du cas espagnol,' vidéoconférence, <https://ihej.org/programmes/politiques-de-justice/videoconference-et-principes-fondamentaux-du-process-publicite-et-inmediacion-decryptage-du-cas-espagnol/>.

3.1 From Physical to Virtual Publicity: The Courtroom as a New Benthamian Panopticon

3.1.1 Aspects of the principle of publicity

The external use of electronic technologies (the use of electronic technologies *outside* the proceeding and the courtroom, so as to give resonance to what happens inside the courtroom) is of such a nature that it changes the perception of trials by the public. It modifies, in particular, that which some authors call the 'public aspect of the principle of publicity'.

As Adrian Zuckerman says, '[T]he principle of publicity has several aspects: a public aspect and a litigant-related or party, aspect'. The Public aspect implies that members of the public have a right to attend court proceedings …. According to the party aspect, 'Parties to civil proceedings have a right to insist that their dispute is adjudicated in a place that is accessible to the public. It is part of a fair trial.'[38]

3.1.2 The renewed conception of the 'public aspect' of the principle of publicity

The increasing use of electronic technologies has deep consequences on the first dimension – the public one. Taking notes and disseminating them through the internet, tweeting, TV broadcast, live webcast or delayed broadcast: All these techniques constitute new paths for transparency. They have major consequences on the effective exercise of the right to report hearings, once praised by Portalis in France,[39] to which they give an exponential importance.

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38 Adrian Zuckerman, *On Civil Procedure: Principles of Practice* (3rd edn Sweet & Maxwell 2013) para 3.10.

39 In a speech given on 14 April 1828, while he was Keeper of the Seals, Portalis denounced the excessively restrictive conception of publicity being understood strictly as the possibility of attending court hearings.
He underlined, in this regard, the crucial role of newspapers in the dissemination of information gathered at court: 'Sans [les journaux], [la publicité] ne serait qu'un vain nom et qu'une vaine forme …; une publicité emprisonnée dans les limites d'un prétoire aussi resserré, n'offrirait qu'une garantie bien imparfaite.' ('Without [newspapers], [publicity] would be nothing but a vain name and a vain form …; publicity imprisoned within the close confines of a courtroom would offer only a very imperfect guarantee'). See Yves Lavoinne, 'Publicité des débats et espace public' (1999) 22 Études de communication, <http://journals.openedition.org/edc/2350>.

Citizens could consider that they are entitled to demand an *updating* of the public dimension of the principle of publicity: From such a perspective, the development of electronic technologies would create a duty for the State and for the judicial machinery to adapt and to offer to citizens the best electronic public access to hearings. Opening the (physical) doors of the courtroom would suffice no more: The judicial machinery should allow everyone to attend the hearing electronically, remotely. The judicial stage would become a global Shakespearian theatre, with a worldwide audience.

3.1.3 Competing conceptions of publicity: from the principle of 'physical courtroom' public access to the principle of 'electronic worldwide' public access to hearings

This sudden entrance of a new 'virtual' audience, that is not physically present in the court, raises questions. It is of such a nature that it could destroy the traditional view of publicity, which holds that, in addition to those actually involved in the hearing, third parties or strangers to the trial can be *physically present* in the room. Should we change the model?[40] Should we switch from the principle of *courtroom* publicity to the model of *electronic* publicity or *worldwide audience* publicity, rendered possible first by television then by the Internet? [41]

3.1.4 The modern courtroom, a new panopticon?

Prima facie, this would reinforce the accountability of judges. In this regard, the Benthamian conception of publicity (the judges in a trial … under trial) would remain perfectly relevant.[42] Indeed, in a way, those elec-

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40 See, on the general question of a shift in Legal paradigm, Richard Susskind, *Transforming the Law. Essays on Technology, Justice and the Legal Marketplace* (OUP 2007) 151.

41 Nathalie Blanc (dir), *Le juge et la mondialisation: dans la jurisprudence de la Cour de cassation*, Annual study of the Cour de cassation (La Documention française 2017) 8: '*Avec l'internet est né le cyberespace, espace virtuel qui ne connaît pas les frontières*' ('Cyberspace was born with the internet, a virtual space that knows no borders').

42 Jeremy Bentham, *Rationale of Judicial Evidence* Vol 1, ch X (1827, Garland Facsimile (ed) 1978) 511-606, in John Bowring (ed), *The Works of Jeremy Bentham* (Edinburgh: William Tait, 1843), Vol 4, 316: 'Publicity is the very soul of justice. It is

tronic devices make the courtroom operate as a huge modern Benthamian panopticon. The courtroom finds itself at the heart of an apparatus that recalls in a particular way the Benthamian prison[43] described by Michel Foucault.[44]

When, for instance, a trial is webcast live, the judge does not know for sure that someone is actually in front of a screen, watching the trial: The public cannot be seen by the judge. But the device creates the sense of being watched, or even inspected, and increases the accountability of the judge. This device is the camera and the ability of the public outside the courtroom to see without being seen. The trial now takes place before a new court, the Court of Public Opinion.[45]

3.1.5 Examples

This dimension of public access has been explicitly demanded, both by citizens and judges. Some private interest groups insist that certain important commercial cases should be held in a *public* arbitration proceedings and webcast, with regard to the major questions raised during the trial. The Center for International Environmental Law (CIEL) urged UNCITRAL to take this demand into account.[46] This encouraged UNCITRAL to adopt new standards to increase transparency in treaty-

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the keenest spur to exertion and the surest of all guards against improbity. *It keeps the judge himself while trying under trial.* In the darkness of secrecy, sinister interest and evil in every shape, have full swing. Only in proportion as publicity has place, can any of the checks, applicable to judicial injustice, operate. Where there is no publicity there is no justice.'

43 Jeremy Bentham, *Panopticon*, Works vol IV (Bowring) 60-64. See in particular Guillaume Tusseau, 'Sur le panoptisme de Jeremy Bentham' (2004) Revue française d'histoire des idées politiques 3 ff: the author underlines the interest of taking an entirely fresh look at Bentham, 'à l'heure où le panoptisme devient possible sur une grande echelle en raison du progress de la technique, des fichiers informatiques, de la vidéosurveillance, des webcams, d'internet' ('at a time when panopticism is becoming possible on a large scale thanks to technical progress, digital records, video surveillance, webcams, and the internet') (ibid 5).

44 Michel Foucault, *Surveiller et punir* (Gallimard 1975) 233 ff.

45 On this idea, and on the links that it has with the requirements of transparency and publicity, see Guillaume Tusseau (n 43) 12.

46 Daniel Magraw, Sofia Plagakis and Jessica Schifano, 'Ways and Means of Citizens' Participation in Trade and Investment Dispute Settlement Procedures' (14 July 2008). Society of International Economic Law (SIEL) Inaugural Conference 2008 Paper. Available at SSRN: <https://ssrn.com/abstract=1159770>.

based investor-state arbitrations.[47] Among these new standards, some changes are designed to increase public access to hearings.[48] ICSID arbitrations are tending to move in the same direction.[49]

In the same way, where judges authorise webcasts or video recording, they often do so by invoking the Benthamian functions of publicity, such as the accountability of judges or the educational purpose of justice.

3.2 From Bentham to Orwell (or Kafka?): the Modern Contradictions of the Principle of Open Justice

3.2.1 Questions raised by the figure of the panopticon

At the same time, the metaphor of the Panopticon also raises complications and questions. Is it really desirable that civil trials can be seen by anyone and in any circumstances, at any time? The question is one that demands an answer. Behind the figure of omniscience and the panopticon, the preservation of privacy, trade secrets, and the safety of the parties, are all at stake. The renewed conception of publicity indeed conflicts with other fundamental individual rights, themselves affected by the development of information technology.

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47 The new art 1, para 4 of UNCITRAL Arbitration Rules (as adopted in 2013) specifies that 'For investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors, UNCITRAL Arbitration Rules include the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration' (on which see Julien Cazala 'Investissements internationaux et arbitrage' (2014) 4 Les Cahiers de l'arbitrage 755 ff).

48 Art 6 of UNCITRAL Rules on Transparency provides that 'hearings for the presentation of evidence or for oral argument ('hearings') shall be public.' According to para 3, 'The arbitral tribunal shall make logistical arrangements to facilitate the public access to hearings (including where appropriate by organizing attendance through video links or such other means as it deems appropriate)', <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html>.

49 If the hearing is open to the public, ICSID provides a videolink from the hearing room which is broadcast to a separate room on the premises of the hearing that is open to the public. The parties may also agree to webcast the videolink.

3.2.2 Publicity as a threat

In civil proceedings, the party-dimension of publicity – the right of *an individual* to be tried in public – is increasingly challenged by another concern: the need to protect one's right to privacy. In democratic legal systems, the open court is no longer seen as a guarantee of a fair trial and of the integrity of the court, but rather as a threat to privacy. Within one person, the individual right to a public hearing is challenged by another individual right, the right to privacy.

As a result, it is increasingly common that a party's claim to secrecy conflicts with the public's demand for access. A struggle begins between the public aspect of publicity and the decline of its private side.

3.2.3 Competing conceptions of privacy: modern redefinition of the right to privacy

As Karen Eltis showed, the dawning of the digital era led to a renewal of certain fundamental notions, starting with the protection of the right to privacy.[50]

Previously, the protection of the right to privacy first supposed the prohibition of the disclosure of sensitive or personal information that might harm the person concerned. The protection of the right to privacy thus rested on the paradigm of secrecy relating to sensitive or personal information whose confidentiality had to be ensured. From this perspective, the fear of an Orwellian universe was highlighted.[51]

Today, a breach of the right to privacy may result from a much more diffuse phenomenon, less immediate and less visible, rendered possible thanks to the digital revolution. This is what Daniel Solove, in the US, called 'aggregation of information', in relation to a particular individual.[52]

Massive electronic aggregation of matters that, taken alone, would be anodyne, allows a *digital biography* of an individual to be drawn up, in total breach of the right to privacy. Thus, more or less well-intentioned people

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50 Karen Eltis, 'The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context' (2011) 56:2 McGill Law Journal 306.

51 Daniel J Solove, *The Digital Person: Technology and Privacy in the Information Age* (New York University Press 2004) 149.

52 Daniel J Solove, 'Access and Aggregation: Privacy, Public Records, and the Constitution' (2002) 86 Minnesota Law Review 1137.

(be they state actors or private ones, such as employers), could rely on this biography – which will be of course largely erroneous and approximate – to take a certain number of decisions that could significantly affect that person.[53]

The fear then becomes that of a Kafkaesque world, in which the State (or private individuals) can gather together a tissue of information that is never really accessible, as a whole, to the person concerned.[54]

3.2.4 The new nuisance potential of the principle of open justice in the information technology age

In this context, a civil hearing which is accessible online, along with all of the other information that it carries, risks amounting to another item in this unfortunate digital biography. It could also breach the 'right to be forgotten' that the Court of Justice of the European Union recently recognised[55]. I have previously mentioned the risk of breaches of impartiality or disruption of the serenity of proceedings. In the commercial field, it could also amount to data likely to interest competitors of a company engaged in a trial: they may wish to exploit the information put online to discover confidential economic data concerning the competing company.

3.2.5 A risk of diverting the traditional functions of publicity

Ultimately, we are seeing the birth of the risk of manipulation of public access to civil hearings for the purposes of breaching the right to privacy or trade secrets. A fundamental principle of civil proceedings could then become, despite itself, a tool used to breach fundamental individual rights.

The three traditionally recognised functions of publicity could potentially find themselves being subverted. Firstly, the therapeutic function, maintaining the social link, could be imperilled: indeed, the civil trial

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53 Ibid.

54 Karen Eltis, 'The Judicial System in the Digital Age' (2011) 307, quoting Daniel J Solove 2004 (n 51) 55.

55 C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* (13 May 2014) <http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d545d7ec8107c44c33b977e53751a633dd.e34KaxiLc3eQc40LaxqMbN4OaNmQe0?text=&docid=152065&pageIndex=0&doclang=fr&mode=lst&dir=&occ=first&part=1&cid=151681>.

could lead to a breach of the rights of the very person who is the beneficiary of this trial. The integrity of the civil trial would then be at stake. The function of the protection of the courts inherent to any trial would thereby be diminished. Secondly, the function known as the 'educational' function of the principle of public access would itself be perverted: indeed, what educational virtue can one claim for a trial the public access to which has *de facto* breached the rights of one of the parties involved? Thirdly, the same criticism could be levelled at the accountability function, which would appear to be an illusion.

Publicity, supposedly the 'soul of justice',[56] could in fact become its gravedigger. It could be, in certain cases at least, the weak link in the procedural chain, the Trojan horse of breaches of party rights.

Therefore, it is essential to seek guidelines to redesign the statutory framework for the principle of publicity in the digital age.

4. Seeking a New Statutory Framework for the Principle of Public Access for Civil Hearings

The extreme heterogeneity of the solutions suggested in positive law (4.1) encourages us to seek guidelines for a common statutory framework (4.2).

4.1 The Extreme Diversity of Solutions in Positive Law Trial and Error in Positive Law

When one approaches the question of the statutory framework to be given to the principle of public access to hearings in the digital era, from a comparative law standpoint, one is immediately struck by its heterogeneity, which is quite extraordinary.

From one country to another, and sometimes even from one court to another, the way in which these questions are approached is extremely varied. Some have grasped the nettle. Others have not yet legislated. Where countries have issued standards on these questions, they vary enormously from one system to the next. This diversity manifests itself in several ways.

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56 Jeremy Bentham, *Rationale of Judicial Evidence* vol 1, ch X (1827, Garland Facsimile (ed) 1978) 511-606, in John Bowring (ed), *The Works of Jeremy Bentham* (vol 4 Edinburgh: William Tait, 1843) 316.

Firstly, most countries traditionally only ask this question with regard to footage from the media or from private individuals, whereas others, which are fewer, yet increasing in number, have organised institutional footage. Accordingly, a practical distinction must first be made concerning the origin of the footage. Two situations must be distinguished.

In the first situation, the footage comes from the media or merely from private individuals. Indeed, most of the time, the institution does not itself provide audiovisual recording of the hearing. Even when it does so, media outlets or private individuals may also wish to film proceedings by their own means.

In the second situation, the footage comes from the institution itself. This hypothesis is increasingly common, even if it is far from being a general solution. In this case, cameras are installed within the courtroom and film the trial in its entirety. The court institution itself controls the manner in which footage is recorded but can also dictate the standards relating to its broadcast.

This solution exists, but in very rare cases, across most of the courts in the country: this is the case in Spain.[57] More frequently, it is limited to an institution that aspires to a particular visibility for its activities. This is now the case for the UK Supreme Court, which has made its hearings available online, as does the Supreme Court of Canada.

The technical implementation varies: for example, the Australian Supreme Court authorises live webcasts, whereas other institutions provide delayed webcasts.[58] One can also observe differences in approach as to the subsequent control over the use that can be made of these recordings. In Spain, it is only upon request that a citizen can obtain a copy of a recording. In other countries, online posting is immediate, one simply needs to consult the court's website to gain access, as with the ECHR. In yet other systems, access to the recordings is only given upon request, which creates a filter in the access to the recorded hearing.

Secondly, if one were to attempt to systematise these diverse approaches, one could say that two technical models appear to stand out in comparative law. Whereas many systems set out a general principle of prohibition of electronic coverage of the hearing, others, which are fewer, set out the inverse principle, that of presumption of authorisation.

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57 See references for subsection 4.1.2, *infra*.

58 This is the solution adopted by the ECHR (broadcast is delayed for a few hours) and, more recently, by the Indian Supreme Court (which is considering a broadcast that is delayed by only a few minutes).

4.1.1 Systems with a general principle of prohibition

We shall begin with systems with a general principle of prohibition. Indeed, these systems are based on a presential conception of publicity. From this point of view, they are more traditional. In these systems, the rule of prohibition simply has exceptions that are subject to conditions; and the *onus* of establishing that these conditions are met is on the applicant. [59]

4.1.1.1 The variety of approaches of the systems with a prohibition

However, within this model, one can observe a wide variety of approaches.

Some countries implement a scheme of exceptions that is tightly restricted, often identical for digital coverage and traditional film. These countries maintain a presential conception of publicity and object to the intrusion of traditional or digital cameras in the courtroom. This is the view that prevails in France, with Law No 54-1218 of 6 December 1954 prohibiting the broadcast of courtroom debate.[60] Nevertheless, some coun-

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59 This is, furthermore, the system preferred by the Recommendation Rec (2003) 13 of the Committee of Ministers to member states on the provision of information through the media in relation to criminal proceedings. This document first sets out the principle that: 'Journalists should be admitted to public court hearings and public pronouncements of judgements without discrimination and without prior accreditation requirements.' (principle 12). But it then specifies that: 'Live reporting or recordings by the media in court rooms should not be possible unless and as far as expressly permitted by law or the competent judicial authorities. Such reporting should be authorised only where it does not bear a serious risk of undue influence on victims, witnesses, parties to criminal proceedings, juries or judges.' (principle 14).

60 This law proposes the insertion of the following provision at art 39 of the Law of 29 July 1881 on the Freedom of the Press: 'Pendant le cours des débats et à l'intérieur des salles d'audience des tribunaux administratifs ou judiciaires, l'emploi de tout appareil d'enregistrement sonore, caméra de télévision ou de cinéma est interdit. Sauf autorisation donnée, à titre exceptionnel par le garde des Sceaux, ministre de la Justice, la même interdiction est applicable à l'emploi des appareils photographiques' ('During proceedings and within the courtrooms of public or general courts, the use of any sound recording device, television or film camera is prohibited. Save where authorisation has been given, on an exceptional basis, by the Keeper of the Seals, the Minister of Justice, the same prohibition applies to the use of photographic devices').

tries are considering extending the scope of exceptions. Others have already taken this step.

4.1.1.2 Exceptional authorisation for educational purposes

From a comparative approach, it appears that the most widely accepted exception is to allow the judge to authorise derogation 'for educational or instructional purposes'. This exception is provided for in many systems. Indeed, in such cases, those who make the request for authorisation to film are driven by a general and impersonal motivation. The particular case interests them only to the extent that it reveals the operation of justice in a system of law. The risks attached to broadcast accordingly appear to be diminished. In addition, most often, the consent of the parties is required,[61] though one can observe that this is not always the case.[62]

In France, this educational concern appeared with Law No 85-699 of 11 July 1985 on the Creation of Audiovisual Archives of the Legal System.[63] This law created an exception to the principle of the prohibition of the recording of hearings: Indeed, it permitted the possibility of recording, with a view to subsequent use, 'trials that present an interest for the creation of historical archives of the legal system'. In reality, this possibility has been very little used, and almost solely for trials that are truly historic (such as the trial of Klaus Barbie).[64] It is rare that recordings of proceedings are used to increase awareness of the daily operation of the justice system,

61 As in Ontario: Courts of Justice Act, RSO 1990, ch 43 (last amendement, 2017), art 136 (3): 'Subsection (1) does not apply to a photograph, motion picture, audio recording or record made with authorization of the judge, … *(c) with the consent of the parties and witnesses*, for such educational or instructional purposes as the judge approves'.

62 As in British Columbia: Policy of the Provincial Court of British Columbia: '4.3 Filming or visual recording requests in a courthouse for educational and court related information purposes may be approved *at the discretion of the Chief Judge*'.

63 *Journal Officiel*, 12 July 1985, 7885.

64 Laurence Dumoulin and Christian Licoppe, 'Grasping the Discrete Link between Filming and Videoconferencing in the Courtroom. Reflections from the French Case' (2017) Revista Crítica de Ciências Sociais 122: <http://rccs.revues.org/6608.> accessed 17 May 2017.

which is regrettable.[65] The scope of the recording of proceedings thus remains limited.

Nevertheless, many of the countries where the principle of the prohibition of recording prevails are considering modernising their legislation.

Such proposals for reform have been made in respect of French law. In 2005, the Linden report[66] suggested a root-and-branch review of legislation. It considered two possible reforms: on the one hand, a system based on prior authorisation (which would maintain the principle of prohibition while allowing many derogations therefrom), and on the other, a principle of regulated freedom, which would allow audiovisual media outlets to record and broadcast as they saw fit without having seek the agreement of the court, nor that of the parties, on the condition, however, that the proceedings be recorded in full and that they protect the rights of the persons filmed.[67] In addition, an interesting report was very recently published by the Montaigne Institute, proposing, under certain conditions, the electronic recording and broadcasting of hearings in order to improve publicity.[68]

4.1.1.3 Exceptional authorisation to film a case

Furthermore, a certain number of legal systems have already taken this step: while maintaining the principle of a prohibition, they have made increasingly broad exceptions. Often, these laws were preceded by initiatives from the judges who, on their own motion, sometimes authorised recordings of the hearing, in a grey area of the law.

Certain legal systems allow for the possibility of giving a media outlet or a private individual permission to film a particular hearing out of interest for that specific case, independently of any educational purpose.

The law of British Columbia is novel in this regard. It provides that the judge may give such an exceptional authorisation provided that the broad-

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65 Robert Badinter and Annette Wieviorka, 'Justice, image, mémoire' (2002), *Questions de communication* <https://journals.openedition.org/questionsdecommunication./6507>, accessed 26 October 2018.

66 Elisabeth Linden (ed) *Rapport de la Commission sur l'enregistrement et la diffusion des débats judiciaires* (La documentation française 2005).

67 See Claire Sécail, 'De la loi du 6 décembre 1954 au rapport Linden (2005): vers le retour des caméras dans le prétoire?' (2010) 15 Le temps des médias 282.

68 Institut Montaigne, *Faites entrer le numérique*, Report submitted in November 2017, 36-37.

cast of the hearing is in the public interest and that it will not 'affect the right of a party to a fair trial', 'cause discomfort to any witness', 'interfere with any privacy interests that may override the public interest in televising the proceedings'.[69]

Similarly, the Ontario Courts of Justice Act provides that: '[N]o person shall take or attempt to take a photograph, motion picture, audio recording or other record capable of producing visual or aural representations by electronic means or otherwise, at a court hearing' (article 136, paragraph 1). But it adds to this principle some very widely drafted exceptions.[70] In particular, it provides for the possibility that the judge may give authorisation 'where required for *any other purpose of the court hearing*'. The Ontario Superior Court recently applied this exception very broadly in a very high-profile case: the Court authorised the webcast and archiving of the trial in particular because of the political and historical stakes attached to the trial and with the aim of reinforcing the confidence that those concerned place in the justice system. Indeed, this case is an ongoing trial between 'First Nations' and the Crown of Canada, relating to natural resources and other revenues generated from the lands in northern Ontario which the First Nations surrendered to the Crown in an 1850 treaty.[71]

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69 Policy of the Provincial Court of British Columbia: '5.1 Applications may be made to a judge of the Court to televise or broadcast all or part of the proceedings in a particular case. It is the policy of the Court that such applications may be granted in the discretion of the presiding judge, provided that he or she finds that it is in the public interest that the proceedings, or part of them, be televised or broadcast, and that to do so will not:
5.1.1 affect the right of a party to a fair trial; 5.1.2 cause discomfort to any witness; 5.1.3 interfere with any privacy interests that may override the public interest in televising the proceedings; 5.1.4 have the potential effect of deterring witnesses in any future similar cases; 5.1.5 cause additional expense to the Court; or 5.1.6 otherwise potentially hamper the ongoing administration of justice in relation to Provincial Court proceedings'.

70 Courts of Justice Act, RSO 1990, ch 43 (last amendement, 2017), art 136 (3): 'Subsection (1) does not apply to a photograph, motion picture, audio recording or record made with authorization of the judge, (a) where required for the presentation of evidence or the making of a record or for any other purpose of the court hearing; (b) in connection with any investitive, naturalization, ceremonial or other similar proceeding; or c) with the consent of the parties and witnesses, for such educational or instructional purposes as the judge approves'.

71 Supreme Court of Canada, 5 January 2018: allows internet live streaming and archiving of live stream video of the Robinson Huron Treaty (RHT) Annuity case, hailed as a step forward in reconciliation. Justice Hennessy stated: 'Collectively, as Canadians, we suffer a deficit in understanding our history and our relationship with our Indigenous neighbors. Creating and preserving an audiovisual record of

4.1.2 Systems with a principle of presumption of authorisation

Thus while many systems implement a principle of prohibition and organise more and more exceptions to the rule, others took an additional step and adopted what appears to be a second model: They set out the inverse rule, namely the presumption of authorisation of electronic film coverage of the hearing. Doing so, they implicitly approved not a presential but a virtual conception of publicity, in accordance with the contemporary concern with democratic transparency.

This presumption was set out by the Spanish Constitutional Court in 2004: reversing its previous case law, it held that the recording of images and sound during a hearing was only a manifestation of the principle of public access to hearings.[72] At the same time, it preserved the possibility that courts may forbid such recordings, on an exceptional basis, by a properly reasoned decision, in order to protect image rights and the right to privacy.

Besides, certain American states (like Nevada, Colorado or Washington) provide for a presumption of authorisation. As Emily Ittner showed, these states have created a presumption that electronic media coverage is allowed in proceedings that are accessible to the public.[73] The same goes for Utah. This latter State drastically changed its legislation in 2013, after a deep collective review that produced a detailed report.[74] Rule 4-401 of the Utah Code of Judicial Administration, which previously authorised the possession of electronic devices in court but forbade the use thereof, has now reversed the principle and the exception. It includes a second paragraph, entitled *Presumption of electronic media coverage; restrictions on coverage*, that begins as follows: 'There is a presumption that electronic media coverage shall be permitted in courtroom proceedings that are open to the public.'

However, within the systems that have a presumption of authorisation, exceptions allow for this presumption to be rebutted, in particular in consideration of factors such as the right to a fair trial, privacy concerns, and safety interests. But the legislation concerned encourages the judge to

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this evidence increases its usefulness and accessibility. It is a significant contribution to our national understanding.'

72 Tribunal Constitucional de España, Sent. 57/2004, 19 April 2004.

73 Emily Ittner, 'Technology in the Courtroom: Promoting Transparency or Destroying Solemnity?' (2014) 22 Comm Law Conspectus 347.

74 Utah State Courts, *Final Report. Judicial Council Study Committee on Technology Brought into the Courtroom* (10 April 2012): <https://digitallibrary.utah.gov/awweb/awarchive?item=54733> accessed 02 November 2018.

implement these exceptions to a greater or lesser extent. In Utah, for instance, the tone of the text is rather dissuasive for the judge: 'Limitations on electronic media coverage must be supported by reasons found by the judge to be *sufficiently compelling* to outweigh the presumption.' (paragraph 2, *in fine*).

4.2 Need for Harmonisation: In Search of a Common Framework

Given these disparate regimes, it is easy to see the need for a new statutory framework. While it is too early to propose a *uniform* framework, we can at least give a rough draft of some *guidelines* for harmonisation. Several possibilities are apparent.

4.2.1 The necessity for a common framework where the recording is institutional

Eventually, the most ambitious solution would be that each legal system organises the audiovisual recordings of its hearings itself and that it determines the broadcast conditions thereof, subject to the respect of the parties' rights.

By way of example, the UK Supreme Court, which provides for the broadcast of its hearings by webcast, specifies on its website that 'the re-use, capture, re-editing or redistribution of this footage in any form is not permitted.' Nevertheless, in a time when anonymous videos are posted on YouTube, it is not certain that this last prohibition is sufficiently protective, whatever the penalties provided. As for Spanish law, which allows for the dissemination of civil hearings by providing copies upon request, it does not even include a provision relating to the use that a third party could make of the video recording of the hearing that is obtained in this way.

4.2.2 Institutional duty to protect the parties' rights

It appears logical that, in the event that courts or legal systems organise the dissemination of their hearings, it falls to them to take the necessary steps to protect the parties' rights.

One could imagine several ways in which this could be done. The names of the parties or witnesses could be anonymised during the hearing itself, as the European Court of Human Rights does; but for more run-of-

the-mill justice, this could be complicated to implement. In addition, certain techniques could be implemented before broadcast: blurring faces, beeping out names. The trial could be made available online only for a given period, and in conditions that then guarantee the right to be forgotten.

More generally, two precautions could be taken, inspired by the techniques currently used in investment treaty arbitrations. On the one hand, hearings should not be broadcast live but always with a delay (even a slight one). This delay allows the preservation of the privacy of any parts of the trial process that may compromise any of the parties' rights. On the other hand, during a public hearing, the lawyers should be able to indicate to the judge that a confidential exhibit or piece of testimony is about to be discussed. In such an event the judge could grant the suspension of the recording of the hearing, for the duration of this discussion.[75] These practices allow the principle of public access to hearings to be infringed upon in a proportionate manner. Not the entirety of the hearing, but only a part of it, would be kept from the public eye.

The body of practices thus described would allow, in addition, the respect of European requirements in relation to the protection of data. Yet this requirement is an essential one. Indeed, in every jurisdiction where the authorities choose to authorise the online broadcast of proceedings, it is foreseeable that certain economic entities will implement the systematic processing of the personal data made available by the online broadcast of these hearings. Such activity would require adapted legislation in each country and would in any event fall within the scope of EU Regulation 2016/679 of 27 April 2016 known as the General Data Protection Regulation (GDPR).[76]

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75 The technique is used in ICSID arbitrations, by application of Rule 32 relating to Oral Procedure: 'Unless either party objects, the Tribunal […] may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.' See also article 6 of UNCITRAL Rules for Transparency, which allows the judge to organise the video recording of the hearing, but specifies that: 'the arbitral tribunal may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this becomes necessary …'

76 However, the systematic processing of the data provided by online hearings seems more burdensome to implement (and less economically beneficial) than the processing of data provided by written material. In addition, for now, the theoretical

4.2.3 Guidelines for recording by media outlets or private individuals

To conclude, I turn to the most frequent example, in which the audiovisual recording is not institutional in origin, but is made by media outlets or private individuals. It seems that a few guidelines can be laid out.

Firstly, modern legislation should adopt texts – even simple court protocols – to govern the use of information technologies within them. But the question cannot be handled at the national level alone. Eventually, the European institutions should continue to deal with this issue. In the same way, bodies such as ELI-Unidroit could usefully suggest texts aimed at such a harmonisation.

Secondly, these texts should ensure that real power should remain with the judge to decide, *in fine*, on the proper use of technology in each case. On this basis it is ultimately unimportant whether there is a presumption of authorisation or prohibition of the recording of hearings, with exceptions. The main thing is to allow the judge a broad margin of appreciation in the exercise of his or her power. Indeed, the rights and guarantees that could be affected by public access are many (fair trial, privacy, trade secrets, etc.); each case should be examined with care *in concreto* in all its aspects, on a case-by-case basis.

Thirdly, in taking his or her decision the judge must use the principle of proportionality. Indeed, though the use of communication technologies must certainly be favoured – far from any 'dated' position; one must ensure that it does not breach the rights of the parties. It must therefore be implemented both *proportionally and reasonably*. This consideration weighs heavily in the case law of the European Court of Human Rights. A balance must always be found between publicity and the respect for privacy, for example. In this way, the Spanish Constitutional Court provides that to prohibit exceptionally the electronic coverage of a hearing, a judge must consider the issue of the proportionality between, on the one hand, the right to access hearings and, on the other, the right to privacy and image rights.

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and practical considerations have been focussed on the open data of court *decisions* and not on the question of the hearings themselves. See Loïc Cadiet (ed), 'L'open data des décisions de justice, rapport de la Mission d'étude et de préfiguration sur l'ouverture au public des décisions de justice' (9 January 2018): <www.justice.gouv.fr/publication/open_data_rapport.pdf>.

4.2.4 Example of the balance to be struck between trade secrets and open justice

In the same way, the need to balance the privacy of confidential business information with the principle of open justice has been recognised by the English Courts. Part 39.2 of the Civil Procedure Rules affirms that, while the general rule is for a hearing to be public, exceptions can be made where necessary. This premise was illustrated in the recent case of *Sahaviriya Steel Industries UK Ltd v Hewden Stuart Ltd*.[77]

This concern for balance now has a basis in European law since the adoption of the EU Directive on Trade Secrets of 8 June 2016.[78] Under Article 9, 'Member States shall … ensure that the competent judicial authorities may, on a duly reasoned application by a party, take specific measures necessary to preserve the confidentiality of any trade secret … in the course of legal proceedings …, *including in these measures the faculty of 'restricting access to hearings'*. The Directive provides that 'When deciding on [these] measures *and assessing their proportionality*', the competent judicial authorities shall take into account, in particular, the right to a fair trial, the legitimate interests of the parties or even third parties, and any potential harm for them.

4.2.5 Proportionality test

Common law has in fact developed a precise approach to the principle of proportionality. Canadian case law[79] uses the *proportionality test* to give adequate protection to the rights of individuals, while preserving as far as possible the central value of public access.[80]

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77 *Re Sahaviriya Steel Industries UK Ltd v Hewden Stuart Ltd* [2015] EWHC 2877 (Ch) [2016] BCC 456, Chancery Division (Manchester District Registry) 13 October 2015 HH Judge Pelling QC (sitting as a judge of the High Court).

78 Directive (EU) 2016/943 of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (8 June 2016).

79 Supreme Court of Canada, *Dagenais v Canadian Broadcasting Corporation* [1994] 3 SCR 835; *R v Mentuck* [2001] 3 SCR 442.

80 Emma Cunliffe, 'Open Justice. Concepts and Judicial Approaches' (2012) no 40 Federal Law Review 407; Catherine Piché, 'Justice Wide Open: Transparency of the Judicial Process in Modern Technological Courtrooms' in Dominique Custos (ed), *La transparence, un principe de gouvernance, Actes du XIIe Congrès de l'Association Internationale de Méthodologie Juridique* (Bruylant 2014) 236.

This test is in two stages. The first consists in a test of necessity: the restriction to the principle of public access must be necessary: It must be *necessary* to do so in order to prevent serious risk to the administration of justice and other means would not achieve the same result. *Then* comes, secondly, the proportionality test proper: the salutary effects of the limitation must outweigh any deleterious effects on the interests of the public.

We find the same requirement in the preliminary article of the new Code of Civil Procedure of Quebec which came into force in 2016, which sets the principle of procedural proportionality:[81] 'The Code is designed … to ensure the accessibility, quality and promptness of civil justice, *the fair, simple, proportionate and economical application of procedural rules*, *the exercise of the parties' rights in a spirit of co-operation and balance*'.[82]

This measured approach appears to be very useful in guiding the courts. In fact, certain judicial practices could not successfully pass this test. Reference may be made to the original practice implemented in the United Kingdom, around 2010, known as 'super-injunctions' or 'curiosity-suppressant orders': these injunctions contained a double order of the courts: the order 'not to disclose an information' likely to harm the right to privacy, but also the order not to make public the existence of the injunction itself! This type of decision, thankfully rather rare, was heavily criticised[83] and then quickly abandoned.[84] It was definitely disproportionate: As the judges held, '[t]he orders for non-disclosure of the fact that an injunction had been obtained *was unnecessary* in view of the terms of the substantive injunction and circumstances of the case.'[85]

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81 On this principle, see Catherine Piché, 'La proportionnalité procédurale: une perspective comparative' (2009-2010) 40 Revue Droit Université Sherbrooke 552; Antoine Guilmain, *Le principe de proportionnalité procédurale à l'aune des techniques de l'information: pour une modernisation en modération de la procédure civile*, unpublished thesis 2018 Université de Montréal/Université Paris 1 Panthéon-Sorbonne, dir. Karim Benyelhlef et Emmanuel Jeuland; Sylvette Guillemard, *Le Code de procédure civile: quelles nouveautés?* (edn Yvon Blais 2016) 16 ff and 39 ff.

82 Code de procédure civile, disposition préliminaire, para 2 : 'Le Code vise… à assurer l'accessibilité, la qualité et la célérité de la justice civile, *l'application juste, simple, proportionnée et économique de la procédure et l'exercice des droits des parties dans un esprit de coopération et d'équilibre*'.

83 Adrian Zuckerman, 'Super Injunctions: Curiosity-Suppressant Orders Undermine the Rule of Law' (2010) 29 Civil Justice Quarterly 2, 131-138.

84 *Donald v Ntuli* [2010] EWCA Civ 1276, 16 November 2010 (Court of Appeal, Judge Lord Neuberger of Abbotsbury MR, Kay LJ, Sedley LJ).

85 Judge Lord Neuberger of Abbotsbury MR, Kay LJ, Sedley LJ, ibid.

4.2.6 The requirement to give reasons

In any event, the power of the judge to exclude public access should not be purely discretionary but reasoned. A party should know why a judge refuses to hold a hearing behind closed doors; likewise, the public prevented from attending the hearing should know the reason for the breach of the principle according to which 'justice must *be seen* to be done.'

5. Conclusion: a Right in Light and Shade

Following this exposé, we can measure the complexity of the questions addressed: certainly, 'Sunlight is the best disinfectant,' as Justice Brandeis once said. But the need to protect a number of fundamental rights in the era of new technologies requires, more than ever, that some shade is retained. Ultimately, the statutory framework for publicity should be in light and shade, in 'chiaroscuro.' This pictorial technique of the Renaissance should inspire tomorrow's legislators. The issue is indeed to ensure that justice is manifestly and undoubtedly seen to be done while preserving legitimate areas of obscurity. The 'renaissance' – the *rebirth* – of the principle of open justice in the digital era comes at that cost.

New Media in the Courtroom: Benefits and Challenges

Robert Magnus

1. Introduction

As a famous songwriter once said 'the times they are a-changing …'[1] and I want to add they are changing fast.

In only 2001 the Minister of Justice for North Rhine-Westphalia wrote in a legal journal that we are living today in a society which could not have been imagined back in the sixties.[2] The primary sources of information for citizens, so the minister said, are no longer print media but television and radio.

From this perspective, the year 2001 seems a millennium away and we are living today, once again, in a society which could not have been imagined back in 2001. Today's most important source of information is, by far, the internet including official websites of publishing houses or governments, blogs by prominent and not so prominent persons, the social network and so on. This digital revolution has led to major transformation in almost every aspect of modern society. The field of law is no exception.

There are two possible influences of the new media which have to be distinguished. On the one hand, the question arises how courts should or could adapt to the new technologies within the courtroom and during public hearings. On the other hand, the changed flow of information might also influence the way in which hearings and court proceedings in general should be presented to the public. I will start with the first issue and will afterwards address the second.

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1 Bob Dylan, 'The Times They Are A-Changin' (1964).

2 Jochen Dieckmann, 'Zur Zulassung von Ton- und Fernseh-Rundfunkaufnahmen in Gerichtssälen: "Drum prüfe, wer sich ewig bindet!"' (2001) Neue Juristische Wochenschrift 2451, 2452.

2. The Use of Modern Technologies within the Courtroom

2.1. Video Conferences and Video Interrogations of Witnesses and Experts

Recently, statements have been made that in the future a public hearing might be superfluous and the day in court will be substituted with a video-conference allowing all parties and judges to stay at home because proceedings will occur in virtual rooms and via livestreams.[3] In my opinion, this is a vision of the future which is neither very likely nor desirable.

As proceduralists of different generations and in different centuries have rightfully pointed out: The public hearing in court with the physical presence of the parties, witnesses and judges has its undoubted merits,[4] which cannot be substituted at all.

Especially when the trustworthiness and credibility of a witness is in doubt, it is of essential importance that judges have an immediate and direct impression of witnesses.[5] This impression cannot be gained with the same effect via video or be substituted with a video interview. The physical presence of all parties concerned is also very important when the court is trying to settle a dispute amicably.[6]

For this and other reasons I think, 'the last day in court' is not soon to come and the influence of the new media on courtroom public hearings will always be rather limited.

On the other hand, a video interrogation of an expert or a witness is better than no interrogation at all. If all parties concerned agree to such a procedure and the video interrogation usefully saves time and money, I see no reason why it should not be allowed.[7] Nevertheless, the video conference will remain an exception with rather limited use in specific circumstances.

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3 Compare, for example, the study 'Civil Courts Structure Review' by Lord Justice Briggs (2016), in which a wide-ranging introduction of Online Courts in the United Kingdom is proposed <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> at para 6.

4 See Christoph Kern, 'Der Unmittelbarkeitsgrundsatz im Zivilprozess', (2012) 125 Zeitschrift für Zivilprozess 53, 70 with further references.

5 Münchener Kommentar zur Zivilprozessordnung/Fritsche § 128a (14); Barbara Völzmann-Stickelbrock, 'Unmittelbarkeit der Beweisaufnahme und Parteiöffentlichkeit – Nicht mehr zeitgemäße oder unverzichtbare Elemente des Zivilprozesses?' (2005) 118 Zeitschrift für Zivilprozess 359, 372.

6 Musielak/Voit/Ulrich Foerste § 278 (5) Zivilprozessordung (ZPO) (German Code of Civil Procedure).

7 Compare § 128 a ZPO.

2.2. *Video and Audio Recordings of the Hearing for the Internal Use of the Parties and the Court*

Another question which has not yet received much attention in the recent discussions is whether or not public hearings should be recorded by camera or audio devices and whether this recording should afterwards be made available (only) for the parties and the court.[8] In my opinion such a recording would have its merits. Especially in very complex lawsuits that stretch on for years or even decades, the exact content of a witness statement made in a public hearing years ago will not be available anymore when the judges eventually come to their decision. In such a situation a video or audio record might prove to be a very useful tool. This is even more so when a lawsuit covers several instances and the judges sitting in the appellate court have to decide about potential errors in the procedure of the court of first instance. Experiences with such devices, for example in Spain and France and in international commercial arbitrations, are rather encouraging as well.[9]

The arguments brought forward against the use of such recordings[10] are in my view not very convincing. In a society and century where almost every action is video recorded and uploaded via YouTube on the internet, witnesses and parties are unlikely to be intimidated by the mere presence of a camera in the court room, especially since use of the recording would be strictly limited to the court and the parties involved.

2.3. *The Use of Electronic Devices in the Audience*

A further unsolved potential conflict lies in the question how the court should deal with the use of electronic devices by the audience. Should

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8 A proposal to extend these possibilities in German law was recently made by Klaus Rennert, Vortrag beim Deutschen EDV-Gerichtstag (22 March 2017) in Berlin, at <https://www.bverwg.de/medien/pdf/rede_20170322.pdf> accessed 25 October 2018.

9 See Gutachten der Großen Strafrechtskommission des Deutschen Richterbundes, 'Ist das 1964 geschaffene Verbot von Bild- und Tonübertragungen aus Gerichtsverhandlungen noch zeitgemäß?' (2013) 36, https://www.bmjv.de/SharedDocs/Downloads/DE/StudienUntersuchungenFach-buecher/Gutachten_Strafrechtskommission Richterbund_%C2%A7169.pdf?__blob=publicationFile&v=3, accessed 25 October 2018.

10 See Christian von Coelln, 'Mehr Medienöffentlichkeit vor Gericht?' (2016) Zeitschrift für Medien und Kommunikationsrecht 491, 493.

spectators be allowed to 'tweet' their impressions of a public hearing or to stream them live on the internet?[11] This problem is handled in various ways in different legal systems. The more modern approach, practiced for example in the Netherlands,[12] seems to allow such a use as long as it does not interfere with or disturb the public hearing.

The unwelcome influence of these postings on witnesses waiting outside the court room[13] before their hearing can quite easily be prevented by keeping them in a room without internet access.

The filming of oral hearings via smartphone in the audience might, on the other hand, stretch the boundaries too far and cause problems with regard to the protection of sensitive data.[14]

2.4. Privileged Entrance for Members of the Media to the Courtroom

A problem which has arisen in Germany in connection with the trial of a terroristic neo-Nazi society (NSU)[15] was whether or not – and according to which criteria – representatives of the media should be given priority access to the limited space in the court room.[16] Here the changed landscape of the media in the age of internet and smartphone comes into play. If there is a priority access for representatives of the media, which the German Federal Constitutional Court has strongly supported, who should represent the so-called *new media* (eg internet blogs, homepages, Instagram accounts) and how are their representatives distinguished from the ordi-

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11 Münchener Kommentar zur Zivilprozessordnung/Walter Zimmermann § 169 (44) Gerichtsverfassungsgesetz (GVG) (Courts Constitution Act); a different view is expressed by Henning Krieg, 'Twittern im Gerichtssaal' (2009) Kommunikation & Recht 673.

12 See Burkhard Hess, 'Die Justiz muss sich öffnen', Frankfurter Allgemeine Zeitung (15 April 2016) http://www.faz.net/aktuell/politik/staat-und-recht/justiz-transparenz-durch-neue-medien-in-der-debatte-14176571-p3.html, accessed 25 October 2018.

13 Henning Krieg, 'Twittern im Gerichtssaal' (2009) Kommunikation & Recht 673, 676 ff.

14 Münchener Kommentar zur Zivilprozessordnung/Walter Zimmermann § 169 (48) GVG.

15 Mehmet Gürcan Daimagüler/Alexander Pyka, '"Politisierung" im NSU-Prozess – Unnötige Verfahrensverzögerung oder umfassende Aufklärung?' (2014) Zeitschrift für Rechtspolitik 143.

16 Compare the decision of the *Bundesverfassungsgericht* (German Federal Constitutional Court) (2013) Neue Juristische Wochenschrift 1293.

nary audience? Is every small blogger part of the press and therefore able to claim priority access? These are questions which lie at the very heart of the constitutional guarantee of freedom of the press.[17] They probably require a different concept and a new understanding of the role of the media and the transmission of information in a modern society.

3. The Adaptation of the Public Hearing to the New Media Outside of the Courtroom

I want to proceed with some short remarks to my second issue: the possible presentation of the public hearing outside the courtroom.

3.1. Live Recordings of Public Hearings on Television or on the Internet

It has been discussed at length whether live recording and distribution of public hearings on television or on the internet is desirable or advisable.[18]

In my view, such a possibility should only be considered in specific circumstances, since in most trials protection of the privacy of the parties and the potential negative influence on witnesses or parties giving statements will discourage worldwide broadcasting of a public hearing.

Potentially more restrictive options might include television broadcasting of the delivery of verdicts by the supreme courts, which has recently been introduced into German law,[19] or even of public hearings before such courts.

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17 In Germany, the guarantee in art 5 para 1 of the Grundgesetz (Basic Law for the Federal Republic of Germany) reads as follows: 'Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed.' The internet as a primary source of information is not mentioned at all.

18 Bettina Limperg/Rudolf Gerhardt, 'Gründe gegen Fernsehübertragungen aus dem Gerichtssaal – Die Rechtskultur würde sich unweigerlich verändern' (2016) Zeitschrift für Rechtspolitik 124; Steffen Rittig, 'Mehr Medienöffentlichkeit im Gerichtsverfahren – Zu den Reformüberlegungen zu § 169 GVG' (2016) Neue Justiz 265; Ulrich Franke, 'Öffentlichkeit im Strafverfahren' (2016) Neue Juristische Wochenschrift 2618, 2620; Ali B Norouzi, 'Öffentlichkeit im Strafverfahren' (2016) Strafverteidiger 590, 594 f.

19 Cf § 169 (3) GVG.

Another possible option would be that, instead of live broadcasts by a television channel, only a revised and *censored* video summary of public hearings be made available on the homepage of the respective court. This is already being done by several international tribunals and the Supreme Court in London[20] these days.

3.2. *Official Websites of the Judicial Branch in the Internet*

In the age of 'fake news' and conspiracy theories on the internet, the fight for true and correct information is of crucial and vital importance. This is also a task the judiciary should not at all neglect. Clear structured, transparent and regularly updated homepages, officially administered by the legal institutions themselves are not only a regular service to the public but thus a necessity. Whether such regular updates and transmission of information by the courts should also use other media such as Facebook, Twitter or Instagram is, on the other hand, rather a question of style. In order to increase the visibility of the court system also for the younger generation more flexibility and rather innovative means of presentation might be useful and advisable.

4. *Summary*

The internet and the new flow of information changes everything, but as far as the public hearing in civil procedure is concerned the changes might not be as fundamental as some authors expect. The day in court is a legal tradition that has been established for more than two thousand years and there are good reasons why it will and should last another few centuries.

And finally, to quote another songwriter, I think something else still remains crystal clear: 'The revolution will not be televised … the revolution will be live.'[21]

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20 See <https://www.supremecourt.uk/live/court-02.html> accessed 25 October 2018.
21 Gil Scott-Heron, 'The Revolution Will Not Be Televised' (1970).

Public Hearings in Civil Proceedings: From the Perspective of a Luxembourgish Judge

Jean-Claude Wiwinius

I would like to thank Professor Burkhard Hess and the Max Planck Institute Luxembourg for inviting me to take part in this high level and exciting conference.

I have been an acting judge for more than 35 years now. In this regard, please note that I enter the debate less as a scientist – I am not an academician – but rather more as a practitioner from a national court.

Since the very first interview I had the opportunity to grant a journalist after becoming president of the Supreme Court on 2nd August 2016, I have been asked questions about, not only the very important subject of the independence of justice in Luxembourg, but also about transparency of justice, access to justice, and thus the topic of the present conference 'Open Justice'.

Courts, especially national courts, are often criticized for lacking transparency compared to the two other branches of state powers. Transparency plays an important part in the Rule of Law. Transparency allows citizens to be kept informed, enabling them to develop a better understanding of the functioning of proceedings and of the different workings of the courts, thus narrowing the gap between courts and society. Even if opening up the courts to the public and improving judicial transparency is a huge task, this ought to be done. Transparency enhances indeed the public's faith in Justice. And public trust in institutions is based on public trust in individuals (i.e. the judges).

It is no secret, and the discussions of Panel II[1] that we heard earlier have proved this, that what captures journalists' interest is drama, namely criminal trials (sex and crime – *Mord und Totschlag* in German). Civil proceedings are, from the media's point of view, of much less interest.

Nevertheless, having served for many years as a civil court judge, as well as in my function as president of the Supreme Court, I feel compelled to show to the public that justice is not only made of criminal cases, but also

1 Panel II of the *Open Justice* conference dealt with the topic of 'Public Hearings in Criminal Proceedings'.

and mainly of civil cases, including commercial law, labour law, social security disputes, (at our Court of Appeal in Luxembourg, for instance, of the 11 chambers only three focus on criminal and correctional matters) and I have also committed myself to describing to my interlocutors what is happening in those jurisdictions.

To one of the first questions I have been asked concerning my projects, I replied that I intend to stress the visibility of justice, if possible and necessary. In fact, giving visibility to justice is part of public service and is an area where things remain to be done to show what justice is. This may moreover also enhance the quality of justice.

In this context I think we, as judges, have to adopt a more proactive approach towards the media. At a time when citizens become more and more suspicious of other institutions – politics, media – this increasing visibility of justice should help maintain everyone's trust in justice.

When delivering a speech to explain my work, I always observe two things: On the one hand, I find that people know very little about our work, but on the other hand they are very interested in what we do. I always have the feeling that they listen to my speech until the end. However, I also notice that the big challenge remains the technical language, which is based on the precise application of legal regulations. Thus, conveying the educational impact of legal proceedings and court decisions is not always an easy task.

Until recently, transparency meant freely entering the courtroom, observing the court's proceedings, and hearing the court's decisions. And in order to do so, the public had to go to the courthouse. Today, however, the public has a different understanding of what a transparent court system means due to technology which makes everything readily available. Nowadays, we mainly speak about online transparency meaning that court proceedings and all relevant aspects of court performance can be made remotely available to the people in a form they can grasp.

Courts are, in principle, open to all citizens wishing to attend a public hearing, but in practice very few people have the time or the opportunity to personally see what is happening in our courts. People therefore rely on television and the internet to access information. This fact, combined with the huge growth in information technology, has raised people's expectations to be able to see and hear things by themselves. I am, therefore, under certain conditions, in favour of filming or recording in courtrooms. Indeed, there is no doubt that the presence of TV cameras during proceedings may disturb people involved in the trial (judges, prosecutors, lawyers, parties, witnesses, etc. some of them seeking publicity) and may even alter their behaviour. Therefore, I consider that broadcasting should be limited

to the public pronouncement of the judgment. And filming or recording should only be done with the permission and under the supervision of the court. Needless to say, access to information must also go hand in hand with accurate and fair reporting. Journalists should be trained to report on legal issues and proceedings so that they can provide intelligent and sound accounts of what is happening in courts. This could also avoid the public pressure that is put on judges often through social media.

In Luxembourg, as in many other countries, judges mainly express themselves through their decisions, which they should not comment on in the press. I however wonder if it would not be appropriate, concerning trials of major public interest, to allow a judge to briefly explain his or her decision after its public pronouncement and, if necessary, to clarify in simplest terms the main points and arguments of a decision to journalists.

Moreover, representatives of the judiciary, with the authorization of their hierarchy, of course, should also not shy away from giving interviews in public on general, legally important issues. Press releases on the court's website and on general website accounts are additional ways of informing the public about the main court events.

Another of the peculiarities of open justice lies, in my opinion, in the language used by justice officials both in writing and orally. A simple, concise and clear judicial language is beneficial to everybody as it makes the rule of law accessible and foreseeable for citizens. Judgments must be interpretable and understandable not only by lawyers, but also by non-lawyers.

As far as the spoken language is concerned, in Luxembourg, in oral hearings, we speak Luxembourgish. But, if you prefer to express yourself instead in French or in German, you may also do so. As far as written decisions are concerned, the legal language is French. In our judgments, we cultivate the French language to the point of accurately applying the appropriate rules of punctuation.

Another important aspect of transparency of justice is that an independent, non-corporatist body – a lot of countries know this body as a 'Council of Justice' - is competent for the appointment of the judges. I dedicated my inaugural speech as president of the Supreme Court to the independence of the judges. I outlined that one of the most important aspects concerning this independence regards judges' selection, appointment and career. The rules to this effect are crucial for the quality of the judicial system, for trust in justice and for the degree of the judges' independence.

I therefore felt that measures had to be taken in order to introduce procedures for the appointment and promotion of the judges which are transparent, based on objective criteria relating to the exercise of a public func-

tion, focusing above all on the candidate's skills and experience, thus his merit, and which are obviously free of political interference.

I also outlined, regarding the designating authority, that it is widely acknowledged on an international level that this authority must be independent of the executive and legislative branches of government.

Apart from access to the Courtroom, another important aspect of access to justice is access to jurisprudence, which means broader publication of court decisions. What effects will result from wide access to jurisprudence? For instance, the outcome of certain cases may become predictable and the most predictable cases may be settled beforehand. Legislative interest in jurisprudence is also enhanced and the legislature, understanding how courts are interpreting and apply certain laws, receives feedback which furthers and assists the development of legal regulations.

That's the aspect that lawyers, but also researchers and university professors, are mainly interested in. I have repeatedly been approached by editors of certain law journals, professors from the University of Luxembourg and also researchers from the Max Planck Institute pointing out that Luxembourg is lagging behind numerous other countries in this regard.

This is not false and we could do more.

It is right that all the judgements of the Court of Cassation and Constitutional Court may be retrieved, since 2007, in a fully anonymized format on the Justice website[2]. The same applies for decisions of the administrative jurisdictions which are totally available to the public. The important decisions of other jurisdictions are listed mainly in the 'Pasicrisie' and other compilations such as the 'Journal des tribunaux'.

But, of course this is not enough. There are many important judgements from the courts of first and second instance which must be brought to the knowledge of the public, lawyers and researchers.

Where does the problem lie, considering that technology makes everything possible? For several years those decisions have been available in electronic format on the Justice's intranet server, which is accessible to all the judges: but, then, why have they been made available only to them?

The major problem remains the necessity, if not the requirement, to anonymize court decisions. This is an enormous undertaking. Allow me to make a personal comment on this: Of course, I am in favour of the anonymization of decisions concerning private aspects of people's lives, such as divorce decisions or juvenile cases, for example. There is no need to

2 See <www.justice.public.lu> accessed 25 October 2018.

expose everything to public view either. But, on the other hand, we should not go too far, either.

The big defender of human rights and of the rights of the defence, the European Court of Human Rights (ECtHR) in Strasbourg, has all its judgments published and many of them are not anonymized. The judgements of the international courts are quoted by the name of the concerned person and not by a number (for example, most of the leading cases are the *Procola* ruling, the *Kemp* judgement, *Van Gend and Loos*, *Kohll and Decker*, *Google v Spain*, etc). A few days ago, I participated in Strasbourg at the solemn hearing to mark the beginning of the European Court of Human Rights judicial year. President Raimondi and President Lenaerts from the European Court of Justice in Luxembourg did not stop quoting their key judgments by the names of the parties.

I believe indeed that, by *over*-anonymizing, we should not fall into the opposite extreme nor into a ridiculous situation. I recently spoke, at the Forum of Judges organized by the Court of Justice of the European Union, to my German colleagues – in Germany, rules regarding the anonymization question are very strict – who cited by way of example one decision where one of the parties was referred to as 'Frau Kanzlerin M – Mrs. Chancellor M.'

In this context everything is a question of achieving a balance between data protection and right to privacy on the one hand and openness of justice, transparency, and access to information on the other hand.

There is no discussion: According to Article 8 of the Charter of Fundamental Rights of the European Union, we must ensure that personal data is protected. However, the right to such protection is not absolute and must be reconciled with another fundamental right enshrined in article 47 of the same Charter of Fundamental Rights, namely the publication of judgements. Public justice is also a fundamental principle of a State grounded on the rule of law. It is thus essential to find the right balance between publication of judgements and protection of privacy.

Needless to say that transparency also promotes accountability, the accountability of judges, but this is another issue, which merits to be discussed in more depth (perhaps during another conference).

I wish to conclude by saying: if Luxembourg is not a *Vorreiter* of Open Justice – I think that especially the Baltic States and some Scandinavian States are – we, nevertheless, are on the right path to becoming so. Compared to some years ago there is less reticence to opening the doors to the public and I am convinced that the leaders of our Judiciary, together with the Ministry of Justice – it is important to emphasize this as well – will achieve, sooner or later (I hope and I think sooner) this goal.

As a judge, I would say, we have a great deal to win and little to lose from being transparent.

How to Justify the Open Court Principle in Criminal Proceedings*

Katrin Gierhake

1. *Introduction*

In Germany, the legal basis of the open court principle is found in section 169 S 1 of the Courts Constitution Act (*Gerichtsverfassungsgesetz*, GVG): 'The hearing before the adjudicating court, including the pronouncement of judgments and rulings, shall be public.'[1]

This principle of publicity applies not only to ordinary jurisdictions, but also, for example, to labour courts, administrative courts and the Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG).[2] The open court principle means that everyone is permitted to enter the courtroom during the main hearing, as long as there is enough room.[3]

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* This text is a short version of an article that has been published in German: Katrin Gierhake, 'Zur Begründung des Öffentlichkeitsgrundsatzes im Strafverfahren' (2013) 68 Juristenzeitung 21, 1030-1038. I would like to thank the translators and editors provided by the Max Planck Institute Luxembourg, Ushanthi Wezenberg and Alex McCafferty, and Dr. Brian Cooper (Bonn) for their excellent work.

1 See also Art 6, para 1 of the European Convention of Human Rights: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

2 See § 52 ArbGG, § 55 VwGO, § 61 SGG, § 17 BVerfGG. Voluntary jurisdiction, proceedings under the JGG (minors), when the defendants are all minors (§ 48 I JGG) are not public. See Otto Rudolf Kissel/Herbert Mayer, *Gerichtsverfassungsgesetz* (6th edn CH Beck 2010) § 169, para 5ff.

3 Eberhard Schmidt, *Deutsches Strafprozessrecht – Ein Kolleg* (Vandenhoeck & Ruprecht Verlage 1967) 65; Lutz Meyer-Goßner, Bertram Schmitt, *StPO mit GVG und Nebengesetzen* (55th edn CH Beck 2012) § 169 GVG, para 3; critical about this narrow understanding of publicity, as access to the main hearing Joachim Scherer, *Gerichtsöffentlichkeit als Medienöffentlichkeit* (Athenäum 1979) 1-4 (according to

In his 1960 essay, Bockelmann observed that no other provision in the current procedural law is as uncontested as this one.[4] The German Federal Court of Justice (*Bundesgerichtshof*, BGH) describes the principle of publicity as an 'ancient democratic claim' that 'entered the consciousness of the people as a matter of course' and therefore 'needs protection from any form of weakening'.[5] The publicity of criminal proceedings is one of the 'fundamental principles of the constitutional state'.[6] The importance given to the principle of publicity in criminal procedural law by the legislator is reflected by the fact that a violation of open court principle section 338 No 6 Criminal Procedure Act (*Strafprozessordnung*, StPO) is an absolute ground for appeal.[7]

So, if this principle of the publicity of proceedings is really that uncontested and its standing is so self-evident, an argument for its legitimacy seems redundant. Should the grounds for a principle that is commonly accepted and even protected and enforced by legislation and the judiciary be questioned? The answer has several elements:

- First, justification of principles in the law is required even apart from when conflicts arise in the application, scope or interpretation of legal norms. Existing principles and concepts of law have to withstand a critical evaluation by the individuals governed by them, and be considered reasonable and just.[8]

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him, publicity means 'transparency of the judicial process'; on the limitation of the public according to available space, see Claus Roxin/ Bernd Schünemann, *Strafverfahrensrecht* (27th edn CH Beck 2012) 412 (with further references). On the term 'indirect publicity' through media: Scherer argues that publicity through media should have the same meaning as publicity in terms of § 169, para 1 GVG. For the difference between direct and indirect publicity, see Eberhard Schilken, *Gerichtsverfassungsrecht* (4th edn CH Beck 2007) para 171ff, 178ff: direct publicity affects personal attendance during the court hearing, while indirect publicity means the coverage and reporting for the entire public through media, for example print, TV and broadcast. See also: Jochen Witzler, *Die personale Öffentlichkeit im Strafverfahren* (Centaurus Verlag 1993) 157.

4 Paul Bockelmann, 'Öffentlichkeit und Strafrechtspflege' (1960) NJW 217.

5 See BGHSt 4, 279 (283) with reference to BGHSt 1, 334 (335) and 2, 56 (57).

6 BGHSt 9, 280, 281. See also Rudolf Kissel/ Herbert Mayer (n 2) § 169, para 4 (with further references).

7 See also BGHSt 1, 334 (335, 336); 4, 279.

8 Rainer Zaczyk, 'Über Begründung im Recht' in: Rainer Zaczyk, Michael Köhler, Michael Kahlo (eds), *Festschrift für E.A. Wolff* (Springer 1998) 409ff.

- Further, the meaning of the concept of open court has shifted noticeably in recent decades.[9] On the one hand, the rising influence of the media has promoted an increased concern for the privacy rights of persons involved in proceedings, especially in criminal matters.[10] On the other hand, the question arises if and under which circumstances the media must be granted access given the limited space of any court room.
- Finally, justification of the concept of publicity in criminal proceedings is necessary because its observance in practice is not as self-evident as portrayed in the above-cited literature and jurisprudence. The practical relevance of the principle of publicity has been seriously threatened by the profound change to the Criminal Procedure Act in 2009, which allowed agreements regarding the proceedings between the parties.[11] The introduction of plea bargains in criminal proceedings has also, as Roxin and Schünemann put it, 'paralysed the concept of publicity as a control mechanism in the constitutional state.'[12]

2. *The Foundations of the Principle of Public Proceedings*

First, I will outline the different lines of reasoning and their sources in the literature of the Enlightenment (section 2.1.), and secondly, I will present the specific reasoning in the area of criminal procedure (section 2.2.).

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9 See Eberhard Schmidt, *Justiz und Publizistik* (Mohr Siebeck 1968); B. Tag, *Die Öffentlichkeit der Hauptverhandlung/ Eine Prozessmaxime im Wandel der Zeit* (Gullivier Verlag 1999); Jochen Witzler (n 3), 46ff; see, for a socio-historic perspective, Jürgen Habermas, *Strukturwandel der Öffentlichkeit/ Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft* (Luctherhand 1962).

10 See Heike Jung, 'Öffentlichkeit – Niedergang eines Verfahrensgrundsatzes?' in: Hans Joachim Hirsch, Günther Kaiser, Helmut Marquardt (eds), *Gedächtnisschrift für Hilde Kaufmann* (De Gruyter 1986) 891, 892.

11 Gesetz zur Regelung der Verständigung im Strafverfahren (dated 29 July 2009, applicable since 4 August 2009, BGBl I 2009, 2353. See: BVerfG, Judgement of 19 March 2013 – 2 BvR 2628/10, 2 BvR 2883/10, 2 BvR 2155/11.

12 Claus Roxin/ Bernd Schünemann, *Strafverfahrensrecht* (27th edn CH Beck 2012), 411.

2.1. General lines of reasoning and their foundations in the literature of the Enlightenment

2.1.1. Contemporary stand on the spirit and purpose of the guarantee of the principle of publicity

If one looks for the spirit and purpose of the principle of publicity, one may find at least four lines of argument:[13]

(1) The public can assert, through their presence in a court room, a certain ability to control the workings of the courts.[14] This mechanism is supposed to ensure that the courts follow the binding, democratically legitimated law. Court decisions are legitimized by the presence and control of the public.
(2) The presence of the public is further supposed to ensure the independence of the courts,[15] as undue influence from the state or private individuals is not possible under public scrutiny.
(3) The publicity of proceedings also safeguards individuals against the dangers of 'secret justice'. The principle of publicity prevents justice from being delivered behind closed doors.[16]

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13 Peter-Paul Alber, *Die Geschichte der Öffentlichkeit im deutschen Strafverfahren* (Duncker & Humblot 1974) 36ff (historically); Bockelmann (n 4) 217 (218); Kissel/ Mayer (n 2) § 169, para 1 ff; Karl Peters, *Strafprozess* (4th edn CF Müller 1985), § 60, II c); Claus Roxin, 'Aktuelle Probleme der Öffentlichkeit im Strafverfahren' in: Jürgen Baumann, Klaus Tiedemann (eds), *Einheit und Vielfalt des Strafrechts, Festschrift für Karl Peters zum 70. Geburtstag* (Mohr Siebeck 1974), 393f; Claus Roxin/ Bernd Schünemann, (n 12) 409f; Manfred Wolf, *Gerichtsverfassungsrecht aller Verfahrenszweige* (6th edn CH Beck 1987) 243. Joachim Scherer (n 3) 5, holds that the purposes mentioned are partly inconsistent with one another.

14 See BGHSt 27, 13 (15: 'Kontrolle des Verfahrensgangs'); 24, 72 (74); Eberhard Schilken (n 3) para 155; Heinz Zipf, 'Empfiehlt es sich, die Vorschriften über die Öffentlichkeit des Strafverfahrens neu zu gestalten, insbesondere zur Verbesserung der Rechtsstellung des Beschuldigten weitere nicht-öffentliche Verfahrensgänge zu entwickeln?' *Gutachten C für den 54. Deutschen Juristentag* (CH Beck 1982), C 40ff; Edgar Jules Wettstein, *Der Öffentlichkeitsgrundsatz im Strafprozeß* (Schulthess 1966), 40ff; Historically on civil procedure Marie Theres Fögen, *Der Kampf um Gerichtsöffentlichkeit* (Duncker & Humblot 1974), 23ff; Herbert Schmidthals, *Wert und Grenzen der Verfahrensöffentlichkeit im Strafprozeß* (Peter Lang 1977), 118, n 190.

15 See also BGHSt 9, 280 (281).

16 BGHSt 7, 218 (221).

(4) The possibility of public scrutiny is further supposed to maintain and enhance public trust in jurisprudence.[17]

These four lines of argument are the result of the discussion on a fair justice system, which was already formed and established in the 18th and 19th century.[18] The discussion on the rationalisation of criminal procedure and the humanisation of substantive criminal law was the result of a new intellectual movement that regarded rationality and reason as the main measure and basis for all positive law.[19]

This movement was led by thinkers like Montesquieu and Voltaire in France, as well as Locke in England at the turn of the 18th century. In his book *On Crime and Punishment* (1766), Cesare Beccaria, a major figure of the Italian Enlightenment, argued for the humanisation of criminal law, and in particular for the publicity of criminal proceedings.[20] In Germany, those thoughts of the Enlightenment led to the important legal doctrines of Kant, Feuerbach and Hegel. Below I will briefly outline their thoughts on the principle of publicity,[21] before turning to specific issues concerning criminal proceedings.

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17 See also BGHSt 3, 386 (387); ECtHR, *Pretto and Others v Italy* (1983) NJW 2177; RGSt 70, 109 (112); BGHSt 9, 280 (281).

18 Summary of the debate on the principle of publicity in the era of Enlightenment in: Peter-Paul Alber (n 13) 18ff; A historical outline starting from the Roman process in: Jochen Witzler (n 3) 15ff; See also Carl J von Sparre-Wangenstein, *Ueber Geschwornen-Gerichte und das Verfahren in peinlichen Sachen* (the Bavarian State Library 1819) 84ff.

19 Eberhard Schmidt, *Einführung in die Geschichte der deutschen Strafrechtspflege* (3rd edn Vandenhoeck & Ruprecht 1995) § 203. For the historical debate in the era of Enlightenment in France, see Günter Haber, *Strafgerichtliche Öffentlichkeit und öffentlicher Ankläger in der französischen Aufklärung* (Duncker & Humblot 1979) 72ff (on Montesquieu), 85ff (on Voltaire), 106 ff (in particular on Beccaria), 135ff (on Rousseau). About the significance of the Enlightenment for law, state and society, see Ernst Cassirer, *Die Philosophie der Aufklärung* (Felix Meiner Verlag 1932), quoted from Volume 15 of the Hamburg Edition of the works of Ernst Cassirer (ECW) 313ff (with reference to Grotius, Leibniz, Pufendorf, Locke and Rousseau).

20 Cesare Beccaria, *Über Verbrechen und Strafen* (Insel Verlag 1755), translated and published by Wilhelm Alff), XIV, 78.

21 See also Torsten Liesegang, *Öffentlichkeit und öffentliche Meinung/ Theorien von Kant bis Marx (1780-1850)* (Königshausen & Neumann 2004).

2.1.2. *The open court principle in German legal philosophy of the Enlightenment*

Immanuel Kant argued in as early as 1795 that the principle of publicity is not merely one of many other procedural principles, but rather the basic principle fundamentally connected to the constitutional state. He contended: every (real) legal claim has the potential for publicity; without it, there would be neither justice, which can only be imagined as public, nor law at all.[22] He maintained that a lack of publicity indicates injustice. He wrote: 'All actions relating to the rights of other men are wrong, if the maxims from which they follow are inconsistent with publicity.'

Based on that reasoning, the mere formal principle of publicity is a criterion for the substantial lawfulness of an act.[23] It is remarkable how Kant substantiated this argument. He asserted that the incompatibility of a maxim for action (*Handlungsmaxime*) with the principle of publicity itself proves the injustice of the maxim, the reason being that the mere need for secrecy must indicate the unjust nature of the maxim. A general and necessary rejection by the public can only have its cause in the injustice of the maxim.[24]

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22 See Immanuel Kant, *Zum ewigen Frieden*, Anhang, II., B 98, 99; A 92, 93 (Immanuel Kant, *Perpetual Peace: A Philosophical Sketch, translated by Mary Campbell Smith* (Gale, Making of Modern Law 2013),185): 'If I look at public right from the point of view of most professors of law, and abstract from its matter or its empirical elements, varying according to the circumstances given in our experience of individuals in a state or of states among themselves, then there remains the form of publicity. The possibility of this publicity, every legal title implies. For without it there could be no justice, which can only be thought as before the eyes of men; and, without justice, there would be no right, for, from justice only, right can come. ... Having thus, as it were, abstracted from all the empirical elements contained in the concept of a political and international law, such as, for instance, the evil tendency in human nature which makes compulsion necessary, we may give the following proposition as the transcendental formula of public right: "All actions relating to the rights of other men are wrong, if the maxims from which they follow are inconsistent with publicity."'.

23 See Claus Dierksmeier, 'Zur systematischen Liberalität von Kants Politik- und Staatsbegriff' in: Henning Ottmann (ed), *Kants Lehre von Staat und Frieden* (Nomos 2009) 42, 49.

24 See Immanuel Kant, *Zum ewigen Frieden*, Anhang, II., B 98, 99; A 92, 93, Campbell Smith (n 22) 185: 'For there is something wrong in a maxim of conduct which I cannot divulge without at once defeating my purpose, a maxim which must therefore be kept secret, if it is to succeed, and which I could not publicly acknowledge without infallibly stirring up the opposition of everyone. This necessary and universal resistance with which everyone meets me, a resistance therefore

G.W.F. Hegel demanded publicity of court proceedings in his book *Elements of the Philosophy of Right*, published in 1821, in the chapter on the 'Administration of Justice'. More precisely, in § 224 he supported the need for publicity of judicial proceedings and judgements with the argument that such proceedings affect not only the parties involved, but also the general public.[25] The application and implementation of the law through individual proceedings have a general validity and are therefore also of general interest. Hegel elaborated on this argument by adding: 'A primary characteristic of a right is that the citizens should have confidence in it, and it is this aspect which requires that justice should be dispensed in public.'[26]

Anselm Ritter von Feuerbach, also in 1821, devoted a book to the topic of publicity and orality of the maintenance of justice.[27] Secrecy, according to Feuerbach, was 'the concealing veil for the bad and rotten'[28] and was in any aspect against the nature of justice. He further asked what the reasons could be for justice to seek secrecy. Was it not rather the case that justice, by shying away from publicity, raised the suspicion of hiding 'shade-loving injustice under its veil' and therefore lost its integrity and its persuasiveness? Feuerbach clearly pointed out: 'Justice, from which one has to fear injustice, is not any better than open injustice itself. And if justice is one of the main pillars of the state (…), it is still necessary for justice to be perceived necessary that justice is also perceived as such by the public.'[29]

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evident *a priori*, can be due to no other cause than the injustice with which such a maxim threatens everyone.' See also Claus Dierksmeier (n 23) 49.

25 Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts* (Nicolai1821) § 224 (Add.), 377 (Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right*, edited by Allen W Wood, translated by Hugh Barr Nisbet (CUP 1991) ('EphR') 254): 'The rights of the subjective consciousness include not only that of making the laws publicly known (see § 215), but also the possibility of knowing [zu kennen] how the law is actualized in particular cases, i.e. of knowing the course of the external proceedings, legal arguments [Rechtsgründe], and so forth – the publicity of the administration of justice; for the course of law is in itself an occurrence of universal validity, and although the particular content of the case may be of interest only to the parties themselves, its universal content (ie the right within it and the decision on this right) is of interest to everyone.

26 Ibid.

27 Anselm Ritter von Feuerbach, *Betrachtungen über die Öffentlichkeit und Mündlichkeit der Gerechtigkeitspflege* (Gießen 1821). See also Josef Coparaelissen, *Tätigkeit und Theorien Feuerbachs im Strafprozeß* (Bonn 1963) 135ff.

28 Ibid, 89.

29 Ibid, 92. See on this thought in relation to criminal procedure also Carl Joseph Anton Mittermaier, *Die Mündlichkeit, das Anklageprinzip, die Öffentlichkeit und das Geschwornengericht* (Gottischer Verlag 1845) 335, 336.

Summarizing those thoughts, there are *two* lines of reasoning which acknowledge the principle of publicity as mandatory for justice:

(1) Firstly, the Kantian fundamental thought that 'real' justice does not have to fear publicity. Justice can only be thought of and imagined as public, and the mere need for secrecy implies injustice.
(2) Secondly, the ideas of Hegel and Feuerbach acknowledged the *intrinsic connection of the public to the judicature* and, following this, the necessity for *public trust in the judicature*.

2.1.3. Inherent limitations to the principle of publicity in light of the role of the media as a justice reporter

Looking at the current debate on the media as justice reporter[30] in light of, inter alia, Feuerbach*'s* arguments, there is an *inherent limitation* of the principle of publicity: It cannot be the goal to equate justice or a judgement in any way with the opinion of, or dependent on, the public. More precisely: Through involving the *public opinion in the process of reaching a verdict*, there might be a risk of losing a calm and impartial environment, focused on and dedicated to delivering justice.

According to section 169 S 2 Courts Constitution Act (GVG), audio and video recordings are in principle prohibited in Germany; the new version of the paragraph, though, will limit this prohibition to those recordings that are intended for publication. In this way, the coverage of a trial can be subjected to the court rules and regulations,[31] which would be impossible throughout a live-broadcast. This prohibition exists especially for the privacy rights of an accused, but also for the dignity of the court, which is not to be subjected to the 'control' of public opinion.

The inadmissibility of those recordings covers any transmission to an unmanageable and anonymous audience, such as through the internet or television.

In the new version of the law there are a few exceptions to this prohibition in respect of historical records or pronouncement of judgments of the German Federal Court of Justice.

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30 On the issue of media and publicity of court proceedings, see Jung (n 10) 891, 908.

31 See Klaus Volk, 'Referat beim 54. Deutschen Juristentag' *in Verhandlungen des 54. Juristentags (CH Beck 1982)* Band II, Part K, K 29 (K 31ff).

2.2. Special Features in the Context of Criminal Proceedings

In 19th century literature one can also find specific thoughts on the issue of publicity in the context of criminal proceedings.

Feuerbach points out the differences between civil and criminal proceedings: in civil proceedings the party in front of a judge is a free person; in criminal proceedings, however, the accused is a person compelled to attend or even in custody under the control of the judge.[32] But there still have to be at least impartial witnesses to the proceedings, so that the defendant has the opportunity to object to the procedural process, for 'silent walls cannot give testimony in his favor.'[33]

Besides, and this is an essential argument, the public also attend proceedings in their own interests and right, since 'the crime not only harms the victim, but also the entire polity, state and public as a whole.'[34] The mention of injury to the entire polity through crime has a special relevance for criminal proceedings. It is argued that the matter of a criminal proceeding *itself*, in contrast to other proceedings, directly involves the public.

The public would not only serve as an *observer*, but would itself be *a party harmed by the committed crime.* This can only be argued if there is more to the correlation between the criminal act and the punishment by the state than a mere harm-restitution relationship between the offender and the victim, as would be the case in civil proceedings.

Feuerbach himself saw this aspect of the criminal act, in the sense that the crime is not only an attack on the goods of the victim, but in general a *wrongdoing* that always affects the law of the state in its totality.[35]

In the legal philosophy of *Hegel,* the intrinsic connection between crime and punishment and their relation to the public is crucial.[36] Crime is the

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32 Anselm Ritter von Feuerbach, *Betrachtungen über die Öffentlichkeit und Mündlichkeit der Gerechtigkeitspflege* (Georg Friedrich Heyer 1821) 164.

33 Ibid, 165.

34 Ibid, 167-168.

35 See Feuerbach, *Lehrbuch des gemeinen in Deutschland geltenden Peinlichen Rechts* (Georg Friedrich Heyer 1801), in particular: §§ 26, 28, 37, 41 and *Revision der Grundsätze und Grundbegriffe des positiven peinlichen Rechts* (Henning 1799) 65. On Feuerbach's therory of violation of law eg Knut Amelung, *Rechtsgüterschutz und Schutz der Gesellschaft* (Athenäum 1972) 33ff; Luís Greco, *Lebendiges und Totes in Feuerbachs Straftheorie* (Duncker & Humblot 2009) 56ff; Uwe Murmann, *Die Selbstverantwortung des Opfers im Strafrecht* (Springer 2005) 63ff.

36 Law, according to Hegel, is the means to the realisation of freedom, and the existence of freedom (see § 30 EphR), divided into interpersonal legal and equality principles, which are formally structured and truly universal. In the shape of legis-

infringement of right; punishment is the offsetting or cancellation of the crime – not only in the relationship between the offender and the victim, but also in respect to the general law. Punishment therefore means restoration of the broken right, serving the general objective to have general rules, giving the right back its actuality.

Therefore, criminal proceedings have to be understood as a way to restore generally valid law (*Wiederherstellung des Rechts*), as a form of re-

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lation, according to Hegel, law becomes universal and is administered by the courts (§ 219 EPhR). The notion of *in*justice, and more specifically of crime, is connected to this notion of law and characterizes crime as the negation of law. With the negation of law, two main aspects of the dimensions of crime are mentioned. On the one hand, it is a breach of the interpersonal legal relationship, which is, according to Hegel, marked by the mutual respect for the other legal subject (§ 36 EphR). On the other hand, the general law is breached, specifically: the audacity to except oneself from the applicable law is an objection to the universality of law. Criminal injustice therefore stands in the way of the realisation of freedom, and 'crime' is then a direct and general violation of freedom – the latter explains the relation to the general legal public. If crime is understood in this manner, punishment in the sense of Hegel is the restoration of the breached concrete relationship and the violated general law. Punishment is the invalidation of the crime, 'which would otherwise be regarded as valid' (§ 99 EphR) and the restoration of right. More specifically on the main aspects of Hegel on criminal law §§ 90ff, 218 and 220 in EPhR; see on Hegel's legitimation of punishment Ossip Kurt Flechtheim, *Hegels Strafrechtstheorie* (2nd ed Duncker und Humblot 1975); Katrin Gierhake, *Begründung des Völkerstrafrechts auf der Grundlage der Kantischen Rechtslehre* (Duncker und Humblot 2005) 110-123 and 135-141; Diethelm Klesczewski, *Die Rolle der Strafe in Hegels Theorie der bürgerlichen Gesellschaft* (Duncker und Humblot 1991); Michael Köhler, 'Strafbegründung im konkreten Rechtsverhältnis' in: Wilfried Küper/ Ingeborg Puppe/ Jörg Tenckhoff, *Festschrift für Karl Lackner* (De Gruyter 1987), 11ff; Michael Köhler,, *Der Begriff der Strafe* (R.v. Decker 1986); Helmut Mayer, 'Kant, Hegel und das Strafrecht' in Paul Bockelmann/ Arthur Kaufmann/ Ulrich Klug (eds), *Festschrift für K. Engisch zum 70. Geburtstag* (V Klostermann 1969), 54ff; Michael Ramb, *Strafbegründung in den Systemen der Hegelianer* (Duncker & Humblot 2005), 16ff; Wolfgang Schild, 'Juristisches Denken und Hegels Rechtsphilosphie' (1978) 29 Österr. Z. öffentl. Recht und Völkerrecht 5ff; Wolfgang Schild, 'Die Aktualität des Hegelschen Strafbegriffs' in Erich Heintel (ed), *Philosophische Elemente der Tradition des politischen Denkens* (Vienna and Munich 1979), 199ff; Kurt Seelmann, 'Hegels Straftheorie in seinen "Grundlinien der Philosophie des Rechts"' (1979) JuS 687ff; Kurt Seelmann, 'Wechselseitige Anerkennung und Unrecht/ Strafe als Postulat der Gerechtigkeit?' (1993) ARSP 79, 228ff; Stephan Stübinger, *Das 'idealisierte' Strafrecht* (V Klostermann 2008), 288ff. See also Kurt Seelmann, Paolo Bechhi, Wolfgang Schild, Gerhard Luf und Benno Zabel in: Andreas von Hirsch/ Ulfried Neumann/ Kurt Seelmann (eds), *Strafe – Warum?/Gegenwärtige Strafbegründungen im Lichte von Hegels Straftheorie* (Nomos 2011) 79ff.

actualizing the law.[37] The public is therefore not a mere spectator in criminal proceedings. On the contrary, it acts as an involved party, as it were – though certainly not in the normal sense as a kind of joint plaintiff to the proceedings. However, it is the law that has been constituted by the public itself in order to protect its freedom which is violated. The court acts to restore justice in the name of the public (the judgment is rendered in the name of the people).[38] The same goes for an indictment: it is rendered in the name of the public; therefore, it is also brought 'on behalf' of the public.

In the context of a crime as directly involving the public, it has to be added that restitution can only be valid when carried out publicly, i.e. when directed towards the general public. Punishment is supposed to act not only as an instrument of restitution, but also to send a message that the community, regardless of the crime, is interested in upholding the general law. Therefore it is essential that the public can follow and comprehend the whole judicial process, and thus understand why an acquittal or sentence has been rendered. In the acquittal, as well as the conviction, lies a publicly manifested affirmation of the applicable law.

The character of *criminal proceedings particularly requires* the *principle of publicity*.

The public, in this context, is not only a mere observer, but involved in the proceedings in a complex way.

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37 See Uwe Murmann, 'Über den Zweck des Strafprozesses' (2004) GA 65, 71, who evaluates the present debate on criminal procedure (65ff). See also Rainer Zaczyk, 'Prozeßsubjekte oder Störer?' (1993) StV 490, 491, and Rainer Zaczyk, 'Bindungswirkung eines rechtskräftigen Strafurteils für das materielle Strafrecht' (1988) GA 357, 359ff. On the debate about the aim of criminal procedure, see, for example, Ulfried Neumann, 'Materiale und prozedurale Gerechtigkeit im Strafverfahren' ZStW 101 (1989) 52ff; Hans-Ullrich Paeffgen, *Vorüberlegungen zu einer Dogmatik des Untersuchungshaft-Rechts* (Heyman 1986) 13ff; Klaus Volk, *Prozessvoraussetzungen im Strafrecht/ Zum Verhältnis von materiellem Recht und Prozessrecht* (Kremer 1978), in particular 183ff (193ff on 'Wahrheit', 196ff on 'Gerechtigkeit', 200ff on 'Rechtsfrieden'); Thomas Weigend, *Deliktsopfer und Strafverfahren* (Duncker & Humblot 1989) 173-219.

38 On this argument, see Rainer Zaczyk, 'Bindungswirkungen eines rechtskräftigen Strafurteils für das materielle Strafrecht' (1988) GA 356, 365.

3. *Violation of the Principle of Publicity by the Introduction of 'Negotiated Agreement' ('Deal') in Germany's Criminal Procedural Act*[39]

Based on the arguments above, I would like briefly to discuss the amendment to the German procedural code, which has been in place for 10 years[40] now and the subject of a fundamental ruling of the German Federal Constitutional Court (BVerfG).[41]

In section 257c, the Criminal Procedural Act (*Strafprozessordnung*, StPO) now permits an agreement 'deal' between the court and the involved parties.[42] It reads: '(1) In suitable cases the court may, in accordance with the following subsections, reach an agreement with the participants on the further course and outcome of the proceedings.'

This section allows the parties to agree on a sentence in return for a confession or some other behaviour during the process by the defendant.[43] Along with introducing this provision for an agreement between the parties, other measures were added to further the consensual elements in criminal proceedings. According to the amendments, the parties can – during preliminary proceedings, interlocutory proceedings and at the beginning or during the main hearing – 'discuss the progress of the proceedings, if this is considered fruitful to further the proceeding' (see sections 160b, 202a, 212 and 257b Criminal Procedural Act, StPO). Those discussions can already be in the light of reaching a agreement (as shown in § 243 IV Crim-

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39 See Thomas Rönnau, *Die Absprache im Strafprozeß* (Nomos 1990) 165ff.

40 Law on the settlement in criminal proceedings (29.7.2009, in effect since 4 August 2009 (2009) BGBl I, 2353.

41 See BVerfG, Judgement of 19 March 2013 – 2 BvR 2628/10, 2 BvR 2883/10, 2 BvR 2155/11. On this issue (opposed), see Carl-Friedrich Stuckenberg, Entscheidungsbesprechung (2013) 4 ZIS, 212ff, and Gerhard Fezer 'Vom (noch) verfassungsgemäßen Gesetz über den defizitären Vollzug zum verfassungswidrigen Zustand,' (2013) 4 HRRS 117ff. In the case, the Supreme Court had to decide on the complaint against a criminal conviction, which was based on a settlement between the court, the advocate general and the accused according to section 257c StPO. The Supreme Court allowed for a settlement, though it criticised the wrongful execution in the proceedings. See also BVerfG, Judgement of 27 January 1987, 2 BvR 1133/86, (1987) NJW 2662f; Bernd Schünemann, Absprachen im Strafverfahren? Grundlagen, Gegenstände und Grenzen, *Gutachten B zum 58. Deutschen Juristentag in München* (CH Beck 1990) B 143ff.

42 See also § 257 c StPO, Carl-Friedrich Stuckenberg in: Löwe-Rosenberg, *StPO und GVG, Großkommentar* (26th edn De Gruyter 2013).

43 See, on the issue of settlements, Bertram Schmitt, 'Zu Rechtsprechung und Rechtswirklichkeit verfahrensbeendender Absprachen im Strafprozeß' (2001) GA 411, 412-413); Thomas Rönnau, *Die Absprache im Strafprozeß* (Nomos 1990) 22ff.

inal Procedural Act, StPO):[44] For the purpose of transparency during the main hearing, this article stipulates an obligation to notify the party of the existence of such settlements in cases where there have been talks about settlement. In those cases the main matter of such a settlement must be expressed.[45]

The German Federal Court of Justice (BGH), in its 1997 decision, saw the main problem with such settlements was that they were reached outside the main hearing and therefore violated the principle of publicity.[46] It saw a danger in detaching the settlements from the main proceedings and the main proceedings becoming 'a mere façade, which obscured the publicity of the reasoning behind the sentence and verdict.'[47]

A settlement between the court and the other parties, which includes a plea by the accused and a sentence, must therefore be reached in the main proceedings – with deliberation by the panel of judges. This, however, does not mean that there cannot be any talks between the parties before or outside of the proceedings to assess the willingness for such an agreement and the current positions; the court, however, must reveal such talks in the main hearing.[48]

This negotiated agreement undermines the rule that all talks must be held within the main hearing.[49] By allowing the court just to present the outcome and main points of these talks that excluded the public, those settlements are reached under the veil of secrecy and in the absence of any possibility for scrutiny, basically becoming an independent and informal proceeding parallel to the main hearing.[50]

Considering the specific need for publicity in criminal proceedings, mentioned above, the problem is obvious: If the whole proceeding is about the restitution of the general law and the public is an affected entity,

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44 See Uwe Murmann, 'Reform ohne Wiederkehr? – Die gesetzliche Regelung der Absprachen im Strafverfahren' (2009) 10 ZIS 526, 530.

45 Ibid.

46 BGHSt 43, 195, 205; BGHSt 50, 40. See BGHSt 43, 195 and André Graumann, Vertrauensschutz und strafprozessuale Absprachen (Duncker & Humblot 2006) 48ff.

47 BGHSt 43, 195, 205.

48 Ibid, 205, 206 (Herbert Schäfer, 'Rechtsgespräch und Verständigung im Strafprozess' (1989) DRiZ 294; Jürgen Wolter *Systematischer Kommentar zur Strafprozessordnung: SK-StPO* (Carl Heymanns 2016) § 151 para 76.

49 See Thomas Weigend, 'Eine Prozessordnung für abgesprochene Urteile? (1999) NStZ 57, 59, 60 and Schmitt B, 'Zu Rechtsprechung und Rechtswirklichkeit verfahrensbeendender Absprachen im Strafprozeß' GA 2001, 411, 423, 424.

50 See BGHSt 43, 195 (206).

then any settlement between the court, advocate general and the defendant cannot reach full restitution. Neither the gathering of evidence, the ascertainment of a breach of law and the guilt of the defendant nor the conviction, acquittal or the reasoning for the sentence are made public. The applicable law on settlements within criminal proceedings therefore violates the principle of publicity.

4. Final Summary

The procedural principle of publicity is rightfully seen as a signal achievement of the constitutional state. This applies notably to criminal proceedings for several reasons. Here, the procedural principle of publicity not only protects the individual from the dangers of secret justice – it also retains the trust of the general public in the dignity of the judiciary. In criminal proceedings, the general public is, in a complex way, involved as a party to the proceedings; publicity is therefore an important part of restoring justice. A violation of the principle of publicity thus lies in the settlement agreements introduced in section 257 c criminal procedural act.

The Dilemma of Open Justice in the Present Political, Social and Cultural Climate

Ruth Herz

Throughout modern history, regardless of which political system was in power, the prevailing axiom remained intact: 'Justice must not only be done, but must be seen to be done.' However, the challenges we face today to ensure the integrity of the judiciary, as a pillar of our democracies in the age of transparency, seem new. Does public scrutiny, especially through the media, really ensure our expectations of fair, predictable and unbiased justice?

I would like to explore whether the culture of openness and indeed transparency has not become a somewhat declarative and mythic proposition. I would like to examine this from my own judicial, media and academic experience.

The predominant image of the courtroom is that of a space of 'stability, tradition and gravitas' securing the legitimacy of justice[1]. However, we must remember that only few people experience the court in person, while most people do so through various media and cultural agents. For the few who find themselves in court, this assumed *sacred* space and the actions taking place within it are not easy to understand. The architecture, the arrangement of the furniture, the roles of the people in the courtroom, their physical positions and the meanings of these positions, let alone the language, the rituals and the costumes of the actors are mostly unfamiliar and incomprehensive.

It is a truism that the action in court is mediated by the press and television, which have increasingly replaced the general public in court. They play a critical role in forming and articulating public opinion, as well as defending the rights of citizens as spectators and as a party harmed by the act committed. Undeniably independent and open justice and a free press are both fundamental to a society that values liberty under the rule of law. There is a long historical tradition of highly professional legal commentary in the press, but the proliferation of the media scene, more often than not,

1 Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law'* (Routledge 2011).

turns the media into populist active *translators* of the courts' decisions to the public at large.

As to the presence of cameras in courts, they may seem like a perfectly natural development, considering that television is an integral part of contemporary life and one of society's main sources of information. However, the Federal Constitutional Court of Germany has confirmed banning cameras from courtrooms while the court is in session[2], while in England and Wales criminal crown court hearings may now be filmed but not broadcast. There is much concern that the rights and the feelings of the people, especially the defendants involved in criminal proceedings, may be compromised.

Having been a judge at the court of Cologne for over twenty years as well as having played the central role of the judge on a German television court series for four years have made me acutely aware of the problems and questions that television cameras in court may pose. The role was offered to me quite unexpectedly by a powerful and well-known producer on German commercial television who was planning a court series of a true to life portrayal of youth court proceedings[3]. The German law accords the judge the central position in the court trial. It is an active and consequentially powerful role. It is the judge's role to examine the defendant, the witnesses and the experts in her quest for the truth. It is the judge who decides whether the defendant is guilty or not, hands down the sentence and gives the reasons for the decision. The producer's idea, as she explained to me, was to present a programme that would show fictional cases based on real life, every day cases heard in youth courts across Germany. They would highlight specific problems and conflicts that young people are confronted with in society and show how the court deals with them. Indeed, at the starting point my interests and those of the television producer seemed to coincide.

The exceptional feature of the programme was that a professional judge would play the role of the judge. The same applied to the parts of the defence lawyer and the prosecutor. Amateur actors would play the other

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2 *Bundesverfassungsgericht* (German Federal Constitutional Court) Urteil vom 24 January 2001, 1 BvR 2623/95 Rn 1-110. Some changes were introduced by the new law in 2018, Gesetz zur Erweiterung der Medienöffentlichkeit in Gerichtsverfahren und zur Verbesserung der Kommunikationshilfen für Sprach- und Hörbehinderte (EMöGG).

3 Youth court hearings dealing with offences committed by youth aged 14-18 years old are not open to the public. § 48 Nichtöffentlichkeit, Jugendgerichtsgesetz (JGG) (Youth Courts Law).

parts such as the defendants, witnesses, expert witnesses, social workers etc. The roles were not fully scripted which further added to the authentic feeling of the programme. In the contract I secured for myself the freedom to conduct the 'trial' the way I thought fit as well as to make the decisions and give the reasons for the decisions in the way I would have done in court in similar cases.

On the one hand the idea sounded exciting, and personally and professionally challenging. And yet, I had never thought of myself as a television personality and was hardly keen on being associated with the medium, convinced that it might question my credibility and independence, as well as undermine my status among my peers. I turned to the president of the Court of Appeal for advice about the project and my involvement in it. I was rather surprised by his spontaneous response: 'You would disappoint me if you didn't accept the offer.' He enthusiastically supported my application for a leave of absence during the shootings. Both he and the Minister of Justice of North Rhine-Westphalia were convinced that the portrayal of justice on television by a professional team, as close to reality as possible, would lift the veil of secrecy surrounding the judicial process and ensure transparency. They both assumed that bringing the court to the cameras would take the pressure off the television cameras trying to push their way into the courts, particularly as the launching of the programme coincided with the decision of the Federal Constitutional Court to ban cameras from the courtroom. In addition to being broadcast the daily programme had an added educational function as school classes were driven to the studios from all over the country to attend the recording of each case, all together some 1,000 cases.

The series turned out to be neither a reality show, nor a purely fictional program. The format became a genre of its own, fitting neatly in between trial coverage by court reporters and documentary films on one hand and fictional courtroom dramas on the other hand. *Das Jugendgericht* became hugely successful with ratings of around 25%, which accounts for about two and a half million viewers daily. This meant that for four years the programme became part of everyday life for many people. It was not uncommon for me to be approached, as it happened one evening by a couple sitting at a neighbouring table in a small restaurant greeting me as an acquaintance. As I was at a loss they smiled and said: 'You should know us because you are in our living room every day.' Given the numbers of viewers, it may well be argued that the programme, and others like it, that sprang up like mushrooms after the rain, became the main source of information on the German justice system for the majority of the population.

Indeed, a study undertaken at the University of Bochum[4] suggests that the court series enhanced the reputation of fair and unbiased justice.

I believed I had been asked to convey on television what I had done in court: To use my legal knowledge and way of thinking in order to solve conflicts with empathy and reach closure in society aiming at mending the social fabric. However, I soon realised that I had to make an inner switch and recognise that I was acting the role of the judge and not being the judge. I soon encountered the crushing power of the media. The world of media, and not just the producers of the specific programme, is not only about information and education; it is also about entertainment, about action, and it is motivated first and foremost by ratings and financial gains. So when competition appeared on the small screen it caused the serious quality of my programme to suffer. The court series, which had started out portraying the justice system realistically, ended up slipping into the scandalous. Emotions, or what the producer thought of as emotions, became more and more prevalent. Now bizarre figures populated the 'courtroom', the language became rough and the actors' dresses even more revealing. The defendant, the witnesses and the audience started communicating uninhibitedly in the courtroom compromising the authority of the judge. And worse still, the defence lawyer as well as the prosecutor began to act aggressively and to raise their voices, a behaviour quite unheard of in a German court. The judge ended up losing her traditional position and competing with the other actors in front of the cameras. This obviously did not conform to the traditional authority of judges in Germany, which is reflected in their high status in society and which in turn maintains their credibility and legitimacy. The media people argued that real court trials were tedious and boring and that television had to render them more emotional and sensational. Fairness and impartiality, the concepts at the heart of justice are not the main concern of journalists when they enter a courtroom to report about the trial. They are far more interested in celebrities and high profile cases. 'This is what the public wants' they claim, thus underestimating or perhaps even manipulating the public, I thought. This was the moment when I quit television fully aware of the power that the media had accrued over the years, no longer being only a source of education and entertainment but perhaps mutating into something of a fourth

4 Stefan Machura, 'German Judge Shows: Migrating from the Courtroom to the TV Studio,' in Michael Asimow (ed) *Lawyers in Your Living Room! Law on Television* (American Bar Association, 2009).

power in the state having as its arsenal far more lucrative and sophisticated means.

Although I am describing my television programme, I believe it reflects the problems we face with television portrayals of court proceedings in general. We should not forget that when reporting about court hearings, the mass media seems first and foremost interested in covering sensational cases or those involving celebrities. Assuming that the majority of cases and court proceedings are dull and tedious, television tends to render them more emotional and dramatic. While the general public may therefore imagine the criminal court to be a succession of breath-taking moments, this is far from reality. Media reporting of court proceedings is therefore problematic because of the nature of the cases selected. They introduce a false emphasis of reality. The result of showing mostly scandalous and violent crimes eventually conceals the 'bread and butter' cases and eventually causes them to disappear and become *secret*. The kind of reporting makes the court proceedings prone to a reduction of complexities and to a simplification of events, conflicts and facts leading to a flattening out of legal meanings rather than sparking public debate on the meanings and politics of court decisions. Fairness and impartiality, the concepts at the heart of justice, are rarely the main concern of journalists covering mostly sensational trials.

It seems to me that claiming to make the court more accessible and interesting to the public is also a means of competition with the judiciary. Judges often make this easy for the media as they rarely exhibit any special competence at talking to the public and tend to have a kind of 'anti-theatrical' way about them, speaking in a language that is rather opaque to the general public. Although media people claim that they only translate the legal proceedings in order to make them accessible to the public, they actually present their own version of the proceedings imbued with their own interpretation. By so doing they turn the public into the judges of the judges. Does the portrayal of justice in the media therefore mean that the social functions of punishment and the affirmation of shared morals have been transferred from the justice institutions to mass media? I still remember the producer's remark after the first case of the programme was broadcast: 'Do you enjoy your newly acquired power?' I in turn had the feeling I had lost any power I might have had in the real court.

So, watching trials on television does not necessarily mean that the justice process has become transparent. Most television spectators may come to believe that watching a trial on the screen is the same as being present at the real trial. This reminds me of the work of the Belgian artist René Magritte who painted a pipe and below the pipe painted the words: 'Ceci

n'est pas une pipe'. It may seem a contradiction, but it is of course true: the painting is not a pipe; it is an *image* of a pipe. What we see on television are images of the proceedings from the perspective of the person reporting about them. We don't see the other aspects, we don't feel the electricity and tensions in the room and we don't understand the questions and the weight of the answers. As I was now aware of the effects that cameras can achieve by way of positioning, lighting and sound etc. I believe that what we see on television hardly delivers transparency but rather puts the credibility of the judicial system in question. Because of their different objectives and priorities, the law and the media simply do not speak the same language.

Yet another overlooked aspect of showing trials on television is the fact that television has turned global. We watch trials on television not only from our local courts, but also from foreign jurisdictions. The obvious examples are those of the *O.J. Simpson* trial in Los Angeles and the *Oscar Pistorius* trial in Pretoria, South Africa. The general public is often ignorant of the differing political and cultural contexts of where the courts are. This is particularly true of the most influential medium of films and television series, set in courtrooms which rarely conform with local rules and conditions. All these formats dislocate courts and blur reality and fiction. The result is that the court does not belong to a specific country or place anymore but becomes displaced. By taking the court out of a specific court building it brings it into cyberspace. The court proceedings we watch are now happening in 'nowhere land'. As in Kafka's *Trial* there are no longer familiar symbols and rituals. One small example of my own experience was that I resisted attempts by the producer to make me to use a gavel, an item that does not exist in German justice but which the public knows from US series and films and has therefore become the universally recognized symbol of the judiciary. But perhaps more importantly, local culture, politics and history play an important role in the judicial understanding of the people and the situation in a trial.

There are of course ways to avoid and limit distortions through television reporting on court proceedings as the Supreme Court in London has done by introducing videos on demand. In setting up its own cameras it decides how to portray the proceedings according to its own standards. However, by eliminating all the television 'effects' the video of a supreme court justice reading the decision defeats the purpose of reaching a larger audience and making the proceedings transparent. This is reflected in the numbers of people who watch the Supreme Court videos. About 8,000 watch each case (mostly lawyers and law students), as opposed to the millions of viewers watching the cases on *Jugendgericht* or high profile trials.

As a result, most people receive information about the law from different sources and therefore have ideas about it that are 'miles away' from those of lawyers and judges.

Are judges also influenced by the public? By the media? Pondering over the essence of judgecraft in the 17th century, the famous English jurist John Selden acutely observed: 'We see judges move like lions but do not know who moves them.' Indeed, what moves the judge remains an enigma nearly 400 years later.[5] The accepted wisdom is that judges do not cater to the media. They are committed solely to seeking the truth by applying the law when solving the case in hand. The question posed by the American legal scholar Cass Sunstein whether judges should care if the public is outraged by a court's decision, has triggered a fierce debate, as it touches on their judicial independence.[6] Indeed, a study undertaken by a team at the University of Mainz revealed that judges are not immune to public opinion and that reporting and the presence of journalists in court do influence them.[7] Does that also mean that while the rights of audiences enable participants to indirectly articulate criticisms, open courts also impose a discipline on the judges?

In conclusion, let me say that I would be the last person to say that television images in and of courts should not be permitted. On the contrary, clearly images make the text, the word come to life through performance, through rhetoric, through rituals. They can surely contribute to the transparency of the justice system. I do, however, want to warn of the pitfalls, which suggest that in the current political and cultural environment we may not yet have found the adequate formula to realise this.

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5 Ruth Herz, *The Art of Justice* (Hart 2012).

6 Cass R Sunstein, 'If the Public are Outraged by their Rulings, Should Judges Care?' (2007) 60 Stanford Law Review 155.

7 Hans Mathias Kepplinger, 'Der indirekte Einfluss der Medien auf Richter und Staatsanwälte' in Lars Rademacher, Alexander Schmitt-Geiger (eds) *Litigation-PR: Alles was Recht ist* (Springer 2012).

Securing Open Justice*

Sir Ernest Ryder

1. *Introduction***

It is a real pleasure to have been invited to give the keynote address today. Open justice is central to our justice systems. It is more than that. It is, through our courts and justice systems, of fundamental importance to democratic government. If I can borrow from Woodrow Wilson, our courts are the 'balance-wheel' of our constitutions. They are 'the ultimate safeguard alike of individual privilege and of governmental prerogative.' They maintain 'political liberty', and the rule of law.[1] Without effective open justice they would not be able to be so.

This might seem, at first glance, rather a bold claim for what many may take to be no more than the principle of publicity common to our justice systems and articulated in Article 6 of the European Convention on Human Rights. It is not a bold claim. And nor is open justice simply another way of referring to the principle of publicity. On the contrary, I take it to encompass three related principles; related because they depend upon each other for their general efficacy.

First, I take open justice to encompass the principle of equal access to court. The commitment, a common law constitutional right in the United Kingdom, of access to justice.[2] Unless courts are genuinely open to all those, whether individuals, businesses, state entities, governments local and central, who need to vindicate their rights, we weaken at best and fail

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* Note from the editors: This work is a reproduction of the keynote speech 'Securing Open Justice' delivered by Sir Ernest Ryder at the 'Open Justice' conference (Max Planck Institute Luxembourg for Procedural Law,1 February 2018) and subsequently published on the official website of the Courts and Tribunals Judiciary: <https://www.judiciary.uk/announcements/speech-by-sir-ernest-ryder-senior-president-of-tribunals-securing-open-justice/>.

** The author wishes to thank John Sorabji for all his help in preparing this lecture.

1 Woodrow Wilson, *Constitutional Government in the United States*, cited in Enid Campbell and Hoong Phun Lee and, *The Australian Judiciary* (2nd edn, CUP 2013) 1.

2 *Attorney-General v Times Newspapers Ltd* [1974] AC 273; *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp* [1981] AC 909, 979.

at worst to make good our commitment to democratic government. In the UK this point has recently and forcefully been expressed by the Supreme Court. In the case of *R (UNISON) v Lord Chancellor*, Lord Reed explained – not that it should need explanation – how without 'unimpeded access' to the courts, 'laws are liable to become a dead letter'. In turn, as he put it, that renders 'the work done by Parliament ... nugatory, and the democratic election of Members of Parliament ... a meaningless charade'.[3]

For democracy to be meaningful the courts – justice – must be open to all. To emphasise this in the clearest terms in our highest courts, as Lord Reed did, is a starting point. To ensure it is a reality is entirely another thing. We need only recall the pioneering work of Cappelletti and Garth to know that[4]. It is, unfortunately, a continuing truism that for large numbers of individuals and businesses the doors of our courts and tribunals remain closed; the right of access theoretical. To the extent that they are, we can say, following Lord Reed, that there is a democratic deficit. We are taking steps to remedy this problem in the UK through bold, systemic reform and digitisation of our court and tribunal processes, and I wish to return to that later. It is, however, particularly important that we do so for another reason.

In their recent book on the continuing and possible future development of online dispute resolution, *Digital Justice*, Ethan Katsh and Orna Rabinovich-Einy[5], outline the sheer number of disputes that are being resolved online by private dispute resolution services, such as those used by eBay and Amazon. The numbers are staggering: eBay, for instance, resolves 60 million disputes per year.[6] These systems are effective. They produce settlements that the parties are happy with, and they provide procedures which are intuitive ie both intelligible and comprehensible to the user. There are serious arguments underpinning their work that our justice systems could not properly deal with the number of disputes these digital systems deal with nor provide an equivalent user experience. At the moment, those arguments are likely to be correct. There is also a persuasive argument that, from a public policy perspective, we should not encourage all such disputes to come before the courts. Peaceful, mutually agreed settlement is in

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3 [2017] UKSC 51, [2017] 3 WLR 409, 68.

4 See, for instance, Mauro Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement' (1993) 56 The Modern Law Review 56, 282.

5 Ethan Katsh and Orna Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes* (OUP 2017).

6 Ibid 4.

the public interest as much as resolution via court determination and judgment.

It is one thing, however, to accept that there is a public interest in the promotion of settlement. It is, however, quite another to accept that such disputes are not, or could not be made, capable of being brought before the courts. To accept the second proposition is to accept that we are moving towards a society where there are *digital outlaws*; individuals and businesses whose disputes are outside the law's protection and control. We would, thereby improperly accept, that dispute resolution should be outsourced by the State to algorithms designed to the specifications of private actors. We would be acquiescing in the privatisation of justice; or to borrow from Owen Fiss, it would be 'capitulation to the conditions of [digital] society'[7].

If we are properly committed to open justice in the first sense I have outlined, we cannot accept that this is, or should be, the case. On the contrary, if we are – as Lord Browne-Wilkinson once put it – to ensure that courts and tribunals meet society's current demands for justice we cannot but configure them so that such claims are capable of being tried and adjudicated effectively.[8] If we do not, as he went on to rightly conclude, we undermine both judicial independence and the rule of law. This places a significant onus on the judiciary as an institution of State to act[9].

Open justice's second aspect is the one with which we are all immediately familiar. It is that courts and their judgments must be open to scrutiny by the public, and the media. Followers of Bentham will know why. It is that publicity – openness – is the great antiseptic. That it is, as Bentham had it, 'the very soul of justice. The keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge ..., while trying, under trial:'[10] A judge observed while judging is an attentive judge. A judge observed is, as Lord Neuberger MR observed in the case of *Al-Rawi*, a democratically accountable judge[11]. When justice slips out of sight, this is lost and the prospect of arbitrary, incompetent or unlawful conduct raises its head. Again, if we simply accept the argument that private online

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7 Owen Fiss, 'Against Settlement' (1984) 93 Yale Law Journal 1073, 1075.

8 Lord Nicolas Browne-Wilkinson, 'The Independence of the Judiciary in the 1980s' (1988) Public Law, 44.

9 Ibid 45.

10 Jeremy Bentham, 'Draught for the Organization of Judicial Establishment' in Bowring (ed), *The Works of Jeremy Bentham* (vol 4, William Tait, Edinburgh 1843) 316.

11 *Al-Rawi v Security Services* [2010] EWCA 482, [2012] 1 AC 531, 543.

dispute resolution is the way in which the majority of disputes, and in some areas all disputes, may be resolved in future we accept this loss of accountability; we further accept the growth of a democratic deficit. And the same is the case if we divert public justice to an unobservable online forum. Our digital courts must be open courts.

Open justice's third aspect again is one we are all familiar with. Open justice, through accessibly-written public judgments, is the means through which the courts fulfil their role of, again if I can borrow from Owen Fiss, explicating and giving 'force to the values embodied in authoritative texts such as [our] Constitutions and statutes'[12]. They interpret, communicate and develop our public social values. Finally, and again as most recently emphasised in the UK by Lord Reed, judgments help to provide clarity and certainty in terms of our legal framework; the framework without which the social and economic development of society would not be able to take place effectively.[13]

Open judgments create the shadow of the law within which we order our lives. And again, linking back to both the first and second aspects of open justice, access to the courts and public scrutiny provide for the judicial process to be carried out properly and ensure that that framework can be properly challenged, articulated, and developed both through the legal process and through stimulating public, democratic debate. The importance of this latter aspect, a concept I shall call 'observational justice', should not be underestimated in the face of the tendency otherwise to irrational populism or at least populist propositions that are incapable of empirical validation.

Against this background, I want to focus on the question of what steps the judiciary should take to secure open justice. In doing so I want to look particularly on:

- The judiciary's duty to secure open justice; and
- How that duty should be implemented.

I should stress at the outset that my comments today, except where clear from the context, are focused on the structure, leadership and manage-

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12 Owen Fiss (n 7) 1085.

13 [2017] UKSC 51, [2017] 3 WLR 409: 'Every day in the courts and tribunals of this country, the names of people who brought cases in the past live on as shorthand for the legal rules and principles which their cases established. Their cases form the basis of the advice given to those whose cases are now before the courts, or who need to be advised as to the basis on which their claim might fairly be settled, or who need to be advised that their case is hopeless.'

ment of the UK Tribunals system, of which I am the current Senior President.

2. *The Judiciary's Duty to Secure Open Justice*

The judiciary has a clear, constitutional duty to secure open justice. This is not a matter of debate. It was recognised as such by the House of Lords in its seminal decision in *Scott v Scott* [1913] AC 417. It is inherent in the duty placed on courts by section 6 of the Human Rights Act 1998 not to act in ways incompatible with Article 6 of the Convention. It is inherent in the long-established common law constitutional principle of the rule of law, which in the UK has been explicitly recognised in statute since 2005.[14] It was affirmed by the Supreme Court in *Al-Rawi*, when the court held that the courts could not in developing the common law do so in a way that permitted the creation of secret hearings, ones which admitted of no public participation or accountability and contravened fundamental aspects of party participation in proceedings.[15]

These and other such decisions, of which there are many, affirming the constitutional right of access to justice are however focused on what the judiciary is required to do in exercising its judicial functions. It might be said that they do not provide a *basis* for the judiciary taking active steps to secure this constitutional right outside the court room. The judiciary's duty is not limited in this way. As Lord Diplock put it,

> ... in any civilised society, it is a function of government to maintain Courts of Law to which its citizens can have access for the impartial decision of disputes as to their legal rights and obligations towards one another individually and towards the State as representing society as a whole. The provision of such a system for the administration of justice by Courts of Law and the maintenance of public confidence in it, are essential if citizens are to live together in peaceful association with one another.[16]

Different countries can take different approaches to how their government carries out this duty. The way in which our constitutional settlement now operates, and has done since the Constitutional Reform Act 2005 and the

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14 Constitutional Reform Act 2005, s1.
15 *Al-Rawi v Security Services* [2010] EWCA 482, [2012] 1 AC 531.
16 *Attorney-General v Times Newspapers Ltd* [1974] AC 273, 307.

Concordat between the Lord Chancellor and Lord Chief Justice[17] which both preceded it and was implemented by it, is one of active partnership between the executive and judiciary in running the courts.

As Professor Malleson rightly noted in evidence to the House of Lord Constitution Select Committee in 2007, the post-2005 settlement was one that envisaged 'two separate but equal branches working together to manage the courts and judiciary.'[18] As Lord Thomas, then Lord Chief Justice put it last year, the relationship between the branches of the State is one of interdependence.[19] This interdependence – working together – is manifested in a number of ways, each of which emphasises the active role the judiciary must play in securing the proper administration of justice, of open justice. Let me outline the specific aspects of this duty and the manner in which it is carried out in partnership with the other branches of the State.

First, as a matter of the common law it is the judiciary that exercises the court's inherent jurisdiction to govern the court's processes. This was the historic power to issue Practice Directions governing the courts procedure and practice. It was, and remains, additional albeit subordinate to, any rules of court approved by Parliament. Today, it is a power that is usually only exercised by the senior judiciary in partnership with the executive, although its basis remains the court's common law jurisdiction.[20] This jurisdiction permits the senior judiciary to prescribe both rules, in the broad sense, governing practice in the courts, but equally enables it to make provision for the effective administration of the courts.[21]

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17 Department of Constitutional Affairs, 'Constitutional Reform - The Lord Chancellor's judiciary-related functions: Proposals' (January 2004); Also see the Concordat between the Ministry of Justice and the UK Supreme Court <https://www.supremecourt.uk/docs/concordat-with-ministry-of-justice-150113.pdf>.

18 Professor Kate Malleson, 'The Effect of the Constitutional Reform Act 2005 on the relationship between the Judiciary, the Executive and Parliament, in House of Lords Constitution Committee, Relations between the executive, the judiciary and Parliament' (6th Report of 2007), Appendix 3 at 63: <https://publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/151.pdf>.

19 Lord Thomas CJ, *The Judiciary within the State – The relationship between the branches of the State*, Michael Ryle Lecture (15 June 2017) 18ff <https://www.judiciary.gov.uk/wp-content/uploads/2017/06/lcj-michael-ryle-memorial-lecture-20170616.pdf>.

20 *Bovale v Secretary of State for Communities and Local Government* [2009] EWCA Civ 171 [2009] 1 WLR 2774.

21 *Attorney-General of the Gambia v Pierre Sarr N'Jie* [1961] AC 617 at 630. A recent example would be Lord Philips CJ's Practice Direction effecting a change to judi-

Second, the judiciary in partnership with the executive and Parliament is responsible for the administration of the courts and tribunals. This is carried out in England and Wales by way of an express partnership between the Lord Chancellor, for the executive, and the Lord Chief Justice for the courts and Senior President of Tribunals for the Tribunals.[22] The Lord Chancellor is under the specific statutory duty to provide sufficient court and tribunal buildings and staff and secure, from Parliament, sufficient funds to secure the proper administration of justice.[23] The Lord Chief Justice and Senior President are under statutory duties requiring them to secure the effective deployment of the judiciary, to provide effective training, guidance and welfare provision for the judiciary, and to represent their views to the executive and Parliament.[24] In Scotland, there is no Lord Chancellor and the partnership in respect of tribunals is between the Senior President and the Parliaments. The constitutional partnership in England and Wales is carried into effect by Her Majesty's Courts and Tribunals Service; the body which provides and runs the courts and tribunals on a day-to-day basis.[25]

Additionally, the Senior President has a number of specific duties, which require me to ensure that while I carry out my duties I have regard to the need to ensure that: tribunals are accessible i.e. open, their judges are expert, that proceedings are fair, speedy and efficient, and – perhaps most significantly – that there is a 'need to develop innovative methods of resolving disputes that are of a type that may be brought before tribunals.'[26] It seems to me that although these duties have been given statu-

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cial court dress: Practice Direction Court Dress (No 5) of 2008 <https://www.barcouncil.org.uk/media/61240/1508_court_dress_pract_dir.pdf>.

22 HMCTS Framework Agreement (CM 882, July 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384922/hmcts-framework-document-2014.pdf>.

23 Courts Act 2003, s1 – s3; Tribunals, Courts and Enforcement Act 2007, ss 39 – 41.

24 Constitutional Reform Act 2005, ss 5, 7; Crime and Courts Act 2013, s 21; Tribunals, Courts and Enforcement Act 2007, sch 1, part 4.

25 On the broader approach to co-operation in leadership between the Lord Chief Justice and the Senior President of Tribunals see, for instance, R. Carnwath SPT, *Justice in a Cold Climate*, 17 November 2010 <http://webarchive.nationalarchives.gov.uk/20131203071215/http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/spt-speech-justice-in-a-cold-climate.pdf>; Lord Chief Justice and Senior President of Tribunal's Diversity Statement, 5 October 2012 <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/diversity/message-from-lcj-judicial-diversity/> .

26 Tribunals, Courts and Enforcement Act 2007, s2. On the importance of the duty to innovate to the Tribunals see, Robert Carnwath SPT, *Tribunal Reform – The Scot-*

tory form they are duties inherent in the Senior President's leadership role for Tribunals, and equally that of the Lord Chief Justice for our courts.

Finally, the Lord Chancellor, Lord Chief Justice and Senior President have joint and several responsibility for the appointment of judges, for promoting diversity within the judiciary, and judicial discipline.[27] Equal access to justice cannot but mean that the judiciary is not a cloistered profession, but one to which any member of society can be appointed on merit. Open justice requires an open judiciary; one in which every part of our democratic societies can see they have a stake. We must therefore ensure that proper and properly open processes are in place to implement these responsibilities.

If I can draw these various strands together. Taken together they demonstrate an inescapable conclusion: the judiciary cannot sit on its hands. On the contrary, it is under a wide range of specific duties, each of which in its own way requires the judiciary to secure open justice in each of its facets. As such they are aspects of a wider general duty which, as Lord Thomas recently reiterated, requires judges to 'engage in the reform and modernisation of the system of the delivery of justice'[28]. To do so judges 'must be proactive in reform. They must also provide the leadership in the major changes that will soon come to legal education and legal practice consequent upon the technological revolution.'[29] And as he noted there was nothing new in this leadership role, Lord Mansfield CJ was a vigorous leader of reform in the 18th Century and Lord Bramwell was equally vigorous in the 19th century. Even if it requires the judiciary to engage to a certain degree in policy issues where the proper administration of justice is concerned, the judiciary cannot but be involved.[30]

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tish Dimension (11 February 2009) 18-24. <http://webarchive.nationalarchives.gov.uk/20131203072115/http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/spt-trib-reform-scottish-dim.pdf>.

27 Constitutional Reform Act 2005, s 108, 137A, schedule 14; Tribunals, Courts and Enforcement Act 2007, s 47; Equality Act 2010, s 50 – s 51.

28 Lord Thomas, *The Rule of Law, the Executive and the Judiciary,* 31st Sultan Azlan Shah Lecture (Kuala Lumpur, 24 December 2017). And see Lord Thomas CJ (n 19).

29 Ibid.

30 Lord Thomas was not alone in this view, see Lord Browne-Wilkinson (n 8) 56.

3. Implementing the Duty

It is all very well to note that judges have actively led reform in the past. The past is a different country. How best to implement the duty today? There are two areas in which I believe the judiciary must act to answer this question: Governance and policy; and, Reform. I take each in turn.

3.1. Governance

First, governance. During the course of two public lectures last year – examples of the judiciary communicating its views in a democratic society outside of individual judgments – Lord Thomas outlined the basic requirement: that judiciaries have both 'internal cohesion' and 'good governance'[31]. Without such structures the judiciary would not be able to carry out its duty effectively. We have flexibility to devise our own structures. Respective Lords Chief Justice and Senior Presidents have done so. It is of central importance that those structures are subject to principled review. As with any large-scale organisation, systems can become outmoded or inadequate; as times change systems also must change. Two questions arise here; and these are as applicable to the UK as they are to the Administrative Office of the United States Courts or Councils of the Judiciary and their equivalents throughout Europe.

First, is the structure in place optimal? In the Tribunals, there is an executive body that supports the Senior President: the Tribunals Judicial Executive Board. It is constituted of representatives of the various Tribunals' judges. Within the Tribunals themselves, leadership is provided by Chamber Presidents and deputy Chamber Presidents. This was the right structure in 2007. Is it still the right one today? The more the judiciary as an institution must take policy decisions further to its duty to secure open justice, does this remain the right structure? Might it need to be expanded into, as was suggested over 30 years ago by Lord Browne-Wilkinson, a more 'collegiate body of judges'.[32] Should it include representatives of the legal profession and civil society among its membership? The benefits of Non-

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31 Lord Thomas, 'The Judiciary Within the State – Governance and the Cohesion of the Judiciary,' Lionel Cohen lecture (Hebrew University, Jerusalem, 15 May 2017) 9: <https://www.judiciary.uk/wp-content/uploads/2017/05/lcj-lionel-cohen-lecture-20170515.pdf>.

32 Lord Browne-Wilkinson (n 8) 56.

Executive Directors are well-recognised in government, just as they are in business. Ought we not to consider drawing on those benefits to improve our governance, and through this form of engagement with wider society our accessibility? I have recently formed an Administrative Justice Council which I chair and which is administered independently of the executive and Parliament with an academic board to advise upon governance and policy in the law.

Secondly, is the management right? The senior judiciary is very fortunate to be supported by a cadre of excellent civil servants, who form the Judicial Office. It is, in essence, a department for the judiciary in miniature. It comes under the aegis of our Ministry of Justice, but consistent with the principle of judicial independence, its members work to the judiciary and not the Lord Chancellor. Should we not also be taking steps to consider whether and in what ways we may need to reform the structure of support we receive? Is the structure right? What might we learn from the latest management techniques? Is the training right? Do we need to ensure that all those who support the judiciary are properly familiar with the digital world? If our courts and tribunals are to be, and they will be in the future, digital by 'default and by design'[33], we all need to be properly trained.

If, for instance, my Executive Board is to consider properly, policy decisions concerning the redesign of our Tribunals, its advice must be fully informed; greater experience in the digital world will not only ensure that our advice is up-to-date, but equally it will enable those giving advice to be able to go beyond reviewing material. It will enable them to see connections, propose further developments and improvements, that would not otherwise come to light. Just as any company or industry must learn from the latest management techniques, must keep abreast of the latest technological developments and invest accordingly in them, so must the judiciary. The judiciary are practiced in the incremental development of the common law which is an analogous process but we are Judges, we are not historically trained in leadership and management; a point which Richard Posner has recently and interestingly written about. As he put it, 'Management skills are often not positively correlated with judicial ability.'[34] You do

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33 Lord Justice Briggs, 'Civil Courts Structure Review – Interim Report' (December 2015) 4: <https://www.judiciary.uk/wp-content/uploads/2016/01/ccsr-interim-report-dec-15-final1.pdf>.

34 Richard A Posner, *Divergent Paths – The Academy and the Judiciary* (Harvard University Press 2016) 222.

not have to engage in the esoteric delights of the economy of law to readily see the truth in that statement. That must change.

To better enable the judiciary to discharge its governance responsibilities we need the right structure and the right support. That is not enough; I return to what more is needed in a moment. I do so because it also raises questions; particularly about transparency and accountability. I want to touch on those now. First, transparency. It is important that the public can understand the role that the judiciary plays in society. That judicial independence is, in some parts, being viewed as something which is a matter of judicial self-interest is as dangerous as it is worrying. That judicial independence is not understood to exist, as it does, for the benefit of the public, for society as a whole is a matter which needs to be combated if we are maintain our commitment to the rule of law. It is also, however, important that society understands how the judiciary is run and organised. Transparency, in so far as it does not impair judicial independence – and that is an important caveat – will help understanding. In doing so it may also improve scrutiny. Scrutiny may well prompt debate concerning our leadership and management structures; it may point out issues that – looking at matters internally – we have missed or downplayed. It will help inform the judiciary as much as it will the public. And that will be of benefit to all.

Second, accountability. It is well-established that the courts and judiciary are accountable in a number of ways. Appellate accountability for decisions. Explanatory accountability, on the part of the Lord Chief Justice and Senior President as leaders of our respective judiciaries in the justice system. Remedial accountability, to ensure we lead reform; a point I will come to shortly. Democratic accountability, through public procedures and judgments and through disciplinary accountability. We are accountable in many ways. As the judiciary as an institution enters more into the policy arena, it becomes difficult not to grapple with the question of how it is to be accountable for policy decisions. Equally, as the judiciary as an institution works in partnership, as it does through HMCTS, the courts and tribunals service, the question has arisen as to our accountability for implementing decisions taken by government.

Historically, the answer to the first point would have been to say that as head of the judiciary and government minister, the Lord Chancellor was accountable to Parliament for any such policy decisions. He was accountable as a Minister not as a judge, even if it was not entirely clear on what basis any particular policy was being considered or implemented. When Lord Browne-Wilkinson considered the creation of a college of judges to take policy decisions, that remained the answer. It is not one available today. As the 2005 and 2007 constitutional and tribunal reforms laid the

foundation for increased responsibility on the judiciary to develop policy for the administration of the courts and justice generally, they reformed the Lord Chancellor's role. If, as they do, the judiciary have leadership duties, so must they have responsibilities. So must they be accountable. Accountability must however continue to be informed by the principle of judicial independence; it cannot undermine institutional independence. Is it perhaps time then for consideration to be given to the adoption of the US model of accountability, as operates through the Administrative Office? Is such a step perhaps more consistent with both the changed role of the judiciary and the duty to secure open justice?

3.2. Policy

Constitutional purists may revolt at the idea that the judiciary should involve itself in policy decisions. They may take the view that the judiciary should not be involved in the implementation of government-led reforms. Two points need to be made.

First, such points assume – and wrongly assume – that the judiciary, government, and Parliament are and must be hermetically sealed away from each other. They are not. They must and do work together. They are interdependent, albeit they must all be careful to ensure that they do not overreach into the others' exclusive province. Developing and implementing policies concerning the effective administration of justice do not overreach. Ensuring judges are trained properly. Ensuring judges' welfare is properly supported. Ensuring judges are deployed to the right courts and tribunals and have the right level of support within the financial settlement provided by the government and Parliament. Ensuring that our courts and tribunals are open to the public. All these are matters well within the judicial province. A failure to develop proper policies to secure them, would be an abdication of responsibility.

Second, our constitutional settlement gives joint responsibility for the courts and tribunals to the government and the judiciary. As it does so, it cannot but be the case that the judiciary works in partnership with the government to effect relevant reform. The judiciary may not, and should not, be responsible or involved in the formulation of government policy, or legislation. That would be over-reaching. Once that policy has been established, and we must not forget both the government and Parliament are democratically accountable for policy decisions they take, partnership requires the judiciary to work with the government.

In acting in this way, the judiciary must however be guided by principle. It was once said by Lord Palmerston, that Britain had no permanent allies, no permanent enemies only permanent interests.[35] The judiciary has and only has permanent interests. They are, as ought to be obvious in the light of what I have already said, to secure the effective administration of justice; or in the words of the judicial oath to 'do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will.' That interest is what must guide and determine any and all policy choices that the judiciary makes through its leadership and management structures.

How practical is it to apply this principle and by what means? I suggest that the concept of 'Proportionality' is our practical guide. If I am right, then the achievement of our aim can be done through an application of the approach explained by Lord Bingham in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 (at para 19) and subsequently adopted by Lord Wilson in *(R) Quila v Secretary of State for the Home Department* [2012] 1 AC 621 (at para 45). As Lord Bingham put it, and I adapt them for present purposes, four factors must be applied:

- First, does the policy objective further open justice?
- Secondly, are the proposed implementation measures designed to implement the objective rationally connected to it?
- Thirdly, are they no more than necessary to accomplish the objective;
- Fourthly, do they strike a fair balance between the rights of the individual and the interests of the community.

We can see that these same questions have underpinned the introduction of proportionality, and the more distributive form of justice it entails, into the civil, family and tribunal justice systems in England and Wales through the concept of the 'overriding objective' in our procedural rules.[36] It seems to me that in examining our future approach to managing the justice system, to developing and implementing policies relating to it, we must adopt clear guiding principles such as these and apply them. They should be our rule of reason.

A clear statement of the judiciary's permanent interests and the test by which it carries out its duties to further those interests will not only better

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35 For the exact quotation see, David Brown, *Palmerston and the Politics of Foreign Policy – 1846-1855* (Manchester University Press 2002) 82.

36 As explained by Lord Dyson MR, 'The application of the amendments to the Civil Procedure Rules' (2014) 33 C.J.Q. 124.

enable the public and the other branches of the State to understand what is done and why. It will also provide a means by which the judiciary can test its own internal structures, and it will also secure principled continuity in its long-term governance. It will ensure that governance does not wax and wane, as equity was said to do, with the length of the Lord Chancellor's – or Senior President's – foot.

3.3. Reform

The development and application of principle and up-to-date management methods is of fundamental importance to reform. Historically reform has been the province of Royal Commissions or individual judges. Some have been advanced based on evidence. Others have not. Some have taken as their basis the idea that a judge knows best how the system operates, how it fails to meet its objectives and what must be done. Some reforms have succeeded. Others have not. And others still simply create problems for future generations to solve; a point Professor Resnik knows only too well. As she has rightly pointed out, 'The history of procedure is a series of attempts to solve the problems created by the preceding generation's procedural reforms'[37].

We are now in a world where such an approach is, quite simply, no longer acceptable. Reform based on the views of a single judge or group of judges, based on anecdote or impression, or even on a certain amount of evidence drawn from willing parties can no longer be the way we approach the matter. Judges while adept at researching the law, are not by and large trained in the skills of empirical, scientific research. They are not well-versed in dispute systems design. They do not necessarily understand or appreciate the connections, or potential connections between the courts, the legal profession, Ombuds schemes and so on. They are not necessarily at home in the digital world, in terms of design and implementation. Sir Michael Briggs, whose excellent report is ushering in the digitisation of our civil courts, is perhaps the last judge who will be in a position to carry out a detailed review of the historic type.

We are now in a new, digital world. It is one that will and does require the judiciary to take a more considered approach. We cannot lead reform as an exercise in the ad hoc. In order to understand, to design and to test reform we must, it seems to me, engage far more than we have in the past

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37 Judith Resnik, 'Precluding Appeals' (1985) 70 Cornell Law Review 603, 624.

with academia, with management experts, digital experts, with the professions, regulators, Ombuds and wider society. Reform must be based on proper research; robust and tested. It must consider the latest design techniques. It must be open to scrutiny, and communicated clearly and readily to the judiciary, government, Parliament, the professions and the wider public. It must require us to consider whether our processes are sufficient to modern conditions. There is no point, for instance, being wedded to personal service of process, when we are moving to a digital world where secure service can be effected at the touch of a button. Which of our processes must change, which may fall by the historical wayside? No question can be out-of-bounds. If we are to secure open justice, all questions must be capable of being asked and examined. But examined properly. The judiciary must therefore support, promote, and commission research. Just as the unexamined life is one not worth living;[38] the unexamined and unresearched reform may not be worth taking.

One point needs particular emphasis. At the present time, there is a lot of talk about digitising or rebooting justice[39]. ODR has transformed mediation and negotiation. It is also increasingly transforming formal justice systems; as experience in Canada with its Civil Resolution Tribunal and the UK, with the developing Online Civil Court and the development of Online Tribunals shows. They are two examples of a more widespread phenomenon. It is, of course, essential that such developments do not undermine open justice in any of its facets. On the contrary, we must seize the opportunity they provide to make justice more open still. Digitisation must make process more accessible. It must be used to make hearings more accessible. And it must be used to make judgments, which in turn must be clearer and simpler, more accessible.

More importantly, digitisation provides us with an opportunity to devise a new, under-developed, aspect of open justice. It is openness that comes from effective feedback. This has two aspects.

First, it provides the opportunity to adopt one of the features of ODR that has made it so successful. As Barton and Bibas explain it, one of the inherent advantages of ODR as it has been developed by Colin Rule is the ability of the systems he designed, such as eBay, to learn.[40] Due to the amount of information the systems gather, they are able to discern pat-

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38 Plato, *Apologia*, s38a.

39 See for instance Benjamin H Barton and Stephanos Bibas, *Rebooting Justice* (Encounter Books 2017).

40 Ibid 112.

terns, to identify weaknesses, and consequently to redesign, implement change and measure the efficacy of those changes. It is the ultimate in data-led reform. Digitisation will, if we are sensible, provide us with the opportunity to gather data on the operation of our justice systems in ways that we have often been unable to before. It provides us with the opportunity to make our justice systems more adaptive; but again, only after proper scrutiny and discussion.

Second, it provides us with the opportunity to reorient our justice systems so that they not only become more accessible, and thus more able to deliver justice; particularly for those who would otherwise be the digital outlaws I referred to at the outset. It also provides the opportunity to enable widespread, systemic problems in the application of the law to come to light. It enables us to put in place feedback loops between for instance the justice system and Ombudsman and regulatory bodies. It will thus provide us with the opportunity to bring to light, and public scrutiny, widespread systemic problems with particular legal issues or areas. It will lay open to public scrutiny systemic weaknesses in the rule of law; providing an enhanced means to promote public debate, to highlight how and where public values instantiated in law are not being developed as Parliament intended: to provide observational justice. It will thus increase the ability of courts and tribunals to promote the rule of law. The creation of such feedback loops is an implicit aspiration of our civil court reforms.[41] It is equally something that I am pursuing for the digitisation of the UK's tribunals. We have an opportunity to broaden and deepen our commitment to open justice through digitisation; we cannot let this unique opportunity slip through our fingers.

The purpose and principles upon which the courts and tribunals modernisation programme in the UK is based reflect our commitment to the rule of law, access to justice and open justice as distinct from price rationing or austerity management. They are these:

The Purpose: to give the administration of justice a new operating model with a sustainable and affordable infrastructure that delivers better services at lower cost and safeguards the rule of law by improving access to justice.

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41 Sir Terence Etherton MR, *The Civil Court of the Future*, Slynn Memorial Lecture (15 June 2017) 24 <https://www.judiciary.gov.uk/wp-content/uploads/2017/06/slynn-lecture-mr-civil-court-of-the-future-20170615.pdf>.

The Objectives:

- Ensure justice is accessible to those who need it
- Design systems around the people who use them – user friendly, intelligible and comprehensible justice
- Create a system that is financially viable using a more cost effective infrastructure (better and effective use of IT and new working practices)
- Eliminate the most common causes of delay
- Retain the UK's international standing as a world class provider of legal services and the judiciary as world leaders in the delivery of justice
- Maintain the constitutional independence of the judiciary

4. Conclusion

I have only been able to outline some of the issues, which I believe to be important as we continue to develop open justice in the 21st Century. They are, I hope, the starting point of a broader public discussion. I started with a reference to Woodrow Wilson, President of the United States, 100 years ago. As judges must eschew politics rather than history or the law, I will end with a comment by Richard Posner. In considering the question of reform, he said this:

> ... the Supreme Court is famously backward in utilizing technology, as backhandedly conceded in the Chief Justice's latest end-of-year report, in which he tries to excuse his Court's backwardness by asserting that "federal judges are stewards of a judicial system that has served the Nation effectively for more than two centuries. Like other centuries-old institutions, court may have practices that are archaic and inefficient – and some are. But others rest on traditions that embody intangible wisdom." I (that is Posner) can't find the wisdom, tangible or intangible, in the archaic and inefficient practices that persist in the Supreme Court, such as the placement of a spittoon beside each Justice's seat in the courtroom.[42]

In the UK we do not have anything comparable to such a practice. But the point is well-made. If we are to ensure that our courts and tribunals fulfil their constitutional role, we – as judges – must ensure that they and their processes are not unexamined; that we lead reform in the light of evidence

42 Richard Posner (n 34) 236.

and through the proper use of expertise. Most importantly, we must ensure that we fulfil our duties and responsibilities as effectively as we can in order to secure open justice for all.

Transparency in the Selection of Constitutional Court Judges: Contextualised Comparison between the USA, Germany and the European Courts in Luxembourg and Strasbourg

Thomas Giegerich

1. *Constitutional Jurisdiction on the National, International and Supranational Levels – Overcoming the Counter-Majoritarian Difficulty*

Constitutional courts are courts that exercise constitutional jurisdiction, following one of two basic models: Constitutional jurisdiction can either be assigned to the ordinary courts alongside their other jurisdiction. This decentralised model has been followed, e.g., in the USA, Switzerland and the EU, where the Court of Justice functions as the ultimate arbiter also of primary Union law, the supranational equivalent of a national constitution.[1] As an alternative centralised model, a separate constitutional court with specialized jurisdiction only over constitutional issues can be established. This has been done, e.g. in Austria, Germany and by the European Convention on Human Rights, where the Strasbourg Court functions as an internationalised constitutional court specifically tasked with the enforcement of human rights.

Constitutional jurisdiction effectively enforces the constitutional constraints to which all political power is subject in any system based on the rule of law. Accordingly, it is an eminently political jurisdiction, and constitutional courts exercise political power in judicial forms. This gives rise to what has aptly been called the 'counter-majoritarian difficulty', i.e. the problem of a very small number of independent and irremovable judges imposing legal constraints derived from the short and often unclear text of the constitution upon elected parliamentarians who represent the political majority of the people.[2] In a democracy, the authority of constitutional courts ultimately depends on the acceptance of their judgements by the people and their representatives. With the internationalisation and supra-

1 See Jeffrey L Dunoff and Mark A Pollack, 'The Judicial Trilemma' (2017) 111 American Journal of International Law 225, 243.

2 Alexander Bickel, *The least dangerous branch: the Supreme Court at the bar of politics* (2nd edn, Yale University Press 1962) 18.

nationalisation of constitutional jurisdiction in today's Europe, national and European constitutional courts are sharing the obligation and purpose to guarantee the rule of law within and beyond the states.[3] This gives the 'counter-majoritarian difficulty' an additional international and supranational dimension.

Recently, constitutional courts in Europe have come under attack from populists and autocrats.[4] The appropriate reaction lies in strengthening public confidence in the indispensability of constitutional courts on the national, international and supranational level as independent guardians of the rule of law against arbitrary government. While the transparency of the judge-selection process obviously plays an important role in this endeavour, it must be put into context.

2. *The Legitimacy of Constitutional Courts – Putting Transparency into Context*

In a democratic system of government, the rule of law cannot be maintained without public confidence in the institutional and operational legitimacy of constitutional courts. That legitimacy derives to a large degree from a synthesis of transparency and effectiveness of the judge-selection process. The transparency requirement extends to the eligibility criteria which candidates must fulfil, as well as the selection and appointment process as such, including the formal or informal involvement of various actors.

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3 Thomas Giegerich, 'Die Verfassungsgerichtsbarkeit in Deutschland, den USA und Europa als Trägerin einer gemeinsamen Rechtswahrungsaufgabe' in Marten Breuer et al (eds), *Im Dienste des Menschen: Recht, Staat und Staatengemeinschaft* (Duncker & Humblot 2009) 95 ff.

4 On the situation in Poland, see Dimitry Kochenov, Laurent Pech and Kim Lane Scheppele, 'The European Commission's Activation of Article 7: Better Late than Never?' (EU Law Analysis, 23 Dec 2017) <http://eulawanalysis.blogspot.de/2017/12/the-european-commissions-activation-of.html> accessed 19 January 2018.

2.1. Institutional and Operational Legitimacy: Synthesising Transparency and Effectiveness

The institutional legitimacy of constitutional courts pertains to their input legitimacy as a branch of the government 'by the people'.[5] It also pertains to their social legitimacy, i.e. their popular acceptance as being a branch of government 'of the people'. Both the input and social legitimacy of constitutional courts depend primarily on their democratic legitimacy, one important element being the transparency of the judge-selection process and the social representativeness of the bench, including a proper gender balance.[6] In case of federal, international or supranational constitutional courts, the federal representativeness, i.e. the inclusion of judges from different constituent states, is an important additional factor with regard to both their input and social legitimacy. It is usually guaranteed by the involvement of the representative organ of the constituent states in the selection process.

The operational legitimacy of constitutional courts is linked to their output legitimacy as a branch of the government 'for the people'. It depends on these courts' effectiveness, i.e. their ability properly to dispense justice in high quality and good time through persuasive opinions which definitely settle the constitutional issues. The most important prerequisite is the personal and professional quality of the judges. Their personal quality consists in their unquestionable independence and impartiality. Their professional quality is characterised by their excellent knowledge of the law and ability to function as a constitutional court judge. From an operational legitimacy perspective, the main concern with regard to the judge-selection process is not its transparency as such but its ability to produce a high-quality bench that ensures the effective functioning of the constitutional court. This goal of effectiveness may require certain trade-offs with regard to the transparency of the process.

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5 The distinction between input legitimacy (government by the people), output legitimacy (government for the people) and social legitimacy (government of the people) goes back to U.S. President Abraham Lincoln's Gettysburg Address of 19 November 1863 (Abraham Lincoln, *Selected Speeches and Writings* [Vintage Books 1992] 405) and was adopted by Art 2 (5) of the French Constitution of 1958 (JO 05-10-1958, 9151-9172).

6 But see Mikael Rask Madsen, 'The Legitimization Strategies of International Judges' in Michal Bobek (ed), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (OUP 2015) 259, 263 ff.

2.2. *Democratic Legitimacy v Effectiveness (Independence, Impartiality and Professionalism) of Constitutional Courts*

The constitutional courts' exercise of political power in judicial forms presupposes that they have a considerable degree of democratic legitimacy of their own.[7] Otherwise, they cannot overcome the 'counter-majoritarian difficulty'. This requires parliamentary control of judicial appointments which also tends to increase the transparency of the process. On the other hand, the confidentiality of candidates' sensitive personal data limits the openness of the selection process. The term of office of judges should be limited, enabling regular renewal of the constitutional court's composition by parliament and thereby constantly refreshing its democratic legitimacy.

Since constitutional courts are courts, their democratic legitimacy must accommodate the three fundamental conditions of effective fulfilment of their judicial tasks, namely independence, impartiality and professional quality. This includes independence from political influences and impartial interpretation and implementation of the constitution, irrespective of political ideology. Thus the design of the appointment process must ensure the selection of judges whose credibility in these respects is beyond doubt so that the effective functioning of the court is guaranteed. The transparency of that process may be limited inasmuch as excessive transparency deters suitable candidates for what is primarily a judicial and not a political office. Furthermore, vacancies on the bench need to be filled without undue delay so that the effective functioning of the constitutional courts is continuously guaranteed.

As the temptation is great for the political majority at any given time to 'pack' a constitutional court with partisan judges, effective legal safeguards must be established against such threats to independence and impartiality. Thus, the important rules (such as eligibility criteria, number of judges, terms of office etc.) need to be clearly formulated and constitutionalised so that they cannot be easily manipulated. Moreover, a qualified majority should be required for the parliamentary election of judges which at the same time increases the level of their democratic legitimacy. Lastly, judicial review should be possible in order to increase transparency of the reasons

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7 See Armin von Bogdandy and Christoph Krenn, 'On the Democratic Legitimacy of Europe's Judges' in Bobek (n 6) 162 ff. See also Armin von Bogdandy and Ingo Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification' (2012) 23 European Journal of International Law 7 ff.

for the appointment of a certain judge and enable annulment of arbitrary appointments.

2.3. Indirect Accountability of Constitutional Court Judges – The Role of Separate Opinions

Judicial independence makes it impossible to hold constitutional court judges directly democratically accountable in the form of recall. Rather, they can only be removed from office for a very limited number of reasons set forth in the constitution and/or law and in a cumbersome procedure.[8] As a matter of fact, no judge of the German Federal Constitutional Court, the CJEU and the ECtHR and no Justice of the U.S. Supreme Court has ever been removed from office.[9] Accordingly, the only accountability of constitutional court judges is realised in the 'court' of public opinion, the public being in many cases represented by constitutional law experts who critically discuss constitutional court opinions in articles and books.

This indirect public accountability is enhanced if separate – concurring or dissenting – opinions by individual judges are permitted. These also increase the transparency of the adjudication process because they make the internal exchange of arguments and counter-arguments public. Apprehensions that a court's authority may be undermined, if it speaks with more than one voice on important issues, are unfounded: The frequent use of separate opinions in the U.S. Supreme Court, the European Court of Human Rights and the German Federal Constitutional Court has not led to any loss of authority. Rather, it has promoted public acceptance of these courts, because it compels the majority to hand down better-reasoned judgments.

2.4. Contextual Question with Regard to Transparency of Selection of Judges

Since the transparency of the process of selecting judges is but one important element ensuring the legitimacy of constitutional courts, it needs to

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8 Art II, s 4 of the U.S. Constitution; s 105 German Federal Constitutional Court Act (FCCA) (Federal Law Gazette I 1993, 1437); arts 6, 8 of Protocol (no 3) on the Statute of the CJEU [2010] OJ C 83/210; art 23 (4) European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (ETS no 005).

9 See also below n 14.

be contextualised. The decisive contextual question thus is: Does the selection process demonstrably reconcile conflicting popular demands for transparency and effectiveness, social and – where applicable – inter-/supranational representativeness in a way that promotes public confidence in the constitutional court? This question will form the backdrop for the following contextual analysis of the transparency of the judge-selection process in the U.S., Germany, and Europe.

3. *Contextualised Analysis of the Transparency of the Selection Processes in the U.S., Germany, and Europe*

3.1. *The U.S. Supreme Court as Prototype Constitutional Court*

3.1.1. *Few Constitutional Precepts and Statutory Rules*

The U.S. Supreme Court can claim to be the model constitutional court.[10] Yet, few constitutional provisions regulate the appointment of the nine Justices, leaving wide discretion to Congressional legislation and volatile political practice. Thus, the eligibility criteria are not defined anywhere and the number of Justices is laid down only in a federal statute.[11] The political majority accordingly possesses the power to increase that number, 'packing' the Court with political partisans and thereby changing its ideological balance. President F.D. Roosevelt tried to do this in 1937 after the Supreme Court had struck down several important pieces of New Deal legislation for overcoming the Great Depression, each time by the narrow margin of 5:4 votes. The President could not muster the necessary majority in Congress to change the law. However, having been sent a clear warning signal by the initiation of the legislative process, the majority in the Supreme Court henceforth exercised the utmost restraint *vis-à-vis* New Deal laws.[12]

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10 See Konrad Zweigert, 'Einige rechtsvergleichende und kritische Bemerkungen zur Verfassungsgerichtsbarkeit' in Christian Starck et al (eds), *Bundesverfassungsgericht und Grundgesetz* (vol 1, Mohr 1976) 63, 65 ff.

11 28 U.S. Code § 1.

12 Jeff Shesol, *Supreme Power: Franklin Roosevelt vs. the Supreme Court* (Norton 2010).

3.1.2. Life Tenure and Individualised Opinions

The Justices enjoy life tenure in the literal sense, serving until they die or voluntarily retire.[13] They can be removed from office only through the impeachment procedure, upon conviction of 'Treason, Bribery, or other high Crimes and Misdemeanors' by a two-thirds majority of the Senate upon an indictment by the House of Representatives.[14] This gives the appointing authorities the power to influence the ideological composition and thus the case-law of the U.S. Supreme Court for decades far beyond the end of their own term of office and is the reason why the appointment of Justices can give rise to major political battles. Introducing term limits, as has been suggested from time to time,[15] would require an amendment to Article III, Section 1 of the Constitution which provides that judges of the Supreme Court 'shall hold their Offices during good Behaviour'.[16]

Furthermore, the individual Justices do not remain behind the cloak of the U.S. Supreme Court as an institution when deciding cases, but are individually present during their entire tenure, both as authors of majority opinions as well as separate concurring and dissenting opinions. It is also always made public how a Justice voted in a particular case. The adjudication process is therefore as transparent as possible, despite the secrecy of deliberations in the judicial conference.

3.1.3. Appointment Authority Shared by President and Senate – Informal Involvement of American Bar Association

In the appointment process, the cooperation of the two non-judicial branches of the U.S. Government – the President and the Senate – is constitutionally mandated. The President has the power to nominate candidates, but requires the consent of the Senate for the appointment of the

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13 Art III, s 1 of the Constitution; 28 U.S. Code §§ 371, 372.

14 Id, art III, s 1; art I, s2, clause 5 and s 3, clause 6; art II, s 4. In the only impeachment procedure ever initiated against a U.S. Supreme Court Justice, Justice Samuel Chase was acquitted in 1805.

15 See eg, David Lat, 'On the Longevity of Supreme Court Justices' (Above the Law, 28 March 2017) suggesting an 18-year term limit <https://abovethelaw.com/2017/03/on-the-longevity-of-supreme-court-justices/> accessed 11 October 2017.

16 The amendment process under art V of the Constitution is extremely cumbersome.

Justices.[17] Since both the President and the Senators are for all practical purposes elected directly, they enjoy a high degree of democratic legitimacy which they pass on to the Justices. Moreover, the Senate being the representation of the peoples of the constituent states, its involvement in the appointment process ensures the federal legitimacy of the Justices.

While the President alone determines the amount of transparency of the nomination process, the confirmation process is transparent. In practice, each nominee is subject to a public confirmation hearing before the Judiciary Committee of the Senate.[18] These hearings are always intense, last for several days and probe the nominee's character, knowledge and 'judicial philosophy'. They can get aggressive, if political opponents try to 'destroy' a certain candidate in front of the cameras.[19]

As an informal part of the process, the American Bar Association's independent, non-partisan Standing Committee on the Federal Judiciary has for several decades publicly rated the qualification of each U.S. Supreme Court nominee 'based on integrity, professional competence and judicial temperament and not philosophy, political affiliation or ideology'.[20] Without the seal of quality of the ABA, a nominee will in practice not be confirmed by the Senate.[21] This compensates for the lack of any constitutional or statutory precepts regarding the qualifications of nominees.

3.1.4. Simple or Qualified Majority in the Senate?

As a general rule, the consent of the Senate for the appointment of a U.S. Supreme Court Justice (as for 'all other Officers of the United States',

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17 Ibid., art II, s 2, clause 2.

18 Paul M Collins, Jr and Lori A Ringhand, *Supreme Court Confirmation Hearings and Constitutional Change* (CUP 2013).

19 The hearings of Clarence Thomas in 1991 constitute the most notorious example (David G Savage, *Turning Right: The Making of the Rehnquist Court* [Wiley 1992] 423 ff). See also Uwe Kischel, 'Amt, Unbefangenheit und Wahl der Bundesverfassungsrichter' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts* (vol 3, 3rd edn, Müller 2005) § 69 margin n 41 – 43.

20 'ABA Committee on Federal Judiciary Rates Supreme Court Nominee Neil Gorsuch "Well Qualified"', (ABA News, 9 March 2017) <www.americanbar.org/news/abanews/aba-news-archives/2017/03/aba_standing_committ.html> accessed 10 October 2017.

21 For a thorough history of US Supreme Court appointments, see Henry J Abraham, *Justices, Presidents, and Senators: a history of the US Supreme Court appointments from Washington to Bush II* (5th edn, Rowman & Littlefield 2008).

including federal judges) requires no more than a simple majority.[22] Thus, if the President and the majority of the Senate are politically close, they can staff the Supreme Court with their ideological partisans.[23]

According to a practice of the Senate which only began recently, the filibuster – that is the unlimited extension of the debate on legislative bills – was also used to prevent a final vote on Presidential nominees for federal judgeships. Under Rule XXII, para 2 of the Senate Rules, that debate can only be terminated by a vote of cloture requiring a three-fifths majority.[24] The practical consequence was that a particular nominee henceforth needed the support of 60 out of the 100 senators for confirmation in case of a filibuster. However, the constitutionality of that practice was questioned because it undermined the Presidential power to appoint federal judges, including U.S. Supreme Court Justices, with the consent of no more than a simple majority of senators.

That constitutional objection prepared the ground for the so-called 'nuclear option' to abolish the practice with regard to confirmation of Presidential nominees. Every Senator can challenge the constitutionality of any Senate rule by making a point of order which, if supported by a simple majority of the Senate, will establish a precedent superseding that rule. In 2013, a Democratic Senate majority decided that 'the vote of cloture under rule XXII for all nominations other than for the Supreme Court of the United States is by majority vote'.[25] In 2017, that precedent was extended by a Republican majority to nominations for the U.S. Supreme Court.[26] This paved the way for the Senate confirmation of Neil Gorsuch as U.S. Supreme Court Justice by 54 votes against 45 (one Senator being absent).[27]

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22 See art II, s 2, clause 2 of the U.S. Constitution and *U.S. v Ballin* [1892] 144 U.S. 1, 8. Few nominees have been defeated. The most spectacular defeat occurred in 1987 when the Senate rejected the ultra-conservative Robert Bork who had been nominated by President Ronald Reagan (Savage [n 19] 133 ff.).

23 But see William H Rehnquist, *The Supreme Court: How It Was, How It Is* (Morrow 1987) 235 ff.

24 The Rules of the Senate are available at <www.rules.senate.gov/public/index.cfm?p=RulesOfSenateHome> accessed 10 October 2017.

25 Congressional Record: Senate, 113th Congress, 1st Session, vol 159, no 167 (21 November 2013) S8417 – S8418 <www.congress.gov/crec/2013/11/21/CREC-2013-11-21-pt1-PgS8413-5.pdf> accessed 10 October 2017.

26 Congressional Record: Senate, 115th Congress, 1st Session, vol 163, no 58 – Part III (6 April 2017) S2383 – S2391 <www.congress.gov/crec/2017/04/04/CREC-2017-04-04-bk3.pdf> accessed 10 October 2017.

27 Matt Flegenheimer, 'Senate Republicans Deploy "Nuclear Option" to Clear Path for Gorsuch' (NY Times, 6 April 2017) <www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html> accessed 10 October 2017.

The unsuccessful Democratic filibuster against Gorsuch, nominated in January 2017 by the newly-elected President Trump to fill the vacancy left by the death of the staunchly conservative Justice Antonin Scalia in February 2016, was in reaction to the refusal of the Republican majority, including the chairman of the Judiciary Committee, to take any action whatsoever on Merrick Garland, who had been nominated by President Obama for that same position already in March 2016. By their blockade the Republicans intended to postpone the appointment process until after the Presidential election in November 2016. They were afraid that an Obama nominee replacing the conservative Justice Scalia would lead to a predominance of the liberal wing of the U.S. Supreme Court. For more than a year, this left the Court understaffed and unable to decide a number of cases because of its being equally divided in a conservative and a liberal group of four Justices each.[28] There is no subsidiary legal mechanism for filling vacant seats should the ordinary appointment process end in a stalemate. A political blockade can only be overcome politically.

Both Garland and Gorsuch had been rated as well-qualified by the ABA and also served on federal courts of appeal for many years, their previous appointments having received large bipartisan support in the Senate. While the politicised process leading to the Gorsuch appointment was fully transparent, it can hardly inspire public confidence.

3.2. The German Federal Constitutional Court – Quintessential Constitutional Court

3.2.1. Few Constitutional Precepts

The German constitution (Basic Law [BL]) contains few provisions on the appointment of judges of the Federal Constitutional Court (FCC), delegating the power to enact even fundamental rules to the federal legislature.[29] The BL only sets forth in Article 94 (1) that the FCC shall consist of federal judges[30] and other members, half of whom are to be elected by the *Bundestag* (Federal Diet), the directly elected federal parliament, and the other

28 If a tied vote occurs, the lower court decision is in practice affirmed by an equally divided court in a *per curiam* decision with no precedential value.

29 Art 94 (2) Basic Law (BL) (Federal Law Gazette I 1949, 1).

30 Federal judges are the judges of the five federal supreme courts established by art 95 (1) BL.

half by the *Bundesrat* (Federal Council), the representation of the sixteen constituent states' governments. The judges of the FCC may not be members of the Federal Diet, the Federal Council or the Federal Government, nor of the equivalent organs of any constituent state. These incompatibilities are intended to safeguard their independence.[31]

3.2.2. Detailed Provisions in the Federal Constitutional Court Act

The Federal Constitutional Court Act (FCCA)[32] provides in Sec. 1 (1) that the FCC 'shall be a federal court of justice which is autonomous and independent of all other constitutional organs', thereby putting the FCC on a par with the other – political – constitutional organs, such as the Federal Diet etc. The FCCA also prescribes the number of judges (sixteen in all, equally divided between two chambers *[Senate]*)[33] and determines that three judges in each chamber shall be federal judges with a minimum of three years' experience.[34] Only persons who have reached the age of forty, are eligible to the Federal Diet, qualified to hold judicial office in Germany and have declared in writing their willingness to become a member of the FCC can be elected to the FCC.[35] The Federal Ministry of Justice keeps and continuously updates a list of eligible federal judges and another list of candidates who are proposed by a parliamentary group in the Federal Diet, the Federal Government or a Land government. These confidential lists are forwarded to the Federal Diet or the Federal Council in time for an upcoming election, but do not in any way bind the electoral body and are thus practically irrelevant.[36]

Sec. 4 FCCA stipulates a term-limit of twelve years for the judges of the FCC and excludes their immediate or subsequent re-election. The retirement age is sixty-eight, including for judges who have not yet completed their twelve-year term. Upon expiry of their term of office the judges con-

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31 Bodo Pieroth, 'Art 94' in Hans D Jarass and Bodo Pieroth, *Grundgesetz* (15th edn, Beck 2018) art 94 margin n 1.

32 Federal Constitutional Court Act in the version of 11 August 1993 (Federal Law Gazette I, 1473), last amended by art 1 of the Law of 18 July 2017 (Federal Law Gazette I 2017, 2730). English translation available at <www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.pdf?__blob=publicationFile&v=5> accessed 6 November 2017.

33 Sec 2 (1), (2) FCCA.

34 Sec 2 (3) FCCA.

35 Sec 3 (1), (2) FCCA.

36 Sec 8 FCCA. See Kischel (n 19), margin n 6.

tinue to carry out their functions until a successor is appointed, which ensures the continuous proper functioning of the FCC.

According to Sec. 6 and 7 FCCA, a two-thirds majority is required in the Federal Diet or the Federal Council for being elected to the FCC. As a result, all the judges of the FCC have so far belonged to the political and philosophical mainstream of Germany and enjoyed a solid democratic as well as federal legitimacy. Only the election process in the Federal Diet will henceforth be discussed.

3.2.3. Election Process in the Federal Diet

Section 6 FCCA on the election procedure in the Federal Diet provides that the plenary elects the judges upon proposal of an Election Committee which consists of twelve members of the Federal Diet who are elected by the plenary in accordance with the principles of proportional representation. The adoption of a proposal by the Election Committee, whose members are completely independent, requires eight votes, thus also a two-thirds majority. As a matter of fact, until a change of the law in 2015 the FCCA tasked the Election Committee with carrying out the election of the FCC judges for the Federal Diet without any involvement of the plenary. The constitutionality of that delegation of electoral power had always been questioned, but was upheld by the FCC.[37]

The FCC held that because such a transfer of electoral power from the plenary to a committee excluded many deputies from participation and thus conflicted with the fundamental principle of equality of deputies, a very weighty reason in the form of another constitutional value was needed to justify it. The Court found such a reason in the interest of keeping the matter confidential, the members of the Election Committee being subject to an obligation to confidentiality. The legislative goal of the transfer was to strengthen the FCC's reputation and the public confidence in its independence and thus to ensure its ability to function properly. The appreciation of the legislature that the FCC could sustain functional deficits if its members were no longer elected in a confidential procedure in the Election Committee but instead by the plenary was weighty enough to justify the arrangement. In other words, the FCC held that the lack of transparency of the Committee process of electing FCC judges amounted

37 See BVerfGE 130, 230 (234 ff.).

to a constitutional value which outweighed the constitutional value of equality of deputies.

In 2015, Section 6 FCCA was amended to the effect that henceforth the plenary shall elect the FCC judges by a two-thirds majority in a secret ballot. But the Election Committee remains important, because it retains the power to propose the candidates, also by a two-thirds majority. In practice, the Election Committee continues to determine who becomes an FCC judge, since the voting act of the plenary is a mere formality.[38] Pursuant to Article 6 (4) FCCA, the Committee members are obliged to maintain confidentiality concerning the personal circumstances of the candidates, the discussions in the Committee and the casting of votes. There is no public hearing and no involvement of professional organisations. Rather, the two major political parties in Germany – the Christian Democrats (CDU/CSU) and the Social Democrats (SPD) – each of them represented by a very influential spokesperson, have traditionally controlled an entirely non-transparent selection process.[39]

This led to an informal and unwritten, but generally known political agreement between them. According to the version of this *modus vivendi* in use since 1976, they both have the right to nominate four of the eight judges in each of the two chambers of the FCC. Three of the nominees may be members of or close to the respective party; the fourth one must be politically neutral. In practice that means that for each of the judgeships in the FCC it is clear which party has the right to propose a successor if the incumbent's term of office expires and whether the nominee must be neutral or may be a party member. In times in which one of the parties forms a coalition government with a smaller party, it will cede one of 'its' seats on the FCC to the junior coalition partner.[40] While the agreement as such is transparent, its application in concrete cases is completely obscure.

This agreement was adhered to until the end of the last election period.[41] The two parties having lost their two-thirds majority in the Federal Diet in the election of September 2017, the fate of their *modus vivendi* remains to be seen when the next election of an FCC judge comes up in the Federal Diet. Strictly speaking, it is an instance of political patronage

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38 On the inevitability of such a preparatory selection process, see Kischel (n 19), margin n 49, 52.

39 Kischel (n 19), margin n 24 – 26.

40 Kischel (n 19), margin n 21 – 22. On the earlier practice, see Klaus Kröger, 'Richterwahl' in Starck et al (n 10) 76, 92 ff.

41 See Christopher Lenz and Ronald Hansel, *Bundesverfassungsgerichtsgesetz* (2nd edn, Nomos 2015) § 6 margin n 8.

which violates basic constitutional principles such as the prohibition of discrimination based on political opinion in Article 3 (3) BL and the command in Article 33 (2) BL that every German shall be equally eligible for any public office according to his aptitude, qualifications and professional achievements (and irrespective of party membership).[42]

3.2.4. Effectiveness of the Appointment Process – Calls for More Transparency

This procedure for selecting FCC judges makes clear that they are primarily political appointees enjoying the confidence of a large political majority in either of the two chambers of the German legislature. Criticism of its non-transparency has so far led only to a minor reform – the aforementioned retransfer of the election competence from the Election Committee to the plenary of the Federal Diet in 2015. Demands to introduce a public hearing of candidates, in order to increase the transparency of the election process, have not been fulfilled because of fears that this would lead to an excessive politicisation and ideological confrontation privileging the posers and discouraging other better qualified candidates.[43] These fears are unsubstantiated. In reality, objections against public hearings seem to be based rather on the intention to avoid public oversight of backroom deals by political parties than on concerns for the candidates' privacy and reputation. Therefore, a public hearing by the Election Committee of a small number of short-listed candidates should be introduced to increase transparency. It should be time-limited and strictly regulated so as to ensure that it would be conducted in a civilised way. It is not unreasonable to require limited publicity from candidates for high-calibre public office such as constitutional court judge.

It is true that the current non-transparent procedure has so far ensured the selection of highly qualified judges with a distinct sense of judicial duty beyond political partisanship.[44] It has also produced a well-balanced bench whose decisions have been both well-reasoned and politically sound, so that their implementation has never caused problems. The public confidence in the FCC has constantly been high in Germany, and also internationally the Court's reputation is excellent. In other words, that

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42 See in general Helmut Lecheler, 'Der öffentliche Dienst' in Josef Isensee/Paul Kirchhof (eds) *Handbuch des Staatsrechts* (vol 5, 3rd edn, Nomos 2007) § 110 margin n 10; Jarass 'Art 33' in Jarass and Pieroth (n 31), art 33 margin n 22.

43 Kischel (n 19), margin n 44 – 47.

44 See Kischel (n 19), margin n 23, 39, 81.

procedure has been effective. Yet, enhancing the transparency of the judge-selection process while diminishing the political patronage elements would help maintaining public confidence and forestall potential populist challenges while not jeopardising the effectiveness of that process.

3.3. The Court of Justice of the EU (CJEU) – Supranational Constitutional Court

The jurisdiction of the CJEU, like that of the U.S. Supreme Court, and different from the jurisdiction of the FCC and the ECtHR, goes beyond constitutional law and comprises the Union law (i.e. the 'federal' law of the EU) in its entirety. This study will concentrate on the CJEU's constitutional jurisdiction and not consider the General Court.

3.3.1. Criteria for Office and Functions of Judges and Advocates-General

All the relevant rules on the appointment of the Judges and Advocates-General of the CJEU are laid down in primary Union law.[45] The CJEU consists of one Judge from each of the 28 Member States and eleven Advocates-General, whose number was increased by a unanimous Council decision upon the request of the CJEU.[46] According to Article 253(1) TFEU, the Judges and Advocates-General shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence. These very general standards have been specified further by the Panel set up pursuant to Article 255 TFEU.[47] In order to ensure their independence, both Judges and

45 Art 19 (2) Treaty on the European Union (TEU) [2016] OJ C 202/13 and arts 253, 255 Treaty on the Functioning of the European Union (TFEU) [2016] OJ C 202/47.

46 Art 19 (2) TEU; art 252 (1) TFEU in conjunction with the Council Decision of 25 June 2013 increasing the number of Advocates-General of the Court of Justice of the EU [2013] OJ L 179/92.

47 Henri de Waele, 'Not Quite the Bed that Procrustes Built: Dissecting the System for Selecting Judges at the Court of Justice of the European Union' in Bobek (n 6) 37 ff; Bobek, 'Epilogue' in ibid. 279, 288 ff. See below under 3.3.3.

Advocates-General may not hold any political or administrative office or engage in any occupation.[48]

In contrast to the three other courts considered in this study, the judicial personnel of the CJEU also comprise Advocates-General equal in status to the Judges, following the model of the French administrative jurisdiction with its *rapporteurs publics* (previously called *commissaires du gouvernement*). France, Germany, Italy, Poland, Spain and the UK, the six most populous member states, each always have an Advocate-General, whereas the other five Advocates-General are allocated to five other member states on the basis of a rotation system.[49]

Pursuant to Article 252 (2) TFEU, it is the duty of the Advocates-General, 'acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases …' While their opinions are not binding on the CJEU, they are mostly followed and can then be used as subsidiary means of interpreting the judgments. If they are not followed, they function as dissenting opinions.[50] In both cases, they increase the transparency of the adjudication process and have an important influence on the development of the case law. The opinions are always attributable to an individual Advocate-General, whereas CJEU decisions are always handed down by panels of at least three Judges who do not have the possibility of writing separate concurring or dissenting opinions. The panel decisions are determined by a majority of the Judges taking part in the deliberations which are and remain secret.[51]

3.3.2. Appointment Procedure

The appointment of the Judges and Advocates-General has always been completely in the hands of the Member States and the selection procedure is largely non-transparent. Pursuant to Article 19 (2) TEU, Article 253 (1)

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48 Arts 4, 8 of Protocol No 3 on the CJEU Statute (n 8); art 32 of the Rules of Procedure of the Court of Justice of 25 September 2012 [2012] OJ L 265 as amended on 18 June 2013 [2013] OJ L 173/65 and 19 July 2016 [2016] OJ L 217/69 <https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf> accessed 15 November 2017.

49 See Declaration (no 38) on art 252 TFEU regarding the number of Advocates-General in the Court of Justice, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon [2016] OJ C 202/350.

50 See Dunoff and Pollack (n 1) 244 n 62.

51 Art 2 of the Protocol on the CJEU Statute (n 8); art 32 of the Rules of Procedure of the Court of Justice of 25 September 2012, as amended (n 48).

TFEU, they are appointed by common accord of the governments of the Member States for a term of six years. Reappointments are permitted without any limitation as to the age or the number of terms. In practice, each government proposes a candidate for the Judge from that member state who is then confirmed by all the others. With regard to the Advocates-General, the respective Member State government[52] proposes a candidate who is then confirmed by all the others.[53] This appointment procedure has rightly been called anachronistic.[54]

3.3.3. Involvement of Expert Panel since 2009 (Article 255 TFEU)

The Treaty of Lisbon introduced an Expert Panel which was considered as necessary in order to rationalise and objectify the appointment process, ensure the professional qualification and personal quality (independence and impartiality) of candidates and eliminate arbitrary considerations, such as partisanship, closeness to a government or national interest.[55] Pursuant to Article 255 TFEU, the Panel shall give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General before appointments are made. The Panel comprises seven persons chosen from among former members of the CJEU and the General Court, members of national supreme courts and lawyers of recognised competence, one of them to be proposed by the European Parliament. The Council establishes the operating rules and appoints the members of the Panel in separate decisions,[56] acting on the initiative of the President of the CJEU and deciding by a qualified majority.[57] The process of selecting the Panel members is entirely non-transparent.

The Council's appointment decision of 2014 refers to the necessity of a balanced membership of the Panel, both in geographical terms and in

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52 See above under 3.3.1.

53 Juliane Kokott and Christoph Sobotta, 'Der EuGH – Blick in die Werkstatt der Integration' (2013) 40 EuGRZ 465, 466.

54 Von Bogdandy and Krenn (n 7) 175 ff.

55 Matthias Pechstein, 'Art 255 AEUV' in id, Carsten Nowak and Ulrich Häde (eds) *Frankfurter Kommentar zu EUV, GRC und AEUV* (vol 4, Mohr Siebeck 2017) art 255 AEUV margin n 1.

56 Council Decision of 25 February 2010 relating to the operating rules of the panel provided for in art 255 TFEU [2010] OJ L 50/18; Council Decision of 11 February 2014 appointing the members of the panel provided for in art 255 TFEU [2014] OJ L 41/18.

57 Art 16 (3) TFEU.

terms of representation of the legal systems of the member states. The operating rules provide that the members of the Panel shall be appointed for four years and their deliberations shall take place *in camera.* As soon as the government of a Member State proposes a candidate, the General Secretariat of the Council sends that proposal to the Panel that is tasked with reviewing the candidate's suitability on the basis of the standards set forth in Article 253 (1) TFEU.[58] The Panel may ask the government for additional information and hears the candidate in private, except where a proposal relates to the reappointment of a sitting Judge or Advocate-General. The reasoned opinion of the Panel is forwarded to the representatives of the governments of the Member States. It is not made public. The Panel procedure deliberately avoids transparency in order to protect the personality rights of the candidates.[59] This lack of transparency is only partly compensated by the period activity reports published by the Panel.[60]

The 'opinion' of the Panel which is only 'consulted' by the governments of the Member States is not legally binding.[61] But if a candidate is disqualified, the government making the proposal will in all likelihood not insist on him or her and if it does, it is unlikely that all the other governments consent. Accordingly, no candidate disqualified by the Panel has thus far been appointed.[62]

3.3.4. Preselection Process in Germany: Finding Suitable Nominees

The non-transparency of the EU part draws our attention to the national part of the selection process which is regulated by national law.[63] In Germany, the nomination of candidates for CJEU positions was traditionally a confidential matter entirely within the discretion of the federal government (cabinet). In 2009, however, the Election of Judges Act, which had

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58 For a survey of the panel's first four years of work see Jean-Marc Sauvé, 'Selecting the European Union's Judges' in Bobek (n 6) 78 ff. See also Alberto Alemanno, 'How Transparent is Transparent Enough?' in Bobek (n 6) 202, 205 ff, and Bobek 'Epilogue' in Bobek (n 6) 281 ff.

59 De Waele (n 47) 36 ff; Pechstein (n 55), margin n 3.

60 De Waele (n 47) 38.

61 Pechstein (n 55), margin n 4. But see Markus Kotzur, 'Art 255 AEUV' in Rudolf Geiger, Daniel-Erasmus Khan and Markus Kotzur (eds), *EUV, AEUV: Vertrag über die Europäische Union, Vertrag über die Arbeitsweise der Europäischen Union* (6th edn, CH Beck 2017) art 255 AEUV margin n 4.

62 Pechstein (n 55), margin n 5.

63 For an overview of various national models, see de Waele (n 47) 32 ff.

previously only regulated the election of judges to the federal supreme courts, was amended by adding the following paragraph 3 to Article 1:

> The personalities that the Federal Government is to propose pursuant to Article 253 of the Treaty on the Functioning of the European Union for appointment of Judges and Advocates-General of the Court of Justice … shall be nominated by the Federal Government by agreement with the Committee for the Election of Judges.[64]

Article 10 (1) of the Election of Judges Act was also amended to the effect that the Federal Minister of Justice and each member of the Committee for the Election of Judges now has the right to propose a candidate for the position of Judge or Advocate-General of the CJEU.

The participation of the Committee for the Election of Judges in the German preselection process involves one minister from each of the sixteen *Länder* and sixteen members elected by the Federal Diet in accordance with the principles of proportional representation. It broadens the national legitimation basis of the German candidates considerably, but the preselection process remains non-transparent because the proceedings in the Committee are confidential.[65] The insertion of Article 1 (3) into the Election of Judges Act[66] was triggered, although not specifically ordered, by the judgment of the FCC on the constitutionality of the Treaty of Lisbon which accepted that Treaty but required the German legislature to extend and strengthen the influence of the Federal Diet and the Federal Council on German decision-making in EU matters.[67]

3.3.5. Need for Reform of an Appointment Procedure Conflicting with Independence

In contrast to the U.S. Supreme Court, the German FCC and the ECtHR, the appointment procedure of the Judges and Advocates-General of the CJEU raises an issue with regard to their independence. This is due to a

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64 My translation.

65 Art 6 (2) of the Election of Judges Act (Federal Law Gazette 1950, 368).

66 It was effected by art 2 of the Act on the Extension and Strengthening of the Rights of the Federal Diet and the Federal Council in European Union Matters of 22 September 2009 (Federal Law Gazette I 2009, 3022, 3024).

67 BVerfGE 123, 267 English translation <www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html> accessed 15 November 2017.

combination of three factors: Firstly, both Judges and Advocates-General have a rather short (six-year) and renewable term of office. Secondly, their appointment as well as re-appointment depends on the proposal by the government of their Member State. Thirdly, there is no rule to exclude a Judge or Advocate-General from participating in the decision of cases of special concern to their Member State. That situation 'may well consciously or otherwise impact … his or her conduct … or, no less importantly, give the appearance of lack of independence.'[68]

That problem should be fixed by amending Article 19 (2) TEU and Article 253 (1) and (4) TFEU to the effect that Judges and Advocates-General shall be appointed for one single longer term without the possibility of reappointment. Article 23 (1) ECHR – one single nine-year term of judges of the ECtHR – can serve as a model in this respect. With that amendment, the Judges could also be permitted to write separate opinions which would increase the transparency of the adjudication process and promote public confidence in the CJEU.[69]

3.3.6. Reducing the Over-Federalisation and Increasing the Parliamentarisation of the Appointment Process

The appointment process of the Judges and Advocates-General of the CJEU is over-federalised in the sense that it is completely in the hands of the Member States acting in concert. The only EU institution involved is the Panel established recently pursuant to Article 255 TFEU, but its function is purely consultative. Obviously, the Member States continue to insist on retaining joint control over the judicial branch of the EU government, usually staffing it with national judges or bureaucrats. Yet that has not prevented allegations that the CJEU was a 'creature' of the Union that disregarded the rights and interests of the Member States, in particular in cases concerning the delimitation of Union competences.

Time has come to reconsider the federalist aspect of the appointment process and at the same time increase its parliamentarisation and transparency.[70] There is no legitimate reason why the Member States should continue to monopolise control over the appointment process of Judges

68 Joseph Weiler, 'Those Who Live in Glass Houses …' (EJIL: Talk!, 8 Nov 2017) <www.ejiltalk.org/those-who-live-in-glass-houses/> accessed 15 November 2017.

69 Dunoff and Pollack (n 1) 245 ff.

70 See in that sense also v Bogdandy and Krenn (n 7) 176 ff.

and Advocates-General. The argument that the exclusion of Union institutions from that process prevents the impression of a hierarchy between them in the sense of a subordination of the CJEU[71] is unconvincing because it could as well be reversed: The control of the Member States may give the impression that they are hierarchically superior to the CJEU, even though the latter can find them guilty of failure to fulfil their obligations under the Treaties and even impose a lump sum or penalty payment on them.[72] Article 253 TFEU should therefore be revised to the effect that the Member States propose candidates who, after having passed the Panel procedure according to Article 255 TFEU and obtained the consent of the Council, acting by a qualified majority, are elected by the European Parliament. Following the model of the Parliamentary Assembly of the Council of Europe, there should be an interview of the candidates by a parliamentary committee before the vote. The Strasbourg model could be emulated in one further respect, namely requiring the Member States to nominate three suitable candidates for each position from whom the European Parliament would elect the one considered as most suitable by the majority.[73]

The question is whether the (future) hearing in the parliamentary committee should be public. There are concerns that this might either constrain the openness of the discussion or jeopardise judicial impartiality when legal issues potentially coming up in future cases are raised in the hearing.[74] However, there is no need to avoid critical questions to candidates in a public hearing as long as the chairperson ensures that the discussion remains civilised. Moreover, well qualified candidates will be able to safeguard their future impartiality. For the sake of additional transparency, a public hearing of perhaps one hour per candidate should be introduced.

The transparency of the selection process could be increased further, if the Member States issued public and open calls for candidatures,[75] as has been the practice with regard to judgeships at the ECtHR for a number of years now.[76]

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71 See Pechstein (n 55), art 253 AEUV margin n 2.

72 Arts 258 – 260 TFEU.

73 See v Bogdandy and Krenn (n 7) 178. But see R Daniel Kelemen, 'Selection, Appointment, and Legitimacy' in Bobek (n 6) 244, 257.

74 Aida Torres Pérez, 'Can Judicial Selection Secure Judicial Independence?' in Bobek (n 6) 181, 196.

75 V Bogdandy and Krenn (n 7) 177 ff.

76 See below under 3.4.4.

3.4. The European Court of Human Rights – International Constitutional Court

3.4.1. Term of Office Made Non-Renewable Only in 2010

The ECtHR[77] consists of one judge elected with respect to each of the 47 States parties.[78] They sit on the Court in their personal capacity, i.e. as independent judges and not representatives of their respective State party.[79] Their term of office is nine years, and they may not be re-elected. The term of office expires when a judge reaches the age of 70.[80] In any case, however, judges continue to hold office until replaced, so that delays in the process of appointing successors will not impair the effective functioning of the Court. Moreover, even after their replacement the judges shall continue to deal with such cases as they already have under consideration.[81] During their term of office, the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office.[82]

Originally, the judges of the ECtHR, whose jurisdiction was then not compulsory, but subject to a separate recognition by the States parties,[83] were elected for a term of nine years and could be re-elected.[84] When the Protocol No 11 established the current permanent court with compulsory jurisdiction, the term of office of the now full-time judges was reduced to six years and the possibility of re-election maintained.[85] The Explanatory

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77 See generally Başak Çalı, Anne Koch and Nicola Bruch, 'The Legitimacy of the European Court of Human Rights: The View from the Ground' (The Legitimacy and Authority of Supranational Human Right Courts, 02. May 2011) <https://ecthrproject.files.wordpress.com/2011/04/ecthrlegitimacyreport.pdf> accessed 13 February 2018.

78 Art 20 ECHR.

79 Art 21 (2) ECHR.

80 Art 23 (1) ECHR. See art 2 of Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms of 24 June 2013 (CETS No. 213 – not yet in force). See also David Kosař, 'Selecting Strasbourg Judges' in Bobek (n 6) 120, 137 ff.

81 Art 23 (3) ECHR.

82 Art 21 (3) ECHR.

83 Arts 46, 48 ECHR as of 1950.

84 See art 40 ECHR as of 1950.

85 Art 23 ECHR, as amended by Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby of 11 May 1994 (ETS no 155).

Report to Protocol No. 11 gives no reason for that reduction.[86] It was Protocol No 14 which ten years later introduced the current non-renewable nine-year term of office.[87] The pertinent part of the Explanatory Report reads thus: 'The judges' terms of office have been changed and increased to nine years. Judges may not, however, be re-elected. These changes are intended to reinforce their independence and impartiality, as desired notably by the Parliamentary Assembly in its Recommendation 1649 (2004).'[88]

3.4.2. Election by the Parliamentary Assembly of the Council of Europe (PACE)

The (s)election process established by the Convention has been characterised as a 'unique mix of meritocracy and democracy.'[89] Pursuant to Article 22 ECHR, the judges are elected by PACE by a majority of votes cast from a list of three candidates nominated by the respective State party. Election results are publicly announced by the President of the Assembly, specifying how many votes each of the candidates received.[90] However, 'virtually nothing is known publicly about the internal mechanics of the election process within PACE.'[91]

PACE is the deliberative organ of the Council of Europe consisting of 'representatives of each member, elected by its parliament from among the members thereof, or appointed from among the members of that parliament, in such manner as it shall decide.'[92] PACE thus is an assembly of

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86 See Dunoff and Pollack (n 1) 250 ff.

87 Art 23 ECHR, as amended by Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention of 13 May 2004 (CETS no 194), entered into force on 1 June 2010.

88 Council of Europe, 'Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention' para 50 <https://rm.coe.int/16800d380f> accessed 16 Nov 2017.

89 Koen Lemmens, '(S)electing Judges for Strasbourg' in Bobek (n 6) 95, 118.

90 See PACE – Committee on the Election of Judges to the ECtHR (Secretariat), 'Procedure for electing judges to the ECtHR' (AS/Cdh/Inf (2017) 01 rev 8, 22 November 2017) para 13. See, eg, <http://website-pace.net/documents/10643/3073880/20171010-ElectionGeorgia.pdf/b62be101-bded-4582-93d5-932acc5f22c9> accessed 23 November 2017.

91 Kosař (n 80) 149 ff.

92 Art 25 of the Statute of the Council of Europe of 5 May 1949 (ETS no 1).

national parliamentarians. The number of seats allocated to the member states ranges from 2 to 18, depending on population.[93] The balance of political parties in each national delegation roughly reflects the one in the respective national parliament, and a proper gender balance is required.[94]

3.4.3. Criteria for Office

The criteria for office for Strasbourg judges are set forth in Article 21 (1) ECHR: They shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence. While the necessary professional expertise is similar to the one prescribed by Article 253 (1) TFEU, the personal qualifications are formulated differently. Article 21 (1) ECHR does not expressly require the indubitable independence of the candidates, but the reference to their high moral character obviously implies this. As a matter of course, one further unwritten qualitative criterion is active knowledge of one of the two official languages of the ECtHR (English and French), and passive knowledge of the other.[95]

3.4.4. European Precepts for National Nomination Processes

In view of problems with the candidate selection processes in various States parties, both PACE and the Committee of Ministers (CM) of the Council of Europe intervened in order to ensure that vacant judgeships in the ECtHR are adequately filled.[96] PACE has firstly insisted that all three candidates included in a State's list must meet the criteria for office pur-

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93 Art 26 of the Statute of the Council of Europe (n 92).

94 Philip Leach 'The Parliamentary Assembly of the Council of Europe' in Stefanie Schmahl/Marten Breuer (eds) *The Council of Europe* (OUP 2017) ch 7, margin n 7.06.

95 Leach (n 94), margin n 7.72. According to the ECtHR, the language criterion 'can be legitimately considered to flow implicitly from art 21 § 1' (ECtHR, 'Advisory Opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights' of 12 February 2008, para 47).

96 Norbert Paul Engel, 'More Transparency and Governmental Loyalty for Maintaining Professional Quality in the Election of Judges to the European Court of Human Rights' (2012) 32 Human Rights Law Journal 448 ff; Lemmens (n 89) 101 ff; Leach (n 94), margin n 7.71 – 7.74.

suant to Article 21 (1) ECHR, giving PACE a real choice. Secondly, every list should include candidates of both genders; single-sex lists will be considered only in exceptional cases.[97] Thirdly, the national selection procedures need to be fair, transparent and consistent, the States being in particular called upon to issue public and open calls for candidatures. If the list of candidates submitted by a State does not meet these standards, it will be rejected by PACE and the State asked to submit a new list.[98] The candidates should be listed in alphabetical order, and any expression of governmental preference will be disregarded.[99] States do not have an unlimited right to withdraw and replace individual candidates and entire lists.[100]

In 2012, the Committee of Ministers adopted detailed guidelines for the States on the selection of candidates for the post of judge at the ECtHR.[101] These guidelines do not only clarify the criteria for the establishment of lists of candidates but also make detailed provisions concerning the procedures for eliciting applications as well as drawing up and finalising the list of candidates. The requirement that there should be public and open calls for candidatures was already formulated three years earlier by PACE.[102] In Germany, such a call was first made in 2009. In contrast to the situation with regard to the CJEU, however, the final decision on the list of candidates for Germany still rests with the federal government (cabinet) alone.[103] The guidelines request the States to submit information about the national selection procedure to the Advisory Panel of Experts when trans-

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97 On the compatibility of that practice with the ECHR, see ECtHR, Advisory Opinion of 12 February 2008 (n 95).

98 Leach (n 94), margin n 7.71 – 7.72. See also Rules of Procedure of the Assembly (as amended), Appendix VIII (v), available at <www.assembly.coe.int/nw/xml/RoP/Rules.pdf> accessed 23 November 2017.

99 PACE, Appendix to Resolution 1432 'Procedure for elections held by the Parliamentary Assembly other than those of its President and Vice-Presidents' (2005) para 3.

100 ECtHR, 'Advisory Opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights (no 2)' of 22 January 2010.

101 Committee of Ministers, 'Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights' (CM(2012)40-final of 29 March 2012, with an explanatory memorandum CM(2012)40-add).

102 PACE, Resolution 1646 'Nomination of candidates and election of judges to the European Court of Human Rights' (2009) paras 2, 4.1 and 4.2.

103 Art 1 (3) of the Election of Judges Act covers only the CJEU and not the ECtHR. For the practice of other Convention states, see Lemmens (n 89) 109 ff.

mitting the names and *curricula vitae* of the candidates.[104] This makes the selection process of the Strasbourg judges more transparent than that of the judges of the other three courts.

3.4.5. Newly Established Bodies: Committee on the Election of Judges and Advisory Panel of Experts

In 2014, PACE created a general Committee on the Election of Judges to the ECtHR, replacing a permanent subcommittee of the Committee on Legal Affairs and Human Rights.[105] The new Committee first convened in January 2015.[106] Twenty of its twenty-two members are appointed by the five political groups in PACE; they need to have appropriate knowledge or practical experience in the legal field. The Chairpersons of the Committee on Legal Affairs and Human Rights and of the Committee on Equality and Non-Discrimination are *ex-officio* members. The Committee is tasked with examining the candidatures and making a reasoned recommendation to PACE (including a ranking of the three candidates). It meets *in camera.* The Committee invites all the candidates to participate in personal interviews. In making its recommendations, the Committee 'considers candidates not only as individuals but also with an eye to a harmonious composition of the Court, taking into account, for example, their professional backgrounds and a gender balance.'[107]

The confidentiality of the Committee procedure is considered as essential for two reasons: Firstly, protecting the personal data and personality rights of the candidates (some of whom might otherwise be discouraged from standing as a candidate) secondly, ensuring the Committee's effective functioning, including the possibility of posing critical questions during the interview and making unfavourable assessments of candidates (public sessions might have a chilling effect in this regard).[108] These objections

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104 See below under 3.4.5.

105 PACE, Resolution 2002 'Evaluation of the implementation of the reform of the Parliamentary Assembly', (2014) para 9. The terms of reference of the Committee are appended to that resolution. See Andrew Drzemczewski 'The Parliamentary Assembly's Committee on the Election of Judges to the ECtHR' (2015) 35 HRLJ 269 ff.

106 Leach (n 94), margin n 7.71.

107 PACE – Committee on the Election of Judges to the ECtHR (Secretariat), 'Procedure for electing judges to the ECtHR' (AS/Cdh/Inf (2018) 01 rev 2, 22 March 2018) para 12.

108 Torres Pérez (n 74), 197 ff.

against conducting public hearings of candidates are unconvincing.[109] Really sensitive personal data need not be disclosed. Candidates who want to sit in judgment on sovereign States must be ready to confront critical questions of parliamentarians in a public hearing. At the very least, the reasoned recommendation of the Committee on the Election of Judges to PACE should be made public.[110]

In 2010, the Committee of Ministers set up an Advisory Panel of Experts on Candidates for Election as Judge to the ECtHR.[111] That Panel, which is modelled on the Panel established under Article 255 TFEU, also having seven members of a similar calibre, is charged with advising 'the High Contracting Parties whether candidates for election as judges of the European Court of Human Rights meet the criteria stipulated in Article 21§ 1 of the European Convention on Human Rights.'[112] Each State will submit to the Panel the names and *curricula vitae* of the intended candidates before sending its list to PACE. If the Panel considers one or more candidates not suitable for office, it will inform the State and give reasons which will be confidential. The Panel does not conduct any hearing of the candidates which has rightly been criticised.[113] When PACE considers a list of three candidates pursuant to Article 22 ECHR, the Panel is requested to submit its view in writing as to whether the candidates meet the eligibility criteria of Article 21 (1) ECHR, which is again to be treated as confidential. The Panel's opinions bind neither the nominating State nor PACE and have sometimes been disregarded.[114]

3.4.6. Necessity to Increase Transparency Further

All in all, the federal and democratic legitimacy of the ECtHR judges rests on a sound basis. Although the European part of the election process is more transparent than the national part, the transparency of the latter has been considerably improved. However, European demands in this regard

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109 See already above under 3.2.4. and 3.3.6.

110 Engel (n 96) 449, 455.

111 Committee of Ministers, 'Resolution on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights' (CM/Res(2010)26 of 10 November 2010) (with operating rules of the Panel in the Appendix).

112 Ibid (s 1). See Alemanno (n 58) 205 ff.

113 Kosař (n 80) 158.

114 Lemmens (n 89) 105 ff.

were not focussed on the transparency of the national process as such, but on its effectiveness in identifying suitable candidates. The transparency of both processes should be further increased by introducing a public hearing of candidates in the Committee on the Election of Judges to the ECtHR.

4. *Conclusion: Putting Transparency into the Contexts of Legitimacy, Effectiveness, Quality and Independence*

4.1. *Transparency in the Context of Democratic Legitimacy and Effectiveness (Meritocracy)*

In the judge-selection process, democracy (including transparency) and meritocracy need to be reconciled as well as possible. Because of their political power, constitutional court judges need democratic legitimacy conveyed by a parliamentary appointment process which also tends to enhance transparency. There is adequate parliamentary input in the selection of the judges of the FCC, the ECtHR and the U.S. Supreme Court, but not the CJEU (where only the national selection process of German candidates has recently been upgraded in this respect).[115] Concerning the transparency of the selection process, the U.S. model is the most open one (with drawbacks concerning the protection of personality rights), followed by the ECtHR, while the FCC comes last and the CJEU is out of the game for lack of any parliamentary role. The parliamentary input in the national selection of German candidates for the CJEU has not increased the transparency of that process.

For (quasi-) federal constitutional courts, a sufficient amount of federal legitimacy is also necessary. The U.S. Supreme Court, the FCC and the ECtHR fulfil this standard in different forms; the over-federalised CJEU exceeds it.

While the democratic legitimacy of constitutional courts also requires transparency of the process for selecting the judges, the first priority of the appointment process is to recruit persons of excellent personal and professional quality. That process's effectiveness therefore depends on whether it produces judges who fulfil these standards.[116] While this has always been the case in the U.S. and Germany, there were problems with regard to the CJEU and the ECtHR. Article 255 TFEU and Convention practice have

115 See above under 3.3.4.
116 With regard to the ECtHR, see Kosař (n 80) 125 ff.

therefore introduced advisory expert panels for screening candidates as to their suitability to perform the duties as a judge of the respective European court.[117] This has had a positive impact on the national candidate selection process, both regarding the quality of nominees and transparency. But the panel procedures both in Luxembourg and Strasbourg should themselves be made more transparent to ensure democratic accountability.[118]

Transparency should of course not jeopardize the effectiveness of the judge-selection process.[119] 'Too much' transparency allegedly provokes politicisation and ultimately leads to the appointment of judges whose lack of personal or professional quality is overridden by political considerations because better candidates are deterred by the invasion of privacy and possible reputational consequences caused by excessive publicity. If that was true, increasing transparency would indeed do a disservice to the effectiveness and legitimacy of constitutional courts. However, these assumptions uncritically extrapolate the politicised conditions in the U.S. that are related to the life tenure of the Justices and the fact that their confirmation requires no more than the simple majority in the Senate.

On the contrary, increased transparency promotes the effectiveness of the judge-selection process because it prevents governments from nominating candidates lacking the required personal or professional quality. This conclusion can be drawn from the experience with the reform of the Strasbourg selection process. That process constitutes a compromise between transparency and effectiveness, but unnecessarily underrates the former. It should be supplemented by a time-limited and strictly regulated public hearing of candidates in the Committee on the Election of Judges to the ECtHR.[120]

The establishment of expert panels at EU and Council of Europe levels has had a positive impact on the national pre-selection processes, both regarding the quality of candidates that are nominated and the transparency of these processes.[121] For the sake of transparency, it has been suggested that the opinions of these expert panels should be made public. It may actually help disqualified candidates if not only the fact of their disqualification but also the relevant reasons are published.[122]

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117 See above under 3.3.3. and 3.4.5.
118 See Alemanno (n 58) 204 ff. See also Kokott and Sobotta (n 53) 467.
119 See Torres Pérez (n 74) 195 ff.
120 See in that sense v Bogdandy and Krenn (n 7) 179 ff.
121 Alemanno (n 58) 208 ff.
122 Alemanno (n 58) 211 ff; Bobek (n 58) 295 ff.

4.2. *Transparency in the Context of Effectiveness, Supermajority Requirements and Subsidiary Appointment Mechanisms*

The important rules on the constitutional courts, including those on the judge-selection (eligibility criteria and procedure), should be entrenched in the Constitution, making them not only transparent but also preventing the political majority from undermining the effectiveness of these courts. The CJEU and to a lesser extent the ECtHR meet this standard, but not the FCC and even less the U.S. Supreme Court.

Requiring a qualified parliamentary majority for the election or confirmation of judges is an important corrective against the packing of constitutional courts with partisans of the political majority that can impede their effective functioning as a check on the exercise of governmental powers. That standard is met with regard to the FCC (two-thirds majority in respective parliamentary chamber)[123] and the CJEU (consensus among the Member States governments), but not the ECtHR and the U.S. Supreme Court (except when the filibuster was temporarily used[124]). With regard to the ECtHR, however, the international composition of PACE that is also limited to choosing from lists of candidates proposed by States attenuates the risk of a politically one-sided composition of the Court.

On the other hand, the difficulty of mustering supermajorities can intolerably delay the filling of vacancies so that a subsidiary mechanism should be available in order to guarantee the continuous effectiveness of the constitutional courts. That mechanism should be based on the principle that if the appointing authorities do not exercise their power in due course, they will lose it to the respective court on whom the appointment power would devolve at least for an interim period. This would provide an incentive for speedily filling vacancies. In Germany, Sec. 7a FCCA provides that after a two-month delay in electing a successor to a judge whose term of office expired, the plenary of the FCC shall propose three candidates to the competent electoral body. But since the electoral body is not bound by the proposal, that mechanism is rather weak. There is no subsidiary mechanism at all in place to speed up the process of filling vacancies on the bench of the CJEU, the ECtHR or the U.S. Supreme Court.[125]

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123 The two-thirds majority requirement is, however, only laid down in the FCCA, not in the BL, and thus subject to change by the political majority.

124 See above under 3.1.4.

125 But see art 23 (3) ECHR and art 5 (3) of the Protocol on the CJEU Statute (n 8), according to which incumbent judges shall continue to serve after the end of their term until successors have been appointed.

A subsidiary mechanism, which has, however, never been used in practice, can be found in the Statute of the International Court of Justice.[126] Members of the ICJ are normally to be elected by the General Assembly and the Security Council of the UN, requiring an absolute majority of votes in both organs.[127] If three runs fail to produce the required double majority, a joint conference of the General Assembly and the Security Council may be formed at the request of either of the two organs, consisting of six members (three to be appointed by each of them). Article 12 (3) ICJ Statute provides that

> [i]f the joint conference is satisfied that it will not be successful in procuring an election, those members of the Court who have already been elected shall, within a period to be fixed by the Security Council, proceed to fill the vacant seats by selection from among those candidates who have obtained votes either in the General Assembly or the Security Council.

In other words, if the authorities who share the appointment power cannot agree on a candidate for the ICJ, their power devolves on the Court. But that subsidiary mechanism is not triggered automatically but only through two succeeding political decisions of the appointing authorities, so that its effectiveness is questionable: The request by either the General Assembly or the Security Council to form the joint conference and the determination by that conference that it will be unable in procuring an election.

4.3. Transparency in the Context of Terms of Office, Independence and Separate Opinions

Neither short renewable terms of office such as those in the CJEU, nor lifetime appointments in the literal sense such as those in the U.S. Supreme Court are ideal. The Luxembourg solution conflicts with judicial independence, whereas the Washington solution makes changes too infrequent, progressively dilutes the democratic legitimacy of individual judges over time and provokes excessive politicisation of their appointment process.

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126 Statute of the International Court of Justice [1945] 33 UNTS 993.

127 In the Security Council, there is no veto in this regard (art 10 (2) Statute of the ICJ).

Both the ECtHR and the FCC provide examples for the obvious compromise reconciling democratic legitimacy and independence, namely one fixed non-renewable term of office short enough to sustain the judges' democratic mandate, but long enough to ensure sufficient continuity in the court's operation.[128] One non-renewable term of office can, however, not completely solve the problem of judicial independence: Judges may at the end of their term be interested in appointment to positions for which the goodwill of the government is required.[129] In this respect, only the Judges and Advocates-General of the CJEU are expressly required 'to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits.'[130] Any doubt on this point will be settled by the CJEU. If a former Judge or Advocate-General is found guilty of a serious violation of this continuing obligation arising from their former office by the CJEU, they can be deprived of their right to a pension or other benefit in its stead. However, such a sanction requires unanimity among all the sitting Judges and Advocates-General.[131] There has never been any such case.

Separate opinions should be permitted and frequently written in order to increase the transparency of the adjudication process and enhance the indirect public accountability of the respective court. Only the CJEU fails to meet this standard in order to protect the independence of the Judges involved.[132]

4.4. Answer to the Contextual Question with Regard to Transparency of Selection of Judges

In summary, this is my answer to the contextual question: All four jurisdictions demonstrably reconcile the conflicting popular demands for transparency and effectiveness, social and – where applicable – inter-/supranational representativeness differently, but more or less well. Need for improvement is discernible in all of them with regard to different aspects of the judge-selection procedure. With regard to the three European courts in the quartet, the transparency should be improved by time-limited and

128 See Torres Pérez (n 74) 199 ff. See also See Dunoff and Pollack (n 1) 275.
129 See Lemmens (n 89) 99 ff. But see also Kosař (n 80) 139 ff.
130 Arts 4 (3) of Protocol no 3 on the CJEU Statute (n 8).
131 Arts 4 (4), 6 of Protocol no 3 on the CJEU Statute (n 8).
132 See above under 3.3.5.

strictly regulated public hearings of candidates. That would increase their institutional legitimacy without diminishing their operational legitimacy.

The Functions of Publicity and of Privatization in Courts and Their Replacements (from Jeremy Bentham to #MeToo and Google Spain)

Judith Resnik *

Jeremy Bentham theorized the disciplinary, educative, and evaluative utilities of public adjudication, in which third parties can observe and critique the proceedings. Constitutions around the world have applied those ideas through mandates for 'open courts' and 'fair hearings,' albeit translated in practice in diverse ways. The contemporary #MeToo movement has deployed Bentham's 'public-

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* This chapter builds on related articles and books, cited below, and especially *Representing Justice: Invention, Controversy and Rights in City-States and Democratic Courthouses*, co-authored with Dennis Curtis. This essay also is the predicate to another book on which I am working. Thanks are owed to Burkhard Hess, Ana Koprivica Harvey, and Marta Requejo Isidro at the Max Planck Institute, as well as to participants at the conference 'Open Justice,' organized in February of 2018 by the Max Planck Institute, Luxembourg, in cooperation with Saarland University. Their generosity enabled me to understand a good deal more about the nuances of European law. Thanks are also due to Andrew Brandt, Anne Joseph O'Connell, Amanda Tyler, and participants at the Berkeley Public Interest Workshop; to Stephen Vladeck, Robert Bone, Willie Forbath, and participants at the University of Texas Faculty Workshop; to Allison Tait and participants at the University of Richmond Faulty workshop; to Robert Post, Suzanne Augenhofer, and participants in the Humboldt University Consumer Law Workshop; to Denny Curtis, John Langbein, Hazel Genn, Daniel Markovits, Sadie Blanchard, Nancy Welsh, Tanina Rostain, Shannon Salter, Stacie Strong, and Darin Thompson for many exchanges; to current and former law students Jason Bertoldi, Matt Butler, David Chen, Kathleen Claussen, Greg Conyers, Adam Grogg, Kate Huddleston, Clare Kane, Adam Margulies, Catherine McCarthy, Michael Morse, Devon Porter, Heather Richard, Regina Wang, Emily Wanger, and Iva Velickovic; and to Bonnie Posick for her expert advice and editorial assistance. Thanks are also owed to Ryan Boyle, Vice President, Statistics and In-House Research, and to staff at the American Arbitration Association for clarifying data questions, and to Philip Schofield, for guiding me through materials from the Bentham Project at UCL. I am an Andrew Carnegie 2018-2020 Fellow, and this essay was made possible in part by a grant from Carnegie Corporation of New York. The statements made and views expressed are solely my responsibility.

ity principle' by using twenty-first century technologies to challenge institutions for failing to sanction sexual predators. The web has thus provided a function akin to what courts do – disseminating information and imposing discipline. These new technologies, enabling 'online dispute resolution' (ODR), augment efforts styled alternative dispute resolution (ADR) to transform courts or to route legal disputes to conclusions without courts. Neither ODR nor ADR, based in or out of courts, routinely builds in mechanisms for third-party access to processes or outcomes. Ready access to information is not, however, an unmitigated good, as reflected in a new right 'to be forgotten' that eliminates materials from the web through decisions by a private adjudicator – Google. This chapter explores the impetus for reforming courts, the repeat players promoting new procedures, the challenges of regulating both process and information, and the fragility of commitments to state-provided public adjudication in which third parties are recognized as authorized to observe and critique.

1. *Unpacking the Terms, Concepts, and Technologies*

When asked to think about the concept of 'open justice' for a discussion on 'Privatization of Justice and Transparency: Arbitration and ADR,'[1] I found myself stumbling over the terms. One could posit that the 'alternatives' to court include administrative agency or tribunal adjudication, arbitration, other forms of alternative dispute resolution (ADR), and online dispute resolution (ODR). This list does not, however, capture the differences within and overlaps among these processes in a spectrum that runs from formal live-person in-court proceedings[2] and large-scale international

1 This panel was one of several in the Max Planck Institute's 'Open Justice' Conference, held February 1–2, 2018 in Luxembourg. Other panels addressed rights to public hearings in civil and in criminal proceedings in Europe, appointment of judges, and communicating with the public.

2 See Ana Koprivica, 'Revisiting the Principle of Public Hearings in the Light of the Ongoing Reform in Germany: Much Ado about Nothing?' in Selena Clavora & Thomas Garber (eds), *Grundsätze des Zivilverfahrensrechts auf dem Prüfstand: 5. Österreichische Assistententagung zum Zivil- und Zivilverfahrensrecht der Karl-Franzens-Universität Graz* (NWV Verlag 2017).

investment arbitrations[3] to the 'paths to justice'[4] for small-scale claimants. A thicker description would also entail specifying the range of technologies relied upon, from the buildings (and sometimes the grand architecture) of courthouses to virtual exchanges through the internet, and the mix of public and private regulation and actors involved.

Many concerns animate the expanding array of dispute resolution procedures. For some, the provision of dispute resolution has not kept pace with the large number of claimants that egalitarian commitments to open access have authorized to assert their rights. Moreover, the price and complexity of process makes it hard for individuals of limited resources to participate. For others, too much ready access has produced too many claims not appropriate for state-based resolution.

The many proponents of altering procedures have succeeded in installing alternative dispute resolution and internet-based interactions in courts and tribunals, such as those used in the UK[5] and in British

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3 See Dimitrij Euler, Markus Gehring & Maxi Scherer (eds), *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (CUP 2015); Janice Lee, 'The Evolving Role of Institutional Arbitration in Preserving Parties' Due Process Rights' (2017) 10 Contemporary Asia Arbitration Journal 71; see also Gilles Cuniberti, *Rethinking International Commercial Arbitration: Towards Default Arbitration* (Edward Elgar Publishing 2017); Gilles Cuniberti, 'The Recognition of Foreign Judgments Lacking Reasons in Europe: Access to Justice, Foreign Court, Avoidance, and Efficiency' (2008) 57 International and Comparative Law Quarterly 25.

4 Dame Hazel Genn, *Paths to Justice: What People Do and Think about Going to Law* (Hart 1999); Dame Hazel Genn, *Judging Civil Justice*, Hamlyn Lecture 2008 (CUP 2010).

5 Sir Ernest Ryder, 'Securing Open Justice', (Lecture at Max Planck Institute Luxembourg, 1 February 2018) <https://www.judiciary.gov.uk/wp-content/uploads/2018/02/ryder-spt-open-justice-luxembourg-feb-2018.pdf> accessed 26 August 2018, and in this Volume; John Sorabji, 'The Online Solution Court: A Multi-Door Courthouse for the 21st Century' (2017) 36 Civil Justice Quarterly 51; Ministry of Justice, Transforming our Justice System (2016) 5, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf> accessed 26 August 2018; Joe Tomlinson, A Primer on the Digitisation of Administrative Tribunals (University of Sheffield 2017) 14–17 <https://lawandgoodadministration.files.wordpress.com/2017/09/a-primer-on-the-digitisation-of-administrative-tribunals1.pdf> accessed 26 August 2018; Dame Hazel Genn, 'Online Courts and the Future of Justice', 2017 Birkenhead Lecture (16 October 2017), <https://www.ucl.ac.uk/laws/sites/laws/files/birkenhead_lecture_2017_professor_dame_hazel_genn_final_version.pdf> accessed 29 November 2018.

Columbia.[6] Many of the new processes relocate the places of decision away from courtrooms and authorize actors who are not state-appointed judges to render decisions that, in some jurisdictions, are binding and legally enforceable. Whether preclusive or not, the hope is that the outcomes will suffice for the disputants and that they will not press for more in courts. The ADR/ODR array works to diffuse disputes[7] by undoing the unity of time, place, and process that has been long associated with adjudication.[8]

Thus, an account that posits a dichotomy between courts and their alternatives misses that, as I detail below, what *is* a 'court' is now in question. In some jurisdictions, these 'other' processes are part – or all – of what judges/courts actually do. The distinctions that once seemed plausible between 'judicial' and 'extra-judicial activities' (to borrow terminology from a 1983 version of a federal procedural rule[9]) are diminishing. Rather than *alternatives*, they are *replacements* for adjudication.

Given this array, an integrated analysis is needed of the meaning and value placed on 'transparency,' 'openness,' and 'privatization' across this variety of dispute resolution processes. And, once again, the terms need more elaboration before they can be discussed.

Transparency often describes the idea of seeing *into* activities. When assessing transparency in dispute resolution, questions focus on how easy it is to know and follow a process's rules; to understand how decision-makers are selected and their methods for resolving conflicts; and to learn about outcomes, individually and in the aggregate.[10] Transparency is sometimes argued to be an end unto itself or to be a means of regulation, molding

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6 The British Columbia provisions are at Civil Resolution Tribunal, *Rules* (effective 12 July 2017) 3, 5 <https://civilresolutionbc.ca/wp-content/uploads/2017/07/CRT-rules-effective-July-12-2017.pdf> accessed 26 August 2018 [hereinafter British Columbia CRT 2017 Rules].

7 See Judith Resnik, 'Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights' (2015) 124 Yale Law Journal 2804 [hereinafter Judith Resnik, 'Diffusing Disputes'].

8 Cécile Chainais, 'Open Justice and the Principle of Public Access to Hearings in the Age of Information Technology: Theoretical Perspectives and Comparative Law,' in this Volume.

9 Federal Rules of Civil Procedure (1983), s 16(c)(7). The changing terminology is analyzed in Judith Resnik, 'The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75' (2014) 162 University of Pennsylvania Law Review 1793.

10 See eg Euler, Gehring & Scherer (eds) (n 3) 5; Nancy S. Marder, 'Judicial Transparency and the Rule of Law' (Pound Civil Justice Institute 2015 Forum for State Appellate Court Judges, 2015) <http://www.poundinstitute.org/sites/default/files/2015PoundForumPaper-NancyMarder.pdf> accessed 26 August 2018.

behavioral expectations of the actors involved and permitting assessments of their work.[11]

Openness often references the capacity of individuals either to enter or to observe dispute resolution systems. One aspect is the *accessibility* of procedures for seeking relief. Concerns that classes of people are priced out have become one of the bases for advocating making entry easier through new technologies.[12] Openness-as-accessibility could also reference third parties, entitled (or not) to observe the interactions.

Even when obligations for open court proceedings exist, what it means in practice varies. An essentialist posture, assuming that institutions called 'courts' provide access to the same aspects of their proceedings, is undercut by the diverse responses from 'courts' around the world about whether third parties can attend hearings, read written submissions, watch deliberations, and read judgments. Different rules are justified on the basis of the same basic principles of fairness, deliberative integrity, and democracy. The rationales for limiting as well as permitting third-party access help to illuminate the stakes of 'openness' for decision-makers, direct participants, and the general public.

In the European context, openness is generally focused on rights to a 'hearing,' typically referring to live, interpersonal exchanges among disputants and decision-makers.[13] In contrast, permitting the public to watch deliberations among the judges is counter-intuitive in many legal cultures.

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11 See David E. Pozen, 'Transparency's Ideological Drift' (2018) 128 Yale Law Journal 100. Pozen tracked the progressive aspirations for transparent government administration, presumed to generate better processes that in turn would produce faith in and a more rational acting government. He argued that transparency has come to be seen as an independent metric of 'good governance' that can be marshalled to undermine government authority and that a nuanced understanding of its regulatory utility and limits is needed.

12 As Lord Ryder explained, 'open justice' encompasses 'the principle of equal access to court,' which is a 'common law constitutional right in the United Kingdom.' See Ernest Ryder (n 5) para 3.

13 For example, art 31 of the Statute of the Court of Justice of the European Union states: 'The hearing in court shall be public, unless the Court of Justice, of its own motion or on application by the parties, decides otherwise for serious reasons.' Statute of the Court of Justice of the European Union (Consolidated Version, Curia) art 31. See also 'Public Hearings' (Curia) <https://curia.europa.eu/jcms/jcms/Jo2_22322/en/> accessed 26 August 2018. The commitment to orality raises questions about the lawfulness of plea bargaining in criminal proceedings. See Katrin Gierhake, 'How to Justify the Open Court Principle in Criminal Proceedings' in this Volume; Ana Koprivica (n 2) 73–90.

Yet, in Brazil, plenary sessions of the Supreme Court's deliberations are televised.[14]

Access to the outcomes of such deliberations – the judgments rendered by courts – is assumed to be universal, even though not all jurisdictions make a comprehensive set accessible through print or online reports.[15] And of course, publishing decisions may not entail providing reasons; in

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14 The Brazilian Constitution has two provisions mandating openness. A first is art 5 – LX, providing that 'the law may restrict publicity of procedural acts only if required to defend privacy or the social interest.' The other is art 93 – IX, which states that 'all judgments of judicial bodies shall be public, and all decisions shall be substantiated, under penalty of nullity; in cases in which preservation of the right of intimacy of the interested parties in secrecy does not prejudice the public interest in information, the law may limit attendance at determined occasions to only the parties themselves and their attorneys, or only to the latter.' See 'Brazil 1988 (rev 2017)' (Keith S. Rosenn tr, *Constitute*) at <https://www.constituteproject.org/> accessed 26 August 2018; original available at <http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm> accessed 26 August 2018.

The Code of Proceedings provides for exceptions, and regulations also come from the National Council of Justice. The Portuguese provisions, which are not to my knowledge available in English, are at <http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm> accessed 26 August 2018; Resolução no 215 de 16/12/2015. Art 22 provides that '[t]he sessions of collegiate organs of the Judiciary Power are public and shall be, whenever possible, live broadcasted online, being considered each organ or tribunal's internal rules, as well as its budgetary availability.' Available at 'Administrative Acts' (National Justice Council) <http://www.cnj.jus.br/busca-atos-adm?documento=3062> accessed 26 August 2018. Thanks to Juliana Cesario Alvim Gomes for this information and the translations.

One researcher concluded that the live televised broadcasting of deliberations, begun in 2002, resulted in the justices behaving 'as politicians,' seeking 'to maximize their individual exposure' to the public. Thus, judges talk more in discussion with their peers and write longer decisions. See Felipe de Mendonça Lopes, 'Television and Judicial Behavior: Lessons from the Brazilian Supreme Court' (2018) 9 Economic Analysis of Law Review 41, 43, available at <https://portalrevistas.ucb.br/index.php/EALR/article/view/8393/5660> accessed 26 August 2018. The court also has a radio station partially dedicated to broadcasting, a TV channel, and sometimes uses YouTube. See Virgílio Afonso da Silva, 'Deciding without deliberating' (2013) 11 I•CON 557, 580. Da Silva argued such publicity could work to limit frank exchanges and in some respects render a justice less 'open' to differing viewpoints and less willing to try alternative approaches. Ibid 580–582. The concern was that the public interactions, along with other practices, undercut fulsome deliberation. Ibid 584.

15 The Supreme Court of India does not have a complete set of published decisions. See Aparna Chandra, *Fostering Respect?: The Supreme Court of India's Approach to International Law: A Call for Caution* (2013) (JSD Thesis, Yale Law School).

the United States, appellate courts may have tables listing their affirmations, 'on the decision below.' Moreover, in some jurisdictions, 'depublication' entails taking a published decision offline to end its authority.[16]

Access to documents that parties give *to* courts is a distinct question that has produced a variety of responses. Public access to docket sheets, pleadings, and briefs filed with courts is familiar in U.S. law, predicated on a mix of common law and constitutional traditions.[17] In the European Court for Human Rights (ECtHR) in Strasbourg and in some of the ad hoc international criminal tribunals, that pattern has been followed, including mak-

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16 In the United States, California is an example of de-publication practices. See Penelope Pether, 'Inequitable Injunctions: The Scandal of Private Judging in the US Courts' (2004) 56 Stanford Law Review 1435. A debate in the federal system about whether courts can publish decisions described as 'without precedential value' or 'not for citation' entailed arguments that a court constituted under art III had no power to issue a judgment which stated others could not rely upon it in subsequent cases. See *Anastasoff v United States* 223 F3d 898 (8th Cir), *vacated en banc as moot,* 235 F3d 1054 (8th Cir 2000). See also Judith Resnik, 'Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century' (1994) 41 UCLA Law Review 1471, 1530.

17 See eg *Hartford Courant Co v Pellegrino* 380 F3d 83, 93–96 (2d Cir 2004); *United States v Amodeo* 44 F3d 141, 145–46 (2d Cir 1995); *Brown & Williamson Tobacco Corp v FTC* 710 F2d 1165, 1179 (6th Cir 1983). For discussion of the doctrine on what constitutes a 'judicial document' and its potential application to ADR, see Judith Resnik, 'A2J/A2K: Access to Justice, Access to Knowledge, Economic Inequalities, and Open Courts and Arbitrations' (2018) 96 North Carolina Law Review 605 [hereinafter Judith Resnik, 'Open Courts and Arbitrations'].

The UK changed its practice in the 2006 procedural reforms and permitted some non-party access to certain filings. See 2006 CPR r 5.4C (Civil Procedure (Amendment), Rules 2006, SI 2006/1689); 'Part 5-Court Documents' (Ministry of Justice, 28 November 2017) r 5.4C <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part05> accessed 28 August 2018; see also Civil Procedure (Amendment) Rules 2006 <http://www.legislation.gov.uk/uksi/2006/1689/pdfs/uksi_20061689_en.pdf> accessed 26 August 2018 (original print PDF version of the 2006 Amendment adding rule 5.4C); 'Practice Direction 5A-Court Documents' (Ministry of Justice, 30 January 2017) <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part05/pd_part05a> accessed 26 August 2018; 'Practice Direction 5B-Communication and Filing of Documents By Email, Ministry of Justice' (Ministry of Justice, 30 January 2017) <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part05/pd_part05b> accessed 26 August 2018. In November 2006, the Civil Procedure Rule Committee added sub-paragraph (1A) to rule 5.4C, providing that non-parties will not be able to obtain statements of cases filed before 2 October 2006, the date on which the original access rule came into force, without court permission. See Civil Procedure (Amendment No. 2) Rules 2006, SI 2006/3132.

ing documents accessible when cases are pending as well as after they are closed.[18]

But several Member States of the European Union (EU) have traditions that parties' filings are not accessible. Likewise, the Court of Justice for the European Union (CJEU) does not routinely make available written submissions of parties, including filings from Member States and the Commission.[19] In pending cases, the questions sent to the court in the reference are public but not the parties' views. When cases are argued, the hearings are open to the public, able to listen to each participant briefly summarize the arguments made.

In January 2011, the Civil Procedure Rule Committee added sub-paragraph (1B) to rule 5.4C, providing that certain documents related to mediation may not be inspected by non-parties without court permission. See Civil Procedure (Amendment) Rules 2011, SI 2011/88. In October 2015, the Civil Procedure Rule Committee added a signpost after rule 5.4D to assist users. See Civil Procedure (Amendment No. 4) Rules 2015, SI 2015/1569; see also Civil Procedure Rules (Ministry of Justice, 24 November 2017) <https://www.justice.gov.uk/courts/procedure-rules/civil> accessed 26 August 2018. For more on the diversity of common law traditions and limits on non-party access to documents, see Vanessa Yeo, 'Access to Court Records: The Secret to Open Justice' [2011] Singapore Journal of Legal Studies 510.

18 A summary of those access-to-document provisions can be found in *Sweden v API and Commission*, Opinion of Advocate General Poiares Maduro (1 October 2009) paras 26–28 [hereinafter *Sweden v API*, Opinion of AG Maduro]. Of the EU Member States in 2008, Finland and Sweden were the two to permit access to documents filed in pending cases. Ibid para 29. The more common practice was that courts made individualized decisions in specific cases. Ibid. In a few Member States (including Luxembourg in which the CJEU sits), access to documents in case files was prohibited. Ibid. Maduro proposed that it should be up to the CJEU to decide in pending cases about access to submissions. Ibid para 30. Once cases were closed, he opined that access should be permitted and that doing so would be especially useful in light of the CJEU practice that no dissenting opinions are issued. Ibid paras 31–33.

19 See art 20(2) of the Statute of the Court of Justice. That provision restricts access to the parties as well as the institutions (such as the Commission) whose decisions are the subject matter of the dispute. The rules do not provide third-party access. See also joined cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others v API and Commission* [2010] ECR 2010 I-08533, para 98 [hereinafter *Sweden v API*]. The Court thus shaped a presumption of closure in pending cases, subject to an individual assessment about whether that presumption should not preclude access to particular documents. Ibid paras 94, 103. In closed cases, the CJEU concluded that a case-by-case determination was again required, to consider whether disclosure would affect other pending cases. Ibid paras 133–34.

While jurisdictions permitting access often do so without elaborating theories of their practices, challenges to the CJEU have prompted it to justify limiting access. A brief account of those explanations illustrates the tensions, discussed in subsequent sections of this chapter, between openness as a means to make courts legitimate in democracies and openness as enabling manipulative exploitation.

A 2001 EU regulation mandated 'public access to all the documents drawn or received and held' by the European Parliament, Commission, and Council 'in all areas of activity of the European Union.'[20] That regulation also provided that institutions 'shall refuse access to a document' that would undermine 'the protection of . . . court proceedings and legal advice . . . unless there is an overriding public interest in disclosure.'[21] Thus, while acknowledging that 'the right of public access to documents of the institutions is related to the democratic nature of those institutions,'[22] the CJEU has refused public access to parties' filings on the grounds that those materials were part of its own deliberative processes, appropriately sheltered from view. In its words, the 'pleadings constitute the basis on which the Court carries out its judicial activities.'[23] The Court therefore shaped a presumption of closure in pending cases, subject to an individual assessment about whether that presumption should not pre-

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20 See Council Regulation (EC) 1049/2001 on Access to Documents [2001] OJ L 145/43, Recital 2. The regulation aims to enable citizens 'to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizens in a democratic system.' See Case C-213/15 P *Commission v Patrick Breyer* [2017] OJ C 300/02 [hereinafter *Breyer*], Opinion of AG Bobek, para 9 [hereinafter *Breyer*, Opinion of AG Bobek]. But, another provision (Declaration no 35 attached to the Final Act of the Treaty of Amsterdam) imposed the limitation that a 'Member State may request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement.' Regulation (EC) 1049/2001, Recital 10.

21 Regulation (EC) 1049/2001 (n 20) art 4(2).

22 *Sweden v API* (n 19) para 68. Pozen's account of the progressive goals in the twentieth century in the United States for transparency in government to make it 'stronger and more egalitarian' resembles the EU's linkage of democracy, transparency, and legitimacy. As he chronicles, some of the mandates installed – such as open meeting laws – have created incentives to avoid creating advisory boards subject to such obligations. David Pozen (n 11) 127. Moreover, those with resources can attend such activities and lobbyists can gather information to target individuals with whom they disagree. Some political scientists see the declining legitimacy of the US Congress as linked to some of its 'openness.' Ibid 131-132.

23 See *Sweden v API* (n 19) para 130.

clude access to particular documents.[24] As for closed cases, the CJEU concluded that a case-by-case determination was again required, to consider whether disclosure would affect other pending cases.[25]

In that 2010 ruling, the CJEU explained that disclosure would subject both the participants and the court to 'external pressures' and therefore 'disturb the serenity of the proceedings'.[26] The concern appears to be that, if the positions of member states are readily known through filings (rather than only at the time when argument is made before the public), lobbyists would try to persuade those states or others to shift positions or rally public disapproval of the legal posture adopted.

In 2016, the issue of third-party access to documents returned to the CJEU through an individual's request for submissions that the EU Commission had from another party and that had been presented to the CJEU.[27] The EU Commission's view was that it need not respond, as it had no obligation to do so. The Commission lost in the General Court, before the Advocate General, and in the Grand Chamber.[28] Thus the current CJEU doctrine requires the Commission to respond to requests and poten-

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24 Ibid paras 103, 104, 130.

25 Ibid paras 131–136.

26 Ibid para 93.

27 See *Breyer* (n 20) and *Breyer*, Opinion of AG Bobek (n 20). Patrick Breyer sought pleadings submitted in a case brought by the Commission against Austria; the Commission had alleged that Austria had failed to implement the Transposition of Data Retention Directive 2006/24. The request related to closed proceedings. Breyer relied on EU Regulations, the TFEU, and art 42 of the European Charter, entitled 'Right of access to documents' and providing that citizens of the Union have 'a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.' See *Breyer*, Opinion of AG Bobek (n 20) paras 4–18.

28 The Advocate General's decision focused on the Treaty on the Functioning of the European Union (TFEU), art 15(1), which states that 'in order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.' Also relevant was art 15(3), providing that 'Any citizen of the Union … shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, … [subject to limits based on] public or private interest governing this right of access as decided by the European Parliament and the Council. … Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents … .' Regulations provided that these precepts applied to the 'Court of Justice of the European Union, the European Central Bank and the European Investment Bank' only when those institutions

tially provide documents. However, given mandates to weigh public and private interests, disclosure would not necessarily result.

The word *privatization* has yet more to untangle. One aspect is closing processes to protect disputants' privacy. Doing so could be ad hoc or regularized, voluntary or required. The use of nondisclosure agreements

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exercised 'administrative tasks,' in this context as distinct from 'judicial tasks.' *Breyer*, Opinion of AG Bobek (n 20) paras 57–58.

In his Opinion, Advocate General Bobek departed from the idea, described in *Sweden v API*, that submissions by parties were part of the court's internal processes. Rather, Bobek delineated a category of 'internal judicial documents,' which he described as drafted within the Court and for the Court, such as 'draft opinions and judgments, preliminary reports, notes for a decision on procedure, or notes for deliberation.' Ibid para 126. He concluded that unless 'the nature of the judicial function was to change considerably, those documents cannot be concerned by openness.' Ibid 125.

In contrast, he detailed another category, 'external judicial documents,' which were either 'drafted by the Court for the purpose of the Court's judicial communication with external bodies (parties, interveners, or the national courts) or … submitted by third parties to the Court in judicial proceedings, such as pleadings submitted by the parties, but also the requests for a preliminary ruling submitted by national courts.' In his view, external documents ought to be accessible subject to specific reasons in individual cases for closure. Ibid 127. Bobek suggested that the Court 'grant physical and remote access to external judicial documents upon request' and 'ideally' should also 'provide access to certain documents of its own motion.'

The Grand Chamber decision agreed that Breyer should be given the opportunity to request the documents; it did not address the proposal made by Advocate General Bobek for a general framework. Rather, the Grand Chamber relied on its earlier decision discussing 'the principle of transparency in EU law.' Documents 'originating from a Member State, such as the written submissions at issue,' held by the Commission 'in connection with proceedings before the Court of Justice of the European Union' could be provided. Moreover, the fact that the Commission had received submissions from the CJEU was not a barrier to the application of Regulation 1049/2001, which applied to documents in the Commission's 'possession.' Origin and authorship did not undercut that obligation. *Breyer* (n 20) para 55.

Under the ruling, Breyer could request documents, but whether disclosure was to follow was a separate question, as other exceptions could shield them. Because by then Breyer had already posted on the internet pleadings which he had obtained without authorization, he was awarded only a portion of the costs for the appeal that he won. Ibid paras 61–62. Concerns about the need for more openness have emerged in part based on the role of the CJEU in a widening array of issues. See eg Grainne de Burca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 Maastricht Journal of European and Comparative Law 168.

(NDAs) is an example of individualized provisions, mandating confidentiality in specific instances. Rules of mediations or arbitrations may also mandate that what transpires is kept private.[29] Privacy can also entail insistence on secrecy through the sealing of information or the shredding of records. The question of whether law should promote, prohibit, or regulate the various forms of closure has gained new salience as individuals have alleged that they unwittingly agreed or felt themselves forced to accede to confidentiality when high-profile individuals (including senior executives of governments and corporations) paid them to forego litigation and hide accusations of sexually predatory misbehavior.[30]

The term privatization also refers to a global phenomenon about shifting allocations of power between governments and the private sector, which can take place under conditions of regulation or can be a part of deregulatory efforts to limit the authority of governments in general.[31] In terms of courts, privatization denotes a movement away from the sovereign monopoly over dispute resolution to permit non-public actors to have authority of aspects of that power.

Disaggregating various forms of privatization is needed. The term privatization could also refer to private decision-makers employed by the parties or to obligations that individuals pay for court-based services such as probation, drug-testing, or for the use of court-annexed ADR/ODR. Those services in turn could be provided by staff employed by the courts or outsourced to private contractors.

Less often discussed is what is taken for granted as the baseline, which is the accrual of sovereign power. I have used the word 'statization' to denote the numbers of activities that governments took on during the twentieth

29 See Judith Resnik, 'Open Courts and Arbitrations' (n 17) 637–38.

30 See Richard Moorhead, 'Ethics and NDAs: A Report of the Centre for Ethics and Law' (UCL Faculty of Laws, April 2018); House of Commons, The Women and Equalities Committee, *Sexual Harassment in the Workplace* (2018) <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/725.pdf> accessed 26 August 2018.

31 Manuel José Cepeda-Espinosa and Judith Resnik, 'Puzzles of State Identity, Privatization, and Constitutional Authority'; Jon Michaels and Susan Rose-Ackerman, 'Privatization and Regulation' in Judith Resnik (ed), *Governments' Authority* (E-volume of the Yale Global Constitutionalism Seminar, 2013, A Part of the Gruber Program for Global Justice and Women's Rights, 2013) <https://documents.law.yale.edu/sites/default/files/global-constitutionalism-2013.pdf> accessed 26 August 2018.

century.[32] Pressed by democratic egalitarian social movements, many countries committed themselves to be welfarist. Social, economic, and civil rights expanded and positive obligations followed.[33]

Courts are one example of the services which came, during the last century, to be understood as entitlements for all.[34] As Lord Ryder, the Senior President of Tribunals in England and Wales, has put it, 'open justice' encompasses 'the principle of equal access to court,' which is a 'common law constitutional right in the United Kingdom.'[35] A failure to provide genuine access to individuals and businesses results in a 'democratic deficit.'[36] Concerned about how courts could meet the demand to provide access, Lord Ryder discussed the utility of moving towards digitalization of court processes.[37]

Reflection is also needed about why questions of 'open justice' – the title of this symposium – are on the agenda. Had this symposium been convened forty years ago, a segment on the privatization of courts and their replacements would have been unlikely.[38] Indeed, even today, we remain awash with the *doctrinal openness* of courts, familiar because of layers of custom, practice, rules, and law.[39] But as I will detail, despite the many textual commitments to open courts and public hearings, there is a

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32 Judith Resnik, 'Globalization(s), Privatization(s), Constitutionalization, and Statization: Icons and Experiences of Sovereignty in the 21st Century' (2013) 11 I•CON 162.

33 Distinctive questions are court enforcement of such rights. See Judith Resnik, 'Courts *and* Economic and Social Rights/Courts *as* Economic and Social Rights' in Katharine G. Young (ed), *The Future of Economic and Social Rights* (OUP forthcoming 2019) [hereinafter Judith Resnik, 'Economic and Social Rights'], at <https://ssrn.com/abstract=2983853> accessed 26 August 2018; see also Alastair R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Bloomsbury 2004).

34 See generally Judith Resnik, 'Economic and Social Rights' (n 33).

35 See Ernest Ryder (n 5) paras 3, 4.

36 Ibid.

37 Ibid paras 5–13.

38 Frank Sander, one of the early proponents of ADR in the United States, used the metaphor of opening 'many doors' in a courthouse, rather than of closing off doors. Frank E. A. Sander, 'Varieties of Dispute Processing' (1976) 70 Federal Rules Decisions 111, 131.

39 In Europe, the shorthand had been art 6, Right to a Fair Trial of the European Court of Human Rights, European Convention on Human Rights (4 November 1950) 213 UNTS 221 [hereinafter art 6 ECHR], now augmented by art 47 of the Charter of Fundamental Rights of the European Union [2010] OJ C 83/02 [hereinafter art 47 Charter]. I discuss the bases of the constitutional and common law mix in the United States in Judith Resnik, 'Constitutional Entitlements to and in

pervasive *functional privatization* of court-based activities and of some forms of ADR/ODR, which undercuts openness and transparency in their many senses.

Courts, arbitration, and other forms of ADR are creatures of our own making, refashioned regularly as politics produces legal change. These processes are always interactive; practices, regulations, and constitutional doctrine shape – and reshape – the normative expectations of each. We are today in a struggle over norms about the power to bring claims, the rules to determine their merits, the right of the public to observe, and the function of courts. Those conflicts are embedded in debates about whether goals of 'open justice' and 'open government' remain central to political ordering.

2. *Repeat Players, Asymmetries, Aspirations for Publicity, and the Risks of a Predatory Public*

Analyzing the dynamics, pressures, and the stakes of new processes brings me to the idea of 'repeat players.' Marc Galanter deployed this phrase decades ago to focus attention on the ability of individuals and entities (lawyers and judges, governments, corporations, and the media) to use their resources and knowledge to structure procedures benefitting their interests rather than those of 'one-shot' players.[40]

The impact that law has on our lives makes me pause when using game metaphors. Yet Galanter's terms identify how reiterative involvement provides insights *into*, and the potential for authority *over*, the procedures that

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Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture' (2012) 56 St Louis University Law Journal 917.

40 Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974), 9 Law and Society Review 95, 98–103; see also Joel B. Grossman, Herbert M. Kritzer, and Stewart Macaulay, 'Do the "Haves" Still Come Out Ahead?' (1999) 33 Law and Society Review 803. Galanter's analysis focused on courts and did not compare the impact of repeat playing and resources in obtaining or structuring the rules for other services, such as health care. See Richard Lempert, 'A Classic at 25: Reflections of Galanter's "Haves" Article and Work It Has Inspired' (1999) 33 Law and Society Review 1099, 1108. Efforts to discipline the processes of federal court rulemaking are analyzed by Robert Bone in 'The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy' (1998) 87 Georgetown Law Journal 887.

have substantive impacts on rights and remedies.[41] As his terms also reflect, resource asymmetries abound. Rather than an 'equality of arms' (as the English put it), profound disparities haunt today's dispute resolution systems.[42]

We are, of course, not the first generation to face these problems. An early proponent of what today we call ADR was Jeremy Bentham, who shared Galanter's insight about the power of repeat players. Bentham famously railed against 'Judge & Co.' (lawyers), whom he believed developed common law practices that promoted their own self-interest.[43] Bentham argued that they had crafted a legal system which created 'so thick a mist' that one could not, if 'not in the trade,' get anywhere.[44] The 'artificial rules' of the common law produced a 'factitious' practice full of procedural obfuscation that cost clients and the public.[45] Civil courts were thus 'shops' at which 'delay [was] sold by the yard as broadcloth [was] sold by the piece.'[46]

Bentham argued that once dispute resolution moved from the open fields of the Medieval era to the indoors, there was nothing *natural* about it. Bentham understood, then, what is clear today: social and political movements, interacting with technologies (his focus was on the architec-

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41 In the United States, Galanter's analysis explains how *functional privatization* has become so salient a feature of dispute resolution. See Judith Resnik, 'Open Courts and Arbitrations' (n 17).

42 An overview from the United States comes from Judith Resnik et al, *Who Pays? Fines, Fees, Bail, and the Cost of Courts,* Liman Colloquium 2018 (The Arthur Liman Center for Public Interest Law, Yale Law School, April 2018) <https://law.yale.edu/system/files/documents/pdf/Liman/liman2018.pdf> accessed 26 August 2018.

43 Jeremy Bentham, *Rationale of Judicial Evidence* in John Bowring (ed) *The Works of Jeremy Bentham* (William Tait 1843) vol 7, 232–33 [hereinafter Jeremy Bentham, Bowring edition]. The Bentham Project at UCL is providing new editions based on Bentham's thousands of pages of writings.

44 Jeremy Bentham, *Law as It Is*, in Jeremy Bentham, Bowring Edition (n 43) vol 5, 233–34.

45 Anthony J. Draper, '"Corruptions in the Administration of Justice": Bentham's Critique of Civil Procedure, 1806-1811' (2004) 7 Journal of Bentham Studies 1; William Twining, *Theories of Evidence: Bentham and Wigmore* (Weidenfeld and Nicolson 1985) 29, 52.

46 Quoted in Anthony J. Draper (n 45) 5. Bentham criticized the court system as a technically abstruse system replete with 'jargonization.' Jeremy Bentham, *Scotch Reform: Considered with Reference to the Plan, Proposed in the Late Parliament, for the Regulation of the Courts, and the Administration of Justice in Scotland* (1808) Letter I, in Jeremy Bentham, Bowring Edition (n 43) vol 5, 23 [hereinafter Jeremy Bentham, *Scotch Reform*].

ture of buildings), shape what we expect courts to do. Choices are always being made, and Bentham's utilitarianism prompted him to call for radical reforms of the justice system in England.

Bentham famously opined: 'Publicity is the very soul of justice. … It keeps the judge himself, while trying, under trial.'[47] Bentham spent the first decades of the nineteenth century advocating for 'codification' (another word he coined) of law as one method of achieving publicity. Bentham thought written laws in an organized code, rather than promulgated in fragments through common law opinions, would make accessible what law demanded. Bentham also wanted to require judges to preside over a whole case so as to dispense justice swiftly,[48] as he hoped that 'oral interrogation before the judge in public'[49] would avoid lengthy, slow, and costly written exchanges.

What are the utilities and the politics of this form of knowledge production and its relationship to justice? Bentham argued that publicity made several contributions. A first was truth; he thought that public access to witness testimony would serve as 'a check upon mendacity and incorrectness' – that public disclosures would make it easier to identify false statements.[50]

Another was education, in that Bentham assumed that judges would want to explain their actions to the people in attendance. Courts were therefore both 'schools' and 'theatres of justice.'[51] And famously, Bentham lauded publicity's disciplinary powers: 'the more strictly we are watched, the better we behave.'[52] Bentham wanted the public to function as a 'half real and half imaginary' Tribunal of Public Opinion, able to know the pro-

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47 Jeremy Bentham, *Draught for the Organization of Judicial Establishments, Compared with that of the National Assembly, with a Commentary on the Same*, in Jeremy Bentham, Bowring Edition (n 43) vol 4, 316.

48 In the United States, we call that practice an 'individual' calendar system, as contrasted with the 'master' calendar system. Maureen Solomon, *Caseflow Management in the Trial Court* (American Bar Association 1973) 9.

49 William Twining (n 45) 31.

50 Ibid 90.

51 Jeremy Bentham, *Rationale of Judicial Evidence* (1827) [hereinafter Jeremy Bentham, *Rationale of Judicial Evidence*], in Jeremy Bentham, Bowring Edition (n 43) vol 6, 354.

52 See 'The More Strictly We Are Watched The Better We Behave' (*UCL Faculty of Laws, Bentham Project*, 2007), <https://www.ucl.ac.uk/drupal/site_bentham-project/sites/bentham-project/files/benthampanopticon.pdf> accessed 26 August 2018. The quote comes from Michael Quinn (ed), *The Collected Works of Jeremy Bentham: Writings on the Poor Laws* (OUP 2001) vol 1, 277.

cess of decision-making and the bases for the outcomes and therefore to assess whether the rules comported with its interests. That competency would enable the public to assess the decision-makers and hence to sit in judgment of judges and of the state that empowered them.[53]

In addition, Bentham worried about state control of information. Bentham proposed that ordinary spectators ('auditors') be permitted to make notes that could be distributed widely. (Today we might call such persons 'bloggers.') Those 'minutes' would, Bentham argued, serve as insurance for the good judge and as a corrective against 'misrepresentations' made by 'an unrighteous judge.'[54] Bentham was not confident that courts would attract enough interest to have sufficient auditors; he proposed the incentive of paying them to observe and distribute information.[55]

Bentham's advocacy for simplified and public proceedings (brought about in part through legislative control) aimed to enable public opinion to function as a 'direct check' on judicial authority – to underscore or to criticize courts.[56] Publicity, 'underwritten by simplicity,' would be the 'main security against mis-decision and non-decision.'[57] 'Without publicity all other checks are insufficient: in comparison with publicity, all other checks are of small account.'[58]

Bentham was nuanced in drawing distinctions between institutional publicity and personal privacy. Bentham, focused on disciplining the power of judges and lawyers, understood well that public processes could burden individuals. Bentham therefore argued for limiting openness if observers were unruly, so as to preserve 'peace and good order.'[59] Also concerned about the need to 'protect the judge, the parties, and all other persons present, against annoyance.'[60] Bentham supported closure of court proceedings to 'preserve the tranquility and reputation of individuals and families from unnecessary vexation by disclosure of facts prejudicial to their honour, or liable to be productive of uneasiness or disagreements among themselves,' or that would reveal their 'pecuniary circumstances.'[61]

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53 Robert Post, 'Data Privacy and Dignitary Privacy: Google Spain, The Right to be Forgotten, and the Construction of the Public Sphere' (2018) 67 Duke Law Journal 981.

54 Jeremy Bentham, *Rationale of Judicial Evidence* (n 51) 355.

55 Ibid 543.

56 Anthony Draper (n 45) 8–9; Jeremy Bentham, *Scotch Reform* (n 46) 23.

57 William Twining (n 45) 48.

58 Jeremy Bentham, *Rationale of Judicial Evidence* (n 51) 355.

59 Ibid 360.

60 Ibid.

61 Ibid.

In short, Bentham limited his publicity principle for reasons ranging from 'public decency' to state secrets.[62] Those circumstances for closure, like Bentham's arguments for openness, are reflected in the rules made in contemporary courts.[63]

Bentham's concerns made him a proponent of reforms for another reason; he was an early advocate of what we now call 'access to justice' (A2J). Although Bentham disdained natural rights, which he called 'nonsense on stilts,'[64] Bentham's utilitarianism made him somewhat of an egalitarian.[65] Bentham described filing fees as 'a tax on distress,'[66] and he argued for subsidies for those too poor to participate. He proposed that an 'Equal Justice Fund' be established, supported by 'fines imposed on wrongdoers,' by the government, and by charitable donations.[67] Bentham wanted not only to subsidize the 'costs of legal assistance but also the costs of transporting witnesses' and the production of other evidence.[68] Bentham called on judges to be available 'every hour on every day of the year,' and he suggested that courts be on a 'budget' for evidence to produce one-day trials and immediate decisions.[69]

While Bentham was innovative, his insistence on publicity was built on practices familiar in the system that he criticized – the common law presumption (in part built on jury trials) that courthouses were open venues.

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62 Ibid.

63 For example, art 6(1) of the European Convention on Human Rights provides that: 'Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

64 That proposition comes from an essay, written in 1795, and also known as 'Anarchical Fallacies.' See Philip Schofield, 'Jeremy Bentham's "Nonsense Upon Stilts"' (2003) 15 Utilitas 1, 10.

65 See Nicola Lacey, 'Bentham as Proto-Feminist? Or an Ahistorical Fantasy on "Anarchical Fallacies"' (1998) 51 Current Legal Problems 1.

66 Jeremy Bentham, *A Protest Against Law-Taxes: Showing the Peculiar Mischievousness of All Such Impositions as Add to the Expense of Appeal to Justice*, in Jeremy Bentham, Bowring Edition (n 43) vol 2, 582.

67 Philip Schofield, *Utility and Democracy: The Political Thought of Jeremy Bentham* (OUP 2006) 310.

68 Frederick Rosen, *Jeremy Bentham and Representative Democracy: A Study of the Constitutional Code* (OUP 1983) 153–54.

69 See Thomas P. Peardon, 'Bentham's Ideal Republic' (1951) 17 Canadian Journal Economic & Political Science 184, 196.

Long before Bentham, one can find commitments to that precept. One example comes from the seventeenth-century founding documents for the English Colony of West New Jersey: 'In all publick courts of justice for tryals of causes, civil or criminal, any person or persons . . . may freely come into, and attend . . . .'[70]

After the US revolution, that proposition was embedded in state constitutions. The rituals from Renaissance times of the public spectacles of adjudication became obligations of republican and democratic governments to welcome observers. 'R-i-t-e-s' turned into 'r-i-g-h-t-s,' as can be seen from excerpts of the Connecticut Constitution of 1818 and from Alabama's 1819 Constitution.

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.[71]

> All courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered, without sale, denial, or delay.[72]

Those propositions took material shape through the development of a special type of building that departed from the multi-function town halls of earlier eras. These segregated spaces – 'courthouses' – came to dot the landscape, as exemplified by Figure 1, a photograph of a 1784 building in Connecticut.[73]

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70 Charter or Fundamental Laws, of West New Jersey, Agreed Upon, ch XXIII (1676), reprinted in Richard L. Perry (ed) *Sources of Our Liberties* (American Bar Foundation 1959) 188, also available at The Avalon Project <http://avalon.law.yale.edu/17th_century/nj05.asp> accessed 26 August 2018.

71 Connecticut Constitution (1818) art I, s 12.

72 Alabama Constitution (1819) art I, s 14.

73 For the history of courthouse construction, see Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (Routledge 2011); Clare Graham, *Ordering Law: The Architectural and Social History of the English Law Court to 1914* (Routledge 2003); Judith Resnik and Dennis Curtis, *Representing Justice: Invention, Controversy and Rights in City-States and Democratic Courtrooms* (Yale University Press 2011) [hereinafter Judith Resnik and Dennis Curtis, *Representing Justice*].

Figure 1

New London County Courthouse, New London, Connecticut, 1784. Architect: Isaac Fitch. Relocated to present-day location in 1839. Additions added in 1909 by Dudley St. Clair Donnelly, and in 1982 by Hirsch and Persch. Source: <http://historicbuildingsct.com/?p=1574>

On both sides of the Atlantic Ocean, 'open justice' was an artifact of the Enlightenment. Governments committed to building nation-state power had the economic resources to spend on public buildings and apportioned funds to construct courthouses, designed to serve as icons of law, justice, and their own authority. Persons walking into courtrooms had rights to observe what transpired therein, and the governments hoped that what they saw would prompt or renew commitments to the rule of their law. The commitments to *doctrinal openness* and to *functional openness* were in service of the need to build state power.

I have provided this image of an eighteenth century Connecticut courthouse because, even as the quaint building is still in use, it underscores the disjuncture between Bentham's era and ours. The numbers of people using courts, the buildings that house judges, and the practices of courts are very

different. So too are the modes of communication. While Bentham could be styled a proponent of ADR, he did not live in a world in which his 'auditors' had become not only our 'bloggers' but also hackers. We have come to understand that they too may be a source of 'mendacity' as well as a buffer against it.

The world that we inhabit, therefore, raises a question about whether claims for open courts are passé, in that many other institutions and technologies disseminate information about conflicts. A vivid example comes from what in the United States is called '#MeToo' (and in Europe, *Balance-TonPorc*, and other phrases).[74] The web gives individuals the ability to tell their own stories of sexually predatory misbehavior and to hear others. Videos have been key to an array of popular outcries, from consumer protests when airline employees drag a seated, ticketed passenger from a plane to street rallies following recordings of the deadly encounters of police with black men in the United States. In some instances, these exchanges have produced structural changes about how institutions respond to complaints, how people treat each other, and what law requires. A version of Bentham's 'Tribunal of Public Opinion' has been put to work.

One of the terms in English for spreading this information is that web posts go 'viral'.[75] The word aptly captures the speed of transmission, and 'viral' also points to the specter of contamination, which brings me to another aspect of the disjuncture between Bentham's era and ours. Bentham assumed that publicity would produce a constructive link between the public and the institutions subjected to scrutiny. Twenty-first century theorists, however, analyze how forms of publicity can generate distrust and suspicion about the very institutions that are obliged to open their processes to public scrutiny.[76]

Moreover, Bentham's imagined public, reflected in his metaphor of a 'Tribunal of Public Opinion,' was predicated on the plausibility of consti-

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74 See eg Samantha Schmidt, '#MeToo: Harvey Weinstein case moves thousands to tell their own stories of abuse, break silence' *Washington Post* (Washington, 16 October 2017) <https://www.washingtonpost.com/news/morning-mix/wp/2017/10/16/me-too-alyssa-milano-urged-assault-victims-to-tweet-in-solidarity-the-response-was-massive/> accessed 26 August 2018.

75 Avi Selk and Lori Aratani, 'United Airlines CEO apologizes for "horrific event", promises review of policies after passenger violently deplaned' *Washington Post* (Washington, 11 April 2017) <https://www.washingtonpost.com/news/dr-gridlock/wp/2017/04/11/amid-pr-fiasco-over-dragged-passenger-united-ceo-defends-his-crew/> accessed 26 August 2018.

76 David Pozen (n 11) 151-2 summarizes some of that literature.

tuting a singular public, understanding its own self-interests, aggregating preferences, and therefore enhancing the general welfare. But that postulate is belied by experiences of the many competing and deeply divided public(s), with understandings of their own self-interests different than what others ascribe to them.[77] Political and critical theorists insist on the construction of preferences and multiplicity of points of views,[78] just as art historians remind us that cubism broke the linear plane and refuted the singular perspective valorized in Renaissance art.[79]

Further, we know well about another kind of public – what I term a 'predatory public' – 'trolling' on the internet and at times launching aggressive attacks on individuals and institutions.[80] Too-easy dissemination of information (true and false) about individuals has caused many injuries. The techniques for manipulation have expanded, as is illustrated by a 'social media black market' in which some individuals, in quest of celebrity, buy fake 'followers' to claim larger market shares of public attention than they actually have.[81]

Jeremy Bentham must, therefore, be situated not only as the central theorist for the much-admired publicity of justice's 'soul,' but also as the touchstone for modern public relations, advertising, and propaganda. Misinformation, disinformation, manipulated information, and too much information are all also aspects of the experiences of 'publicity.'

If one set of concerns centers on accuracy, manipulation, and deception, another is about personhood and privacy. Tensions between free expression and privacy have preoccupied law for a long time, and the development of virtual exchanges has underscored the complexity of the impact of infor-

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77 Nancy Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' in Craig Calhoun (ed), *Habermas and the Public Sphere* (MIT Press 1992).

78 See eg Jane Mansbridge, 'The Descriptive Political Representation of Gender: An Anti-Essentialist Argument' in Jytte Klausen and Charles S. Maier (eds), *Has Liberalism Failed Women?: Assuring Equal Representation in Europe and the United States* (Palgrave Macmillan 2001) 19.

79 See eg Jonathan Crary, *Techniques of the Observer: On Vision and Modernity in the Nineteenth Century* (MIT Press 1992).

80 Examples are provided by many. See eg Karen Eltis, 'The Judicial System in the Digital Age: Revisiting the Relationship Between Privacy and Accessibility in the Cyber Context' (2011) 56 McGill Law Journal 289.

81 Nicholas Confessore, Gabriel J X Dance, Richard Harris, and Mark Hansen, 'The Follower Factory' *New York Times* (New York, 27 January 2018) <https://www.nytimes.com/interactive/2018/01/27/technology/social-media-bots.html> accessed 26 August 2018.

mation flows. A leading contemporary example addressing the trade-offs is *Google Spain Sl. v Agencia Española de Protección de Datos*, decided in 2014 by the Court of Justice of the European Union (CJEU) and shaping what has come to be referred to as a 'right to be forgotten.'[82] The Court concluded that webmasters had an obligation to take information off the web because of EU directives obliging deletion of 'personal data … no longer necessary … to the purpose for which they were collected;' that mandate, however, had to be balanced with rights of 'freedom of expression and of information.'[83]

I raise this case as part of this introduction to a discussion of the functions of the public and the private in dispute resolution to make several points. First, *Google Spain* reflects the pain that new technologies make possible. The ease of crossing all geographical boundaries when obtaining and exchanging information contrasts to what some refer to as the 'practical obscurity' of the 'public' records of courts.[84] Before electronic materials, documents in many jurisdictions were 'public' in the sense that third parties were entitled to read them. Yet, if the materials were in file drawers inside courthouses, individuals had to have the resources for labor-intensive site visits, and further dissemination required yet other costs.

Thus, and second, *Google Spain* reminds us that search engines create new opportunities and provide, as Robert Post put it, a 'virtual communicative space in which democratic public opinion is now partially formed.'[85] Google does not just stockpile information; it organizes it. In these respects, search engines provide some of the functions Bentham

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82 The term 'right to be forgotten' was foregrounded in the CJEU's press office's release about the opinion. See Press Release, Court of Justice of the European Union, Press Release No 70/14, Judgment in Case C-131/12 (13 May 2014) 1–2. The decision itself noted that Spanish Court had referred a question on the scope of the 'derecho al olvido' (the right to be forgotten). Case C-131/12 *Google Spain SL v Agencia Española de Protección de Datos* [2014] OJ C 212/04, para 20. [hereinafter *Google Spain*].

83 *Google Spain* (n 82) paras 4, 94. The case had been filed by Costeja Gonazlez, who argued that an old report about the auction of his repossessed home had ceased to have relevance. He sought to prevent the report from being available by searching Google. Ibid paras 14–16. See Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, repealing 95/46/EC [hereinafter 2016 Data Protection Regulation].

84 See Karen Eltis (n 80) 303. The term was also used in the decision in *United States (Department of Justice) v Reporters' Committee for Freedom of the Press*, 489 US 749, 762, 780 (1989).

85 See Robert Post (n 53) 990.

ascribed to courts, which also compile and disseminate information. Google has its methods of deciding what materials to put up and the order of retrieval,[86] just as courts have rules on what documents are made public, the decorum required for in-person hearings, and the evidentiary boundaries of what is admissible.

Third, Google and other search engines are not only potential stand-ins *for* courts as 'communicative spaces,' but in practice, they *are* also courts, rendering decisions balancing data protection rights and public access to the information in question. After the decision in *Google Spain*, the company created an ad hoc Advisory Council that proposed guidelines for how the company should make its rulings[87] when individuals or governments requested that information be taken down.[88] Because refusals to delist are appealable to data protection agencies at the national level, Google, as a repeat player, may have presumptions to take down information rather than invite public appeals of its refusal to do so.[89] Moreover, refusing to delist can, under the General Data Protection Regulation in effect in the spring of 2018, also result in fines of not more than four percent of global revenues – which creates yet other incentives for data controllers to delist.[90]

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86 Google's choices about much of what it does are seen as protected, as is the press, under the First Amendment. See eg *e-ventures Worldwide, LLC v Google, Inc*, No 214CV646FTMPAMCM, 2017 WL 2210029 (MD Fla 8 February 2017) 4.

87 See Luciano Floridi, Sylvia Kauffman, Lidia Kolucka-Zuk, Frank La Rue, Sabine Leutheusser-Schnarrenberger, José-Luis Piñar, Peggy Valcke, and Jimmy Wales, 'Report of the Advisory Council to Google on the Right to be Forgotten' (6 February 2015) <https://static.googleusercontent.com/media/archive.google.com/en//advisorycouncil/advisement/advisory-report.pdf> accessed 26 August 2018.

88 See Google, 'Transparency Report: Government Requests to Remove Content' <https://transparencyreport.google.com/government-removals/overview?removal_requests=group_by:reasons&lu=removal_items&removal_items=group_by:reasons> accessed 1 March 2018.

89 See eg Daphne Keller, 'The New, Worse "Right to be Forgotten"' (27 January 2016) Stanford Center for Internet and Society Blog, <http://cyberlaw.stanford.edu/publications/new-worse-%E2%80%98right-be-forgotten%E2%80%99> accessed 26 August 2018 ('A platform that simply erases users' content on demand risks nothing.'); Daphne Keller, 'Empirical Evidence of "Over-Removal" By Internet Companies Under Intermediary Liability Laws' (12 October 2015) Stanford Center for Internet and Society Blog <http://cyberlaw.stanford.edu/blog/2015/10/empirical-evidence-over-removal-internet-companies-under-intermediary-liability-laws> accessed 26 August 2018.

90 See General Data Protection Regulation (n 83) arts 48, 83(5); see also Daphne Keller, 'The Right Tools: Europe's Intermediary Liability Laws and the 2016 Gen-

Fourth, dipping into Google's self-reports of what it does reflects its quest to be perceived as legitimate in its court-like role. Google has embraced a form of Bentham's publicity principles and a commitment to human decision-making – recorded in its publication it calls a 'Transparency Report.' In this document, Google reported that it makes decisions on a 'case-by-case basis,' that it sometimes asks for more information, and that no requests are 'automatically rejected by humans or by machines.'[91]

Further, Google described the process as 'complex,' requiring evaluation of factors such as the 'requester's professional life, a past crime, political office, position in public life,' and the authorship of the materials.[92] Examples of delisting included requests at the behest of the wife of a deceased individual about alleged sex offenses. Illustrative of refusals to delist were decisions declining to do so for individuals who were in political life.[93] Google reported that, from 2014 through the winter of 2018, it had received 665,000 requests for delisting almost two and a half million URLS and that it had removed more than forty percent – about 900,000 URLs.[94]

Fifth, Google's processes illustrate the privatization of court-like services. Google is one of many companies running its own in-house dispute resolution system. Another example comes from EBay, which described dealing with sixty million disputes annually – said to yield a high satisfaction by its users.[95] Companies may, like Google, employ their own, in-house decision-makers, or they may hire third-party firms, such as Modria, (once used by EBay and now a part of Tyler Technologies) that services a large number of U.S. courts. Many other companies require using mechanisms for dispute resolution which they select, and many in the United States outsource to the American Arbitration Association.

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eral Data Protection Regulation' (forthcoming) Berkeley Technology Law Journal, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2914684> accessed 26 August 2018.

91 See Google, 'Search Removals Under European Privacy Laws' 2 <https://transparencyreport.google.com/eu-privacy/overview> accessed 26 August 2018 [hereinafter 'Search Removals Under European Privacy Laws'].

92 Ibid. See also Jennifer Daskal, 'Borders and Bits' (2018) 71 Vanderbilt Law Review 179, 212-13.

93 'Search Removals Under European Privacy Laws' (n 91) 3.

94 Ibid 1 (reporting taking down 43.3% of the requested URLs). That document includes a chart mapping the requests from July 2014 to (as of my reading) February 2018. Ibid 2. See also Post (n 53) 988.

95 Ernest Ryder (n 5) para 5. Ethan Katsh and Oma Rabinovich-Elny, *Digital Justice: Technology and the Internet of Disputes* (OUP 2017) 35.

Sixth, the privatization of providers of dispute resolution currently includes leaving to those private providers the decision about what to make public. The primary source of information about private courts such as that run by Google comes from them. The 'corporation as courthouse' is not an open space in which third parties can freely enter.[96] Google and other corporate dispute resolution systems (some of which may be run by nonprofit companies) have concluded that some forms of transparency are requisite but have not embraced the principles that 'all courts shall be open' and that every 'person can freely come and attend.' Rather, we have Google's self-reports,[97] augmented by what it must tell webmasters,[98] what

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96 Rory Van Loo, 'The Corporation as Courthouse' (2016) 33 Yale Journal on Regulation 547, 554–569, 578–585.

97 See eg Theo Bertram, Eli Burstein, Stephanie Caro (and nineteen co-authors, all 'affiliated with Google'), 'Three Years of the Right to be Forgotten' (Google 2018) <https://drive.google.com/file/d/1H4MKNwf5MgeztG7OnJRnl3ym3gIT3HUK/view> accessed 26 August 2018. This article offered a 'retrospective measurement of the 2.4 million URLs' sought to be delisted from May 2014 until the end of 2017. The variables included the countries from which requests come, entities like governments, media, and other directories in which information appears, and the 'prevalence of extraterritorial requests.' Ibid 1, 3.

The Google authors report that their 'results dramatically increase transparency … and reveal the complexity of weighing personal privacy against public interest when resolving multi-party privacy conflicts that occur across the Internet.' Ibid 1. For example, they reported that 20% of the URLs sought to be delisted involved what they called a 'requester's legal history,' while 33% were about 'personal information.' France, Germany, and the UK accounted for more than 50% of the requests, and some of the requests came from law firms and 'reputation management services.' Ibid 2.

98 A 2016 article reported that Google notified web publishers in about one-quarter of delisting cases after delisting. Aleksandra Kuczerawy and Jef Ausloos, 'From Notice-and-Takedown to Notice-and-Delist: Implementing Google Spain' (2016) 14 Colorado Technology Law Journal 219. Google and other third-party intermediaries may be held liable for providing identifying information to webmasters. For example, in September 2016, the Spanish Agencia Española de Protección de Datos fined Google 150,000 euros for disclosing identifiable information when it informed webmasters that their URLs had been deindexed for particular individual names. Agencia Española de Protección de Datos, Resolucion R/02232/2016 (14 September 2016) <http://www.agpd.es/portalwebAGPD/resoluciones/procedimientos_sancionadores/ps_2016/common/pdfs/PS-00149-2016_Resolucion-de-fecha-14-09-2016_Art-ii-culo-10-16-LOPD.pdf> accessed 26 August 2018.

can be gleaned from reports posted about outcomes of these adjudicatory-like decisions and by way of the press, scholars' analyses, and litigation.[99]

As noted, under European law, if Google or other web platforms decline to delist,[100] individuals can appeal to national data regulatory bodies, and those cases may make their way to the CJEU.[101] Further, webmasters who receive Google's notice of delisting may also request that Google review a

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99 See eg Sylvia Tippman and Julia Powles, 'Google Accidentally Reveals Data on "Right to be Forgotten" Requests' *The Guardian* (London, 14 July 2015) <https://www.theguardian.com/technology/2015/jul/14/google-accidentally-reveals-right-to-be-forgotten-requests> accessed 26 August 2018; Julia Powles, 'Google's Data Leak Reveals Flaws in Making It Judge and Jury Over Our Rights' *The Guardian* (London, 14 July 2015) <https://www.theguardian.com/technology/2015/jul/14/googles-data-leak-right-to-be-forgotten> accessed 26 August 2018; James Ball, 'EU's Rights to be Forgotten: Guardian Articles Have Been Hidden By Google' *The Guardian* (London, 2 July 2014) <https://www.theguardian.com/commentisfree/2014/jul/02/eu-right-to-be-forgotten-guardian-google> accessed 26 August 2018; Gail Sullivan, '"Right to be Forgotten" Gets Real as Google Wipes Stories from Search Results' *Washington Post* (Washington, 3 July 2014) <https://www.washingtonpost.com/news/morning-mix/wp/2014/07/03/google-erases-unflattering-news-stories-because-of-right-to-be-forgotten-is-this-like-burning-books-in-a-library/?utm_term=.a42a4b803b4f> accessed 26 August 2018.

As noted, questions about delisting that reach courts provide insights because of third-party rights to those venues. See eg 'Court Rejects "Right to be Forgotten" Demand' *Japan Times* (Tokyo, 1 February 2017) <https://www.japantimes.co.jp/news/2017/02/01/national/crime-legal/top-court-rejects-right-forgotten-demand/#.WnuvhpM-frl> accessed 26 August 2018; Alex Hern, 'ECJ to Rule on Whether "Right to be Forgotten" Can Stretch Beyond EU' *The Guardian* (London, 20 July 2017) <https://www.theguardian.com/technology/2017/jul/20/ecj-ruling-google-right-to-be-forgotten-beyond-eu-france-data-removed> accessed 26 August 2018. See generally Paul Fleischer, 'Three Years of Striking the Right (to Be Forgotten) Balance' (Google Blog, 15 May 2017) <https://www.blog.google/topics/google-europe/three-years-right-to-be-forgotten-balance/> accessed 26 August 2018.

100 Google has provided information on the factors it relied upon when deciding not to delist. See Q3 2015: Common Material Factors Involved in a Decision Not to Delist a Page (Google, November 2015) <https://storage.googleapis.com/transparencyreport/faqs/eu-privacy/Google_EU_privacy_data_nov 2015.pdf> accessed 26 August 2018.

101 For example, pending before the European Court of Justice of the European Union is the question of whether 'sensitive personal data' – such as the political allegiance of an individual, or a past criminal conviction reported in the press – should be used generally as the factor that outweighs the public interest in obtaining the data. See Request for a preliminary ruling from the Conseil d'État (France) lodged on 15 March 2017, Case C-136/17 *GC, AF, BH, ED v Commission nationale de l'informatique et des libertés (CNIL)* [2017] OJ C 168/33. The ques-

decision; those efforts can open windows to third-parties to learn about disputes.[102] And in principle, the many resulting issues are questions of EU law – some of which reach Member State courts and the CJEU.[103] But absent the web engines offering full disclosures or legal mandates for third-party access, we have no way to assess how, in its tens of thousands of decisions, Google is implementing the EU requirement to balance personal privacy and public rights to information.

Seventh, I have used the example of delisting to underscore the layers of questions about the public/private divide. Google's Transparency Report provides a kind of public accounting, albeit without any means of independent inquiries. That report reflects the vitality of publicity as a method of legitimatization. Google wants to be seen – by some versions of

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tions referred include whether 'the prohibition imposed on other controllers of processing data caught by arts 8(1) and (5) of Directive 95/46, (1) subject to the exceptions laid down there, also apply to this operator as the controller of processing by means of that search engine,' and if so, whether an operator can 'refuse a request for "de-referencing", if it establishes that the links at issue lead to content which, although comprising data falling within the categories listed in Article 8(1), is also covered by the exceptions laid down by Article 8(2)(a) and (e) of the directive.' Another question is, 'whether or not publication of the personal data on the web page at the end of the link at issue is lawful, must the provisions of Directive 95/46 be interpreted as requiring the operator of a search engine, when the person making the request establishes that the data in question has become incomplete or inaccurate, or is no longer up to date, to grant the corresponding request for "de-referencing"'.

102 'European Privacy Requests Search Removals FAQs' (Google 2018) <https://support.google.com/transparencyreport/answer/7347822> accessed 26 August 2018.

103 Pending as I write is Case C-507/17 *Google Inc v Commission nationale de l'informatique et des libertés*, [2017] OJ C 347/30 (lodged 21 August 2017). At issue in this case is the scope of the obligation to delist, in terms of whether it applies to the venue from which the person searches and to the domains searched; some Member States have concluded that the requirement extends to domains beyond the one linked to their borders. Questions include the scope of the obligation and the relevance of variables such as the venue from which the search is launched and the domain linked to particular Member States. See, eg, Case C-398/15 *Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Manni* [2017] OJ C 144/07 (judgement from 9 March 2017) and Opinion of AG Bot. The CJEU held that national courts had the responsibility of determining the possible existence of 'legitimate and overriding reasons' which might justify limiting third parties' access to data concerning Mr Manni from publicly available companies' registers. Ibid Judgement para 63. See also Christian Kohler, 'Conflict of Law Issues in the 2016 Data Protection Regulation of the European Union' (2016) 52 Rivista di diritto internazionale private e processuale 653.

Bentham's Tribunal of Public Opinion – as a decent, fair decision-maker. But even if all the decisions made by Google were done by a state-empowered 'public' court, some limits on public access would be necessary to avoid doing harm to the people sought to be protected by this right of privacy.

In short, the challenges of balancing public and private interests mandated by the CJEU are enormous in a world lacking 'practical obscurity.' Return then to Bentham's enthusiasm for 'publicity' and realize that he is far from the only great analyst who now seems endearingly innocent. So too were most commentators, entrepreneurs, and inventors who, just a decade ago, assumed the web's great egalitarian force without foreseeing the hacking and manipulation that has ensued. Few forecast how predatory actors could invade systems of openness – grabbing information about individuals' finances and health records, terrorizing specific people, altering market information, controlling streams of knowledge, and influencing and undermining elections. Nor were the myriad of questions in view about how to manage the information; whether to provide free materials or charge for access; how to think through propriety interests in content control; and whether to constrain the power of webmasters to render court-like decisions.

Likewise, constitutional drafters mandated open courts in an era when vast numbers of potential claimants were legally barred from using them because of race and gender subordination. Today, even as egalitarian norms have generated rights of access by all, the ability to pursue rights (what US sociologists have termed 'naming, blaming, and claiming') remains constrained by limited knowledge and economic resources. And many constitutions are silent on key questions of subsidies for courts and for their users, as well as on how to balance public and private interests in the dispute resolution fora that they create.

3. *The Demand Curve, Doctrinal Openness, Functional Privatization, and the Cost of Courts*

In addition to being too optimistic about the complexity of 'the public' and the uses to which openness and transparency could be put, my initial discussion did not engage how exclusionary courts were in Bentham's era. The excerpts from the 1818 and 1819 Connecticut and Alabama constitutions promised 'every person' a right to a remedy in 'open courts.' But, whether in Connecticut or in Alabama, women and men of all colors were not then treated equally in courts. 'Every person' was not all of us.

To underscore this point, look at this mural, installed in 1938 in a courthouse in Aiken, South Carolina.

Figure 2

Justice as Protector and Avenger, Stefan Hirsch, 1938.
Charles E. Simons, Jr. Federal Courthouse, Aiken, South Carolina. Image reproduced courtesy of the Fine Arts Collection, United States General Services Administration.

The artist saw himself as offering up a modern version of the Virtue, Justice. He wrote that he had abjured the standard attributes of scales, sword and book and instead had personified Justice's strength as 'protector' and

'avenger' – garbed in the colors – red, white, and blue – of the American flag.[104]

But spectators in the 1930s in that courthouse saw something else. A local reporter described the figure as a 'barefooted mulatto woman wearing bright-hued clothing.'[105] The federal judge who was to sit in front of the mural described it as 'monstrosity,' resulting in a 'profanation of the otherwise perfection' of the courthouse.[106] That judge wanted the mural removed. In response, the artist argued he had not intended to make any political statements and offered to lighten the skin tones. Federal and State officials were interested in repainting, but after a national controversy erupted with protests from organizations of artists and the National Association for the Advancement of Colored People, that plan was cancelled. The denouement was that, as can be seen in Figure 2, brown drapes were placed on each side so as to hide the mural from view.[107] Despite the words – 'equal justice under law' – inscribed on the US Supreme Court's façade when its own courthouse building opened in 1935, the United States was far from providing equal justice.[108] The unwelcomed image of a 'mulatto justice' in the 1930s reflected how unwelcome people of color were in many US courts.

The substantive law and the rules of procedure changed in the wake of the political and social movements of the second half of the twentieth century, to which we here are, of course, the heirs. The impact of the 'rights revolution' can be seen from a 1999 revision of the constitution of the State of Delaware.

> All courts shall be open; and every person for an injury done him or her in his or her reputation, person, movable or immovable posses-

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104 Letter from Stefan Hirsch, Artist, to Forbes Watson, Advisor to the Section of Painting and Sculpture of the Treasury Department (18 May 1938) (on file with GSA Archives, Public Building Services, Fine Arts Collection, 477, Stefan Hirsch); see also Judith Resnik and Dennis Curtis, *Representing Justice* (n 73) 111–13.

105 Marlene Park and Gerald E. Markowitz, *Democratic Vistas: Post Offices and Public Art in the New Deal* (Temple University Press 1984) 61, 90 n 30; see also Karal Ann Marling, *Wall-to-Wall America: A Cultural History of Post Office Murals in the Great Depression* (University of Minnesota Press 1982) 64–65.

106 Judith Resnik and Dennis Curtis, *Representing Justice* (n 73) 112.

107 Ibid 112-13.

108 See Judith Resnik and Dennis E. Curtis, 'Inventing Democratic Courts: A New and Iconic Supreme Court' (2013) 38 Journal of Supreme Court History 207, 233.

> sions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense. …[109]

The amendments augmented the familiar phrases (echoing the Magna Carta) of rights to remedies and open courts by adding a 'him or her' so as to encode women's authority into the text. (That decision was very much of its time, before concerns emerged that gendered pronouns suggest dichotomies that do not take into account the range of sexual identities.)

The Delaware text reflects that, since Bentham wrote, courts have opened their doors in a deeper sense of accessibility. Employees can now call for legal accountings by their employers, just as prisoners can now challenge their custodians. Individuals ('vulnerable persons,' as some of the European case law puts it[110]) can seek protection from abusive family members, and women are no longer supposed to be 'chastised' (beaten) by their husbands. Twentieth-century egalitarian movements produced a mix of constitutional and statutory law that not only recognized all persons as entitled to equal treatment, but also understood the terms of equality in different ways and welcomed an array of new participants into courts.

These new rights and these new participants turn courts into one of several *democratic venues*, obliged to treat all persons with respect and requiring state agents – judges – to do so as well. In using the word 'democracy,' I am not focused (as many others are) on the role played by lay jurors, temporarily holding the state's power to render judgment.[111] The aspect of 'the democratic' of interest here is how courts can provide opportunities for the public to watch state actors in action, as they accord (or fail to provide) litigants, lawyers, and witnesses dignified treatment. The public also can see that disputants (be they employee or employer, prisoner or prison official) are required to treat each other civilly as they argue in public about their disagreements, misbehavior, wrongdoing, and obligations. Litigation is a social practice that forces dialogue upon the unwilling (including the government) and momentarily alters configurations of authority.

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109 Delaware Constitution (1999) s 9.

110 See eg *Valiuliene v Lithuania*, App No 33234/07 (ECHR, 26 March 2013).

111 See eg Tatjana Hörnle, 'Democratic Accountability and Lay Participation in Criminal Trials' in Antony Duff, Lindsay Farmer, Sandra Marshall, and Victor Tadros (eds), *The Trial on Trial: Judgment and Calling to Account* (vol 2, Bloomsbury 2006), 135–53.

A body of law, denoted by my phrase 'doctrinal openness,' reinforces this proposition.[112] The 'right to a public hearing' for criminal and civil proceedings is a familiar refrain in European law. The US Supreme Court has many times insisted that criminal trials and related proceedings be open to the media and the public in general. Lower courts recognize a right of the public to observe civil trials and the hearings related to those processes.[113] Thus, as I explained at the outset, the right of access to courts has come to reference both the right of individuals to bring cases to courts and the right of third parties to watch. While litigation is often styled as a triangle, with the judge at the apex dealing with opposing plaintiffs and defendants, adjudication ought to be mapped as a square, with a fourth line required to denote the audience.

My focus on courts' function as venues of democracy makes another argument for why publicity is important today and requires a revision of the list of utilities that Bentham posited that publicity provided. Bentham saw courts as 'schools for justice' because he thought judges would naturally want to explain their decisions to their audience. For me, the state is not only a teacher, but also a *student*, reminded that all of us have entitlements in democracies to watch power operate and to receive explanations for the decisions entailed. The observers are, in this account, a necessary *part* of the practice of adjudication, anchored in democratic political norms that the state cannot impose its authority through unseen and unaccountable acts. Therefore courts are, like legislatures, a place in which *democratic practices* occur in real-time.

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112 Others in this symposium address this obligation in Europe. See eg Maciej Szpunar 'Right to a Public Hearing according to Art. 6 ECHR and Art. 47 of the Charter of Fundamental Rights of the EU: Constitutional Perspectives' in this Volume. See generally Jens Hillebrand Pohl, 'The Right to be Heard in European Union Law and the International Minimal Standard – Due Process, Transparency and the Rule of Law' (SSRN, 9 November 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3070106> accessed 26 August 2018; *Waste Management, Inc v Mexico*, ICSID Case No ARB (AF)/00/3 (30 April 2004).

113 See *Press Enterprise Co v Superior Court*, 464 US 501, 503–05 (1984) [hereinafter *Press Enterprise I*]; *Richmond Newspapers, Inc v Virginia*, 448 US 555, 559–63, 580 (1980) (plurality opinion); see also Judith Resnik, 'Due Process: A Public Dimension' (1987) 39 University Florida Law Review 405, 409 [hereinafter Judith Resnik, 'Public Dimension']. The Sixth Amendment right of the defendant is sometimes either itself the basis of access by third parties or related to a First Amendment right or 'freedom' of the public to 'listen.' See *Richmond Newspapers*, 448 US at 576.

My account also assumes that law and norms – substantive and procedural – are not fixed but are dynamic and that court-based processes are one venue for debate. This proposition is an element of my concerns about the functional privatization of dispute resolution and the use of online forms. Underlying some fast-track techniques is the assumption that the task is to take the law 'as is' and apply it to individual problems. But how do we know what the law is? Or how can we push for changes? Google's closed courts do not let us understand how to develop the balance between personal privacy and access to information, and neither do closed ODR or ADR processes in 'public' courts.

Before examining more about privatization, I want to underscore another aspect of publicity that does work *for* and *in* courts. Statutes and regulations direct judiciaries to publish a wealth of data about themselves. In the United States, public records name every judge appointed in the federal and state systems. Statistics on case filings are likewise available, and such data collection began more than a century ago.[114] The National Center for State Courts regularly offers comparative analyses of state court workloads.[115] European data on costs per case and justice investment appears more extensive, as it provides measures across the Member States on a host of metrics in terms of investments in and outputs of the justice systems.[116]

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114 For the history of the development of this administrative apparatus, see Judith Resnik, 'Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III' (2000) 113 Harvard Law Review 924; David S Clark, 'Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century' (1981) 55 Southern California Law Review 65; Peter G Fish, The Politics of Federal Judicial Administration (Princeton University Press 1973) 91–95. The current governing statutes are 28 USC ss 601, 604, 610 (2015), and under those provisions, the Director of the Administrative Office publishes reports annually. See eg United States Court, Judicial Business 2013 <http://www.uscourts.gov/Statistics/JudicialBusiness/2013.aspx> 26 August 2018.

115 See Court Statistics Project 'State Court Caseload Statistics' (National Center for State Courts 2018) <http://www.courtstatistics.org/Other-Pages/StateCourtCaseloadStatistics.aspx> accessed 26 August 2018.

116 See European Commission, *The 2017 EU Justice Scoreboard* (2017) 18-36 <http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2017_en.pdf> 26 August 2018. Concerns about the data and its uses comes from Adriani Dori, 'The EU Justice Scoreboard: Judicial Evaluation as a New Governance Tool' (2015) MPILux Working Paper 2 <https://www.mpi.lu/fileadmin/mpi/medien/persons/Dori_Adriani/Dori_The_EU_Justice_Scoreboard_-_Judicial_Evaluation_as_a_New_Governance_Tool_25_8.pdf> accessed 26 August 2018.

This documentation is not only predicated on ideologies promoting open courts; the documentation is embedded in the political economy *of* courts. Judges need to convince their coordinate branches to provide funding, and the statistics on demand for services are regularly submitted as evidence of the need for support. In the US, this public data production has worked well for the federal courts, with its tiny sliver of adjudication. The federal judiciary continues to be successful in maintaining their budget allocations even as other segments of the government have suffered cuts.[117] State courts, where the bulk of litigation – more than 95% –are less well-funded; about 3% of state budgets go to their courts systems, and many states have insufficient funds to maintain services.[118]

The issue of financing brings me from the discussion of the ways in which democratic egalitarianism *changed* courts to the ways in which democratic egalitarianism has *challenged* courts. One of the questions I posed at the outset was about why the topic of privatization and ADR are on the agenda now. The rights revolution of the twentieth century is part of the explanation for the focus on ADR/ODR and privatization. Legislatures provided a panoply of new rights, and courts were required to welcome all comers.

Below, I provide two graphs to capture this volume, and these images also underscore the ways in which photographs of court buildings and their iconography no longer suffice to depict the world of adjudication. Figure 3, *Comparing the Volume of Filings: State and Federal Trial Courts, 2010*, shows cases filed in the United States as of 2010. The high bar, denoting about 48 million cases, represents filings related to contract, tort, and family cases in state courts. In contrast, despite the visibility of the US federal court system, it receives a very small set of cases. About 360,000 cases

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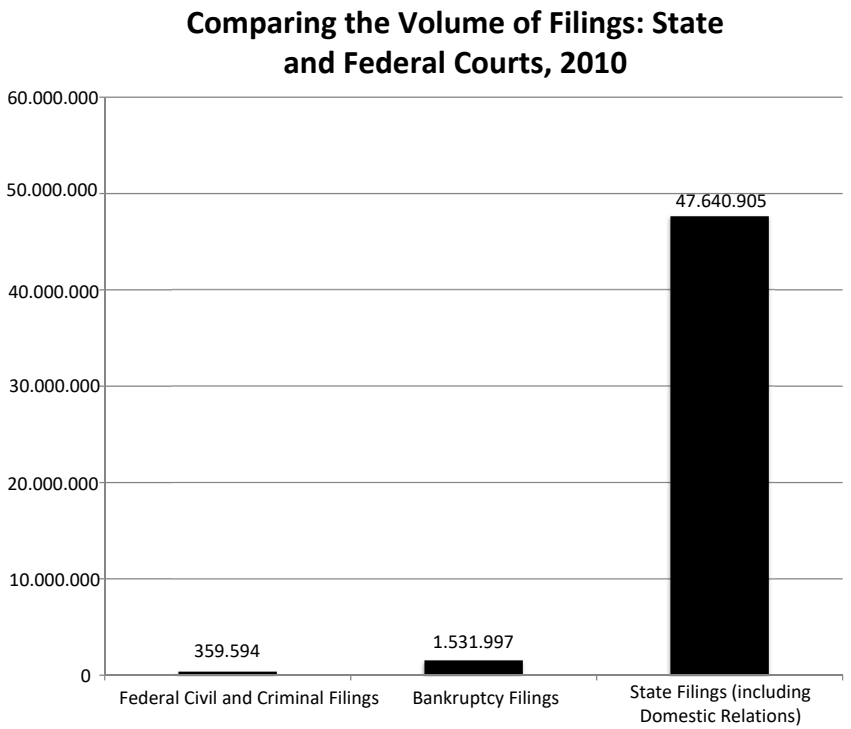
117 For fiscal year 2017, the federal judiciary requested (and received) USD 7.0 billion in discretionary appropriations, a 3.2% increase above fiscal year 2016 funding. United States Courts, *Judiciary Transmits Fiscal Year 2017 Budget Request to Congress* (12 February 2016) <http://www.uscourts.gov/news/2016/02/12/judiciary-transmits-fiscal-year-2017-budget-request-congress> accessed 26 August 2018. For fiscal year 2018, the courts requested USD 7.2 billion, a 3.2% increase over the previous year. United States Courts, *Federal Judiciary Seeks Funds to Support Court Operations in Coming Year* (17 May 2017) <http://www.uscourts.gov/news/2017/05/17/federal-judiciary-seeks-funds-support-court-operations-coming-year> accessed 26 August 2018.

118 See eg Justice at Stake and National Center for State Courts, 'Funding Justice: Strategies and Messages for Restoring Court Funding' (2013) <http://www.justiceatstake.org/media/cms/Funding_Justice_Online2012_D28F63-CA32368.pdf> accessed 26 August 2018.

are filed a year, and bankruptcy filings in 2010 were about 1.5 million and have since declined considerably.[119]

Figure 3



Sources: Administrative Office of the U.S. Courts, Caseload Statistics, 2010. Data on state filings come from the National Center for State Courts, Court Statistics Project, National Civil and Criminal Caseloads (2010). The number of state filings is an estimate, as states do not uniformly report data on all categories; further, this number does not include juvenile or traffic cases.

119 In 2017, 790,830 bankruptcy petitions were filed, which was part of a seven-year decline in filings. John Roberts, '2017 Year-End Report on the Federal Judiciary' 15-16 (Public Information Office, US Supreme Court, 31 December 2017) <https://www.supremecourt.gov/publicinfo/year-end/2017year-endreport.pdf> accessed 26 August 2018.

Figure 4

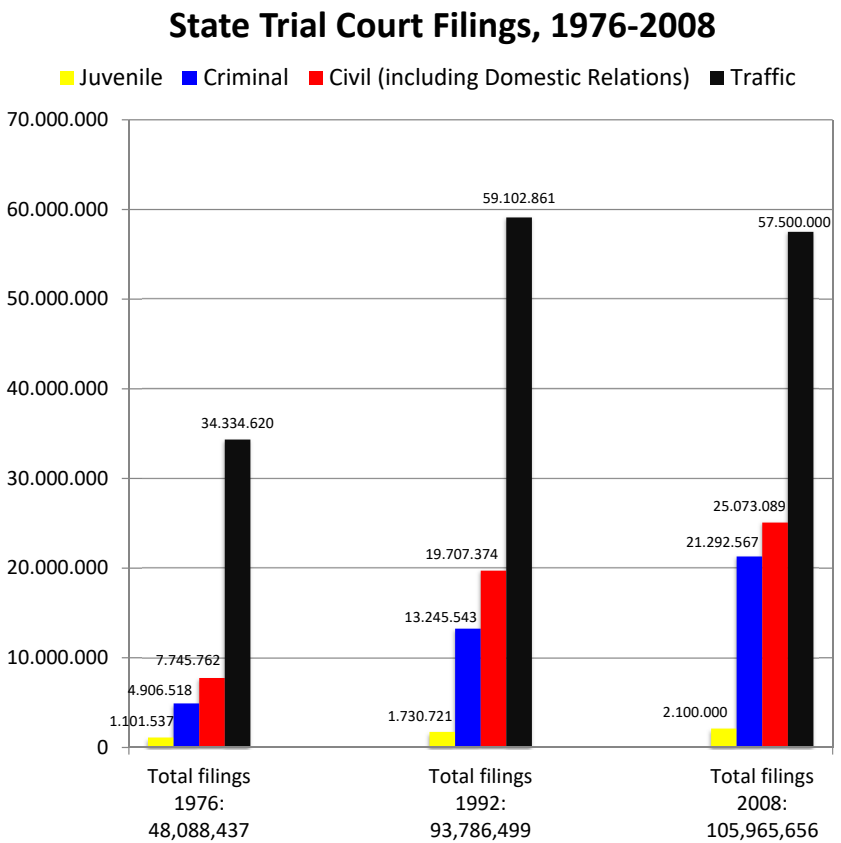


Figure 4, State Trial Court Filings, 1976-2008, maps the growth during a few decades of litigation in the state courts. This graph also disaggregates traffic, juvenile, civil, and criminal filings. As of 2008, more than 100 million cases were filed in state courts.

In many jurisdictions, not only have the numbers risen in terms of rights and the persons seeking them, but so have the fees charged to individuals using the system. The government, as a repeat player, turns both to legislatures and to users for support. Proponents of expanded services seek to fund new programs, from ADR and ODR to methods to divert individuals from the criminal justice system and better court-based facilities such as areas for children. One way to do so is by fee-for-service pricing.

For example, a 2016 European volume praising ODR as a means of facilitating the pursuit of claims. The authors commented that, although waivers or subsidies may be required in some instances, 'charging users seems to be the only known way forward towards 100% access to justice.'[120] Rules being developed on such charges reflect Galanter's repeat player analysis. The individuals in need of services are often one-shot players, with limited ability to argue against the creation of new fee schedules. The sums may be relatively small 'surcharges,' yet the cumulative impact can result in thousands of dollars of expenses. In many jurisdictions, fees are not pegged to income or to the stakes of a lawsuit. Rather, the fee structure becomes a regressive tax used to finance courts.

Lawsuits on both sides of the Atlantic have been filed to protest the burgeoning reliance on user fees and the impact of court fines – now called 'court debt' or 'legal financial obligations' (LFOs). Some of the arguments rest on how fee systems violate obligations of governments to provide courts equally accessible by all. In 2014, for example, the Canadian Supreme Court found impermissible an escalating set of fees charged by British Columbia when litigants' trials lasted for more than three days.[121] Exempted under the rules were those who were 'indigent.' The Canadian Supreme Court relied on Section 96 of its Constitution Act of 1867 (providing that the 'Governor General shall appoint the Judges' of provincial courts)[122] to conclude that litigants had a right to '"Section 96 courts."'[123] As a consequence, British Columbia could not charge hundreds of dollars if doing so imposed an 'undue hardship' on persons of limited means.[124]

In 2017, the UK Supreme Court took a similar approach when it invalidated the high fees imposed by the government on claimants in its

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120 HiiL, 'ODR and the Courts: The Promise of 100% Access to Justice?' (2016) 54 <http://www.onlineresolution.com/hiil.pdf> accessed 26 August 2018 [hereinafter HiiL, 'ODR and the Courts']. The monograph argues that using ODR lowers the costs and thereby would overall result in a reduction of fees by changing the 'dynamics' that had led governments to raise fees. Ibid 56.

121 *Trial Lawyers Association of BC v British Columbia* [2014] 3 SCR 31, paras 35–36 (Can).

122 Constitution Act, 1867 s 96 (Can).

123 *Trial Lawyers Association* (n 121) para 29, citing *MacMillan Bloedel Ltd v Sampson* [1995] 4 SCR 725, para 52.

124 Ibid paras 46, 52. Thereafter, British Columbia amended its fee rules. See British Columbia Supreme Court Civil Rules 20-5(1). That rule authorizes judges to waive fees if imposing an 'undue hardship' unless the judge determines that 'no reasonable claim or defense' is made, or the case is otherwise abusive. Ibid.

Employment Tribunals.[125] While the schedule varied with the kind of claims brought by employees, fees ran from GBP 1200 to GBP 7200 at the first instance level, to be paid in different stages for filing, hearings, and the like. In contrast, fees in the UK's small claims courts were pegged to the value of the claim and ranged from GBP 50 to GBP 745.[126]

Remissions (fee waivers) were available in the Employment Tribunals. But the UK Supreme Court found the increased fees unlawful, given that a 'right of access to the courts is inherent in the rule of law' and that the administration of justice was not 'merely a public service like any other.'[127] The UK Supreme Court spoke not only of the value of producing precedent, but also emphasized the need of the commercial sector to know about the ability to enforce rights or 'that if they fail to meet their obligations, there is likely to be a remedy against them.'[128] That knowledge, in turn, 'underpins everyday economic and social relations.'[129]

Like the Canadian Supreme Court, the UK Court reasoned that indigency was not the only basis on which fees had to be waived. Rather, the question was the impact of fees 'in the real world'; when low- or middle-income households had to forego 'the ordinary and reasonable expenditure required to maintain what would generally be regarded as an acceptable standard of living, the fees cannot be regarded as affordable.'[130] In short, in the UK and Canada, courts have determined that amounts set have been too high for people of modest means, as well as the indigent, are impermissible.

In the United States, the focus has been on the poor. Challenges to court fees were, in the 1970s, a facet of broader efforts to define poverty as a 'suspect classification' under the Equal Protection Clause of the Fourteenth Amendment to the US Constitution. The US Supreme Court rejected that proposition in a case that had argued that property-based

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125 *R (UNISON) v Lord Chancellor* [2017] UKSC 51 para 117 (Lord Reed).

126 Ibid paras 16–20; see also Abi Adams and Jeremias Prassl, 'Vexatious Claims: Challenging the Case for Employment Tribunal Fees' (2017) 80 Modern Law Review 412, 414, 418.

127 *R (UNISON) v Lord Chancellor* (n 125) para 66. Lady Hale's opinion focused on the discriminatory disparate impact of the fees. Ibid paras 121–34.

128 Ibid para 71 (Lord Reed).

129 Ibid. The court added: 'That is so, notwithstanding that judicial enforcement of the law is not usually necessary, and notwithstanding that the resolution of disputes by other methods is often desirable.' Ibid.

130 Ibid para 93.

taxes for education resulted in unequal educational opportunities for children living in poor neighborhoods.[131]

Yet a line of decisions takes poverty into account when the courts are involved. Filing fees are one context. Statutes in the federal and most state courts provide for fee waivers if individuals qualify as 'in forma pauperis.'[132] In the 1970s, however, Connecticut did not provide waivers for individuals seeking divorces. A class of 'welfare recipients residing in Connecticut' argued that, by failing to create a method by which to waive the sixty dollars for filing and service that was required to obtain a divorce, the state had violated their federal constitutional rights.[133]

Justice Harlan, writing for the Court in *Boddie v Connecticut*,[134] agreed that the combination of 'the basic position of the marriage relationship in this society's hierarchy of values and the … state monopolization' of lawful dissolution resulted in a due process obligation for the state to provide access.[135] Although the concurrences argued for broader principles that would have applied beyond the context of divorce,[136] Justice Harlan's language shaped a narrow obligation to waive fees. For example, the Court thereafter refused to require fee waivers when individuals sought to challenge a reduction in welfare benefits or to file for bankruptcy.[137]

Concern about the impact of poverty on criminal defendants arise not only through the questions of fee waiver but also about state-paid lawyers for impoverished individuals, mandated in *Gideon v Wainwright* in 1963, as well as fees after conviction, when fines were imposed. The US Supreme Court in the 1970s and 1980s concluded that the inability to pay a fine could not be the basis for continuing to keep a person, who had completed a sentence, in prison.[138] Likewise, the Court ruled that a lack of resources to pay a civil or criminal fine or other monetary sanctions could not be the basis for incarceration without a judge learning about whether the person

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131 See *San Antonio Independent School District v Rodriguez* 411 US 1 (1973).

132 Standards for qualifying as poor enough for a waiver vary widely, including in the federal courts. See Andrew Hammond, 'Pleading Poverty in the Federal Courts' (forthcoming 2019) 128 Yale Law Journal.

133 Ibid 372.

134 *Boddie v Connecticut* 401 US 371 (1971).

135 Ibid 347.

136 Ibid 383 (Justice Douglas concurring); ibid 387 (Justice Brennan concurring).

137 See *Ortwein v Schwab* 410 US 656, 658–61 (1973); *United States v Kras* 409 US 434, 446 (1973); see also Judith Resnik, 'Fairness in Numbers: A Comment on *AT&T v Concepcion*, *Wal-Mart v Dukes*, and *Turner v Rogers*' (2011) 125 Harvard Law Review 78, 86.

138 *Williams v Illinois* 399 US 235 (1970).

had the capacity to obtain the money to pay or was wilfully refusing to pay.[139]

In the last decades, an array of ad hoc charges tacked on at municipal, county, and state levels have generated new debt for individuals of modest means.[140] As the kinds and numbers of court assessments have multiplied in civil, criminal, juvenile, and traffic filings, lawsuits are again arguing that money is an impermissible barrier to courts or an unlawfully exploitative sanction imposed by courts. One locus of attention is the use of money bail, which even when set at levels under USD 1000 can sometimes keep in jail a person found eligible for pre-trial release. A few courts have held that it is unconstitutional to do so.[141] In addition, some lower courts have concluded that states cannot automatically suspend the drivers' licenses of individuals who owe fees imposed by courts.[142] Some courts have also held unlawful court-imposed fees because the benefits accrued to the judges deciding to levy them.[143]

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139 *Beardon v Georgia* 461 US 660 (1983).

140 See generally Alexes Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor* (Russell Sage 2016). See also Marie Claire Tran-Leung, 'Debt Arising from Illinois' Criminal Justice System: Making Sense of the Ad Hoc Accumulation of Financial Obligations' (2009) Shriver Center 1 <http://povertylaw.org/files/docs/debt-report.pdf> accessed 26 August 2018.

141 *ODonnell v Harris County* 227 F Supp 3d 706 (SD Tex 2016), affd in part, revd in part, *ODonnell v Harris County* 882 F 3rd 528, 538 (5th Cir. 2018); In re Humphrey No A152056, 228 Cal Rptr 3rd 513 (Cal Ct App 2018); appeal pending; *People v Mullen* 2018 IL App (1st) 152306, 2018 WL736120 (5 February 2018).

142 *Stinnie v Holcomb* No. 3:16-CV-00044, 2017 WL 963234 (WD Va 13 March 2017), appealed dismissed, case remanded, No 17-1740, 2017 WL 963234 (4th Cir 23 May 2018); *Fowler v Johnson* No CV 17-11441, 2017 WL 6379676 (ED Mich 14 December 2017).

143 See eg *Cain v City of New Orleans* No 15-4479, 2017 WL 6372836 (ED La 13 December 2017) 21–22. The court discussed *Tumey v Ohio* 273 US 510 (1927), in which money raised by fines levied 'was divided between the state, the village general fund, and two other village funds.' Ibid 22. As in that famous Prohibition-era case, the federal district court in *Cain* concluded that the judges' 'direct pecuniary interest in the outcome' created financial motives to convict. Ibid 22, 25 (quoting *Tumey*, 273 US at 535). The court's subsequent decision certifying a class and denying summary judgment is at 281 F Supp 3rd 624, 658-659 (ED La 2017). In a challenge to a gun-user fee, litigants argued that because the fees go to general revenues and not to the service provided, the fee impermissibly imposes on the constitutional right to bear arms. See Petition for Writ of Certiorari, *Bauer v Becarra* No 17-719, 2017 WL 5495938 (9 November 2017), *cert denied*, 138 S Ct 982 (20 February 2018). The argument was that the 'cost-recovery principle ensures that the government may not leverage constitutionally protected conduct as a general revenue-raising measure.' Ibid 1. Applying those

Litigation has been one response, interrelated with political organizing to change legislation and policies. The numbers of poor people in state courts have prompted many jurisdictions to commission task forces on 'access to justice,' and what some of them have learned is the difficulty of knowing what courts cost. Illustrative is a chart, described as a 'Recipe of Civil Court Assessments' (figure 5) from a 2016 effort commissioned by the Illinois judiciary. That state does not have a 'unified' system; rather each county decides on the fees to charge, which is why the task force spent a good deal of time researching and mapping the fees and surcharges.

In addition to local fees, the state has imposed 'add-ons' – resulting in fees of several hundred dollars – levied unless a person can show that he or she is 'indigent.' Moreover, not only are plaintiffs charged to file cases; in some states (including Illinois and California), defendants have to pay to file their answers.[144] The state-to-state variation for different kinds of claims is substantial. For example, in California, child support claims cost USD 435; in New York, no fees are charged to individuals seeking support.[145]

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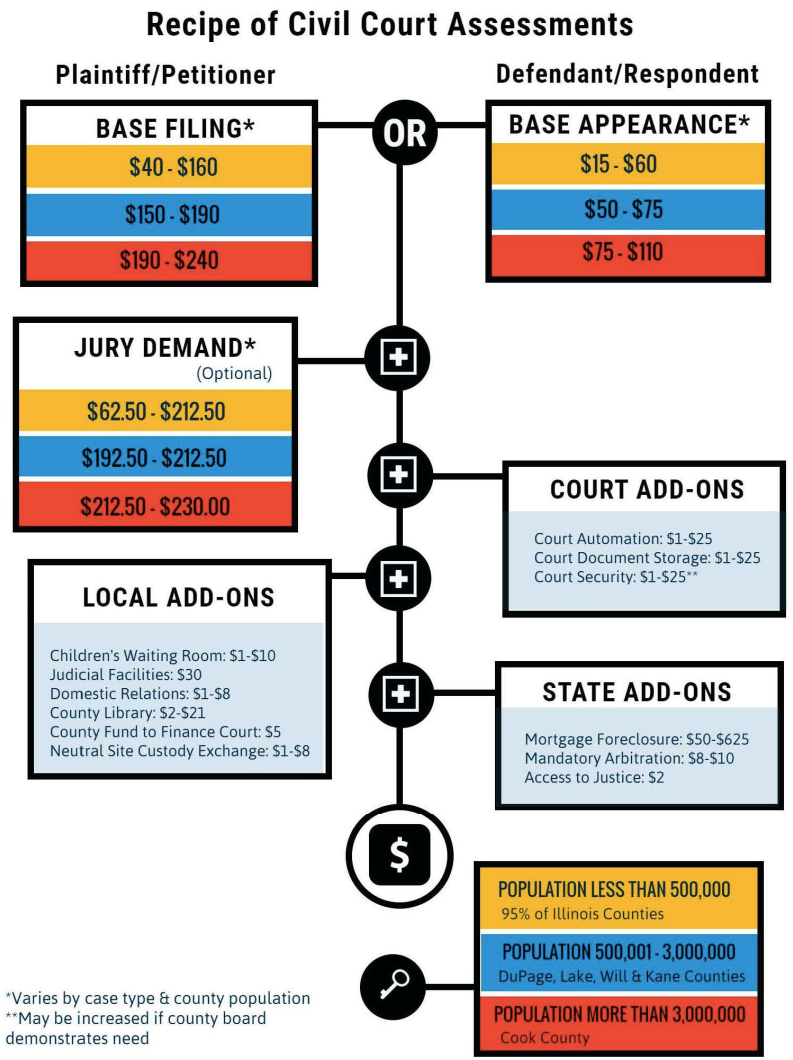
propositions to courts may be attractive for some, but the problem identified in *Cain* raised the question of its viability for courts; if the fees go back to the judges or the courts on which they sit, that kind of self-interest would be impermissible.

144 In California, the fees as of 2017 ran from USD 225 to USD 435, and in Illinois from USD 15 to USD 110. See Superior Court of California, *Statewide Civil Fee Schedule* (2017) 5–6 <http://www.fresno.courts.ca.gov/fees_schedule/documents/Statewide%20Civil%20Fee%20Schedule%20January%202017.pdf> accessed 26 August 2018; Statutory Court Fee Task Force, *Illinois Court Assessments: Findings and Recommendations for Addressing Barriers to Access to Justice and Additional Issues Associated with Fees and Other Court Costs in Civil, Criminal, and Traffic Proceedings* (2016) 10 <www.illinoiscourts.gov/2016_Statutory_Court_Fee_Task_Force_Report.pdf > accessed 26 August 2018.

145 Superior Court of California, County of San Diego, *Family Law Fees*, <http://www.sdcourt.ca.gov/portal/page?_pageid=55,1524419&_dad=portal&_schema=PORTAL> accessed 26 August 2018. In Los Angeles County, it costs USD 435 to file for child support if a child support agency does not intervene and USD 424 for the child interview portion of child custody evaluation. Superior Court of California, County of Los Angeles, *Civil Fee Schedule* (1 July 2016) 4 <http://www.lacourt.org/forms/pdf/fees/fee-schedule-2016_rev.pdf> accessed 26 August 2018.

Figure 5



Of course, filing fees are the tip of the iceberg. Disputants pay vastly more for lawyers and experts. Thus, four important facets of contemporary civil litigation in the United States need to be brought into focus. A first is that many people are in court without lawyers. About a third of the civil filings

in the federal courts are brought by individuals lacking lawyers;[146] on appeal, more than fifty percent who seek review do so without lawyers.[147] Research on state courts identified a set of about 650,000 civil cases in which at least one side in three-quarters of the cases had no lawyer.[148] Most often that party was the defendant.[149]

The second facet of US litigation is that remarkably few cases actually involve much adjudication. The National Center on State Courts evaluated almost a million cases dealt with between 2012 and 2013. Most of the civil cases involved debt collection, in which debtor-defendants were rarely represented.[150] Almost all of the decisions took place without adjudication, defined broadly to encompass summary judgments and court-annexed arbitration as well as trials on the merits. Low level complaints involving misdemeanors and traffic cases are heard in local and municipal courts, where dispositions take place in densely packed modestly-appointed rooms that are largely populated by individuals with limited or no resources and provided counsel (or not) through state funds. Dozens of cases are disposed of in a day, and virtually all without trials.

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146 The federal district court database provides information on unrepresented litigants (termed 'pro se filings') beginning in 2005: United States Courts, *Civil Pro Se and Non-Pro Se Filings* (2005–2010) <http://www.uscourts.gov/report-names/judicial-business?tn=c-13&pt=All&t=All&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D=> accessed 26 August 2018. Some 25% of civil cases are filed by unrepresented plaintiffs. See United States Courts, US District Courts – *Civil Pro Se and Non-Pro Se Filings* (30 September 2016) <http://www.uscourts.gov/sites/default/files/data_tables/jb_c13_0930.2016.pdf> accessed 26 August 2018.

147 United States Courts, *US Courts of Appeals – Pro Se Cases Filed* (2014) tbl 2.4 <http://www.uscourts.gov/sites/default/files/table_2.04_0.pdf> accessed 26 August 2018.

148 National Center for State Courts and State Justice Institute, *Civil Justice Initiative: The Landscape of Civil Litigation in State Courts* (2015) iii [hereinafter State Court 2012–2013 Civil Litigation].

149 Ibid iv. In 1992, attorneys had represented both parties in 95% of the cases; in 2012–2013, attorneys were present in 24% of the cases. See ibid 31.

150 Ibid 31–33. Specifically, about two-thirds of the filings involved contract claims; more than one half of that set of claims were landlord-tenant and debt collection. Ibid iii. Those numbers reflect a change in the kinds of cases coming to court and in the modes of disposition. Twenty years ago, in a parallel study, the National Center found that about half of the claims analyzed were tort cases; the NCSC's 2012–2013 data put tort cases down to 7%. In about three-quarters of the more recent judgments analyzed, the sums were under USD 5,200, and the study reported that overall, 4% of the filings were disposed of by trials.

In federal court, the statistic that has become familiar is that one-in-one-hundred civil cases starts a trial. The shorthand is the 'vanishing trial.' Opportunities for the public to watch proceedings other than trials are also diminishing. Research on 'bench presence' counts the hours that federal judges spend in open court, whether on trial or not. One study reported a 'steady year-over-year decline in total courtroom hours' from 2008 to 2012 that continued into 2013.[151] Judges spent less than two hours a day on average in the courtroom, or about '423 hours of open court proceedings per active district judge.'[152]

The numbers of unrepresented individuals and the dearth of adjudication may seem counter-intuitive, given the public face of courts. But a third facet of adjudication in the United States helps to explain that visibility. Collective actions infuse resources into the system. Since the 1960s, the federal courts have facilitated collectivity through rules authorizing class actions as well as pre-trial consolidation as 'multi-district litigation' (MDL) proceedings, sometimes including cases certified as class actions. As of 2016, of the 325,000 pending civil cases in the federal system, about a third were part of an MDL. A single judge is assigned to manage the pretrial phases of what, formally, are tens of hundreds of individual cases but functionally are handled in the aggregate.[153] Thus, while courts in the United States are populated by many people with no lawyers, much of the visible litigation happens through scaling-up by way of collective actions in which lawyers provide representation because of the economies of scale. Illustrative are several of the lawsuits I mentioned that challenge the system of pricing of court services.

Apex courts are a fourth facet that merit attention. The large buildings and the media coverage of decisions by the highest courts convey the impression of a well-funded set of government services. But the reminder is that the cases that reach those venues are few in number. The United States Supreme Court, for example, has extraordinary resources and decides under a hundred cases a year.

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151 Jordan M Singer and William G Young, 'Bench Presence 2014: An Updated Look at Federal District Court Productivity' (2014) 48 New England Law Review 565, 565.

152 Ibid 566.

153 Details are provided in Judith Resnik, 'Lawyers' Ethics Beyond the Vanishing Trial: Unrepresented Claimants, De Facto Aggregations, Arbitration Mandates, and Privatized Processes' (2017) 85 Fordham Law Review 1899, 1912–16.

4. *Reconfiguring Processes – From ADR to ODR*

My abbreviated account of decades of litigation and doctrine has been in service of explaining the backdrop driving the changes producing ADR and ODR. In part, these new modes of dispute resolution come in response to the success of courts – welcoming new claimants and providing innovative remedies in the wake of the expansion of government functions.

These developments highlight yet other ways in which Bentham's era and ours diverge. In Bentham's days, the repeat players shaping court practices were 'Judge & Co,' the professional elites. Today, the repeat players range from social egalitarian movements to governments, corporations, and the media.[154] This array of repeat players has competing agendas. Some aim to redistribute the social services that courts provide by enlisting judicial power to achieve more egalitarian practices. Others seek to prevent use of court services.

John Rawls famously imagined a 'veil of ignorance' that would enable us to make rules that were more just by not knowing how they would affect us.[155] No such veil is at work here. Rather, entrenched and new interest groups – some understanding they are likely plaintiffs and others seeing themselves as defendants – are playing to promote what they take to be their self-interests through rules about openness, transparency, and privatization. The goal of all these groups is to redefine the contours of 'justice' systems.

This backdrop provides the frame for a brief overview of contemporary technologies and processes for decision-making in courts and in their alternatives/replacements. A first example is the economic commitment to courthouse construction. During the last decades of the twentieth century, governments reiterated beliefs in litigation through their significant investments in new and large courthouses; judges, lawyers, and architects succeeded in obtaining funds for signature buildings.[156] One translation of rising filings and a robust economy is figure 6, the federal courthouse in St. Louis Missouri, with its 29 stories and dozens of courtrooms.

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154 See generally Stephen B. Burbank and Sean Farhang, *Rights and Retrenchment: The Counterrevolution against Federal Litigation* (CUP 2017).

155 John Rawls, *A Theory of Justice* (Belknap 1971) 136–37.

156 National and transnational building projects produced important public buildings, including the vastly expanded Court of Justice for the European Union. See Judith Resnik and Dennis Curtis, *Representing Justice* (n 73) 225–46.

Figure 6

Thomas F Eagleton Federal Courthouse, St. Louis, Missouri, 2000. Architects: Hellmuth, Obata + Kassabaum, Inc. Photographer: The Honorable David D Noce, US Magistrate Judge for the Eastern District of Missouri. Photograph courtesy of and reproduced with the permission of the photographer.

Just like the courthouse dating from the eighteenth century in Connecticut in figure 1, this twenty-first century building may also be at risk of becoming obsolete. In contrast to what that imposing building seems to offer – courtrooms and public hearings – the advice posted in 2014 on the website of the US Courts encourages private resolutions. In a text box, the judiciary counseled that, to 'avoid the expense and delay of having a trial, judges encourage the litigants to try to reach an agreement resolving their dispute.'[157] A translation of that admonition comes from the federal 'local rules' implementing the national regime in the District of Massachusetts. In a subpart entitled 'Settlement,' the court proposed that at 'every conference conducted under these rules, the judicial officer shall inquire as to the utility of the parties conducting settlement negotiations, explore means of facilitating those negotiations, and offer whatever assistance may be appropriate in the circumstances.'[158]

This rule provides instructions for the judges who sit in a courthouse (figure 7), designed by the architect Harry Cobb, opened in 1998, and adorned with Ellsworth Kelly panels.

The courthouse has twenty-five thoughtfully adorned courtrooms, as illustrated by Figure 8. Each of the four walls is marked by stencilled arches of equal size to denote the four sets of participants in adjudication – the judge, the plaintiffs, the defendants, and the public – forming the square that, as I discussed, ought to be substituted for the triangle often used to depict a judge and disputants, laid out to mimic scales.

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157 That text was on the home page of United States Federal Courts website as of 2 April 2014.

158 Local Rules of the US District Court for the District of Massachusetts (March 2017) r 16.4 (a)–(b) <http://www.mad.uscourts.gov/general/pdf/combined01.pdf> accessed 24 January 2018.

Figure 7

John Joseph Moakley United States Courthouse, Boston, Massachusetts. Architect: Harry Cobb, 1998. Photographer: Steve Rosenthal, 1998. Photograph reproduced with the permission of the photographer.

Moreover, as the interior courthouse photograph shows, ample room has been set aside for observers to watch what transpires. Yet, once again, these new buildings are harkening back to earlier eras. While many benches have been built into the courtrooms of this federal courthouse, rules of court have limited their relevance. As the excerpt from the federal district court of Massachusetts reflects, no place is written into its settlement practices for third party observation. That approach is not idiosyncratic. Across the country, published ADR rules rarely reference the public.[159] To

159 Judith Resnik, 'The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public's Role in Court-Based ADR' (2015) 15 Nevada Law Journal 1631.

the extent third parties are mentioned, the context is usually an admonition that confidentiality is required of participants in court-based ADR processes.

Figure 8

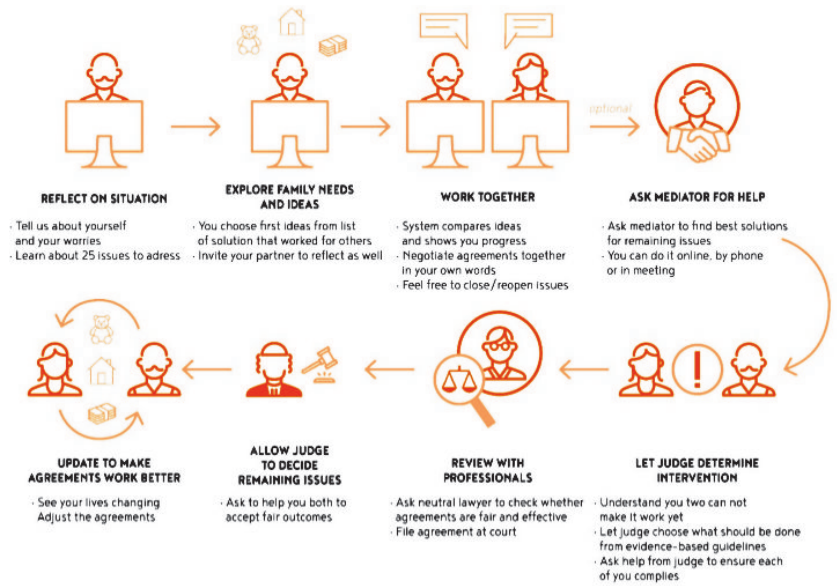
Interior of a courtroom, John Joseph Moakley United States Courthouse, Boston, Massachusetts, 1998. Photographer: Steve Rosenthal. Photograph reproduced with the permission of the photographer and courtesy of the court.

The denouement, as one esteemed trial judge put it, is that the image of a federal judge sitting on the bench in a black robe 'presiding publicly over trials and instructing juries' is obsolete; it should be replaced by a picture of a person in business dress in 'an office setting without the robe, using a computer and court administrative staff to monitor the entire caseload and individual case progress.'[160] That point is made again, and celebrated, in a

160 The Honorable Brock Hornby, 'The Business of the US District Courts' (2007) 10 Green Bag 453, 462.

pictograph, borrowed from the 2016 Report entitled '*ODR and the Courts: The Promise of 100% Access to Justice?*'.[161]

Figure 9



HiiL, 'ODR and the Courts: The Promise of 100% Access to Justice?' Online Dispute Resolution, 2016.

The images and text outline steps for responding to conflicts. Depicted are individuals behind computers aiming to reach a resolution. In one of the eight frames, a person is labeled as a mediator, and in another, a person is labeled a judge. The public is not in sight.

The monograph aspires to have ODR promote users' 'fairness experience,'[162] and the referent is to disputants. Unlike the 2017 decision of the UK Supreme Court, requiring that filing fees be limited in employment

161 HiiL, 'ODR and the Courts' (n 120) 38.

162 Ibid 41. The monograph called for 'transparency of outcomes' but did not provide for transparency in process or discuss how outcome data was to be compiled and disseminated. The monograph spoke of concerns about how to scale up ODR to lower marginal costs (ibid 54) and to enable a 'respectful dialogue' (ibid 44). The monograph did not provide the metrics of respect.

tribunals because everyone needs to know about the enforceability of rights, 'which underpins everyday economic and social relations,'[163] this monograph neither addresses the public nor describes how users and consumers can be understood as citizen-agents empowered to participate in a public commitment to fair dispute resolution processes.

The exclusion of the public is not inevitable. Some ODR processes, such as those in the courts of British Columbia, seek to preserve the principle of openness[164] even as ODR is becoming what is 'the court.' The 'Tribunal Decision Process' of the British Columbia's Civil Resolution Tribunal (CRT) aims to 'replace a model' of in-person open dispute resolution of property disputes (that had been 'generally open to the public') with an ODR process reliant on written submissions and available unless parties opt out.[165] The governing rules worry both about maintaining institutional openness and about individual privacy and the potential for appropriation of web-based information.[166]

Just as the US federal courts press the parties to focus on negotiation, so too does the CRT. No provisions are made for public access to the interactions because, as noted in the 'Access to Records and Information in CRT Disputes' provisions,[167] these exchanges in person often take place in private settings. As for the disputes that proceed to the Tribunal, the policy concluded that it was 'not practical to provide the public with the opportunity to observe the Tribunal Decision Process as it occurs.'[168] Instead, the policy offers 'transparency . . . by posting CRT final decisions on a publicly accessible website' and permitting public access, if fees are paid, to the 'evidence submitted.'[169]

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163 *R (UNISON) v Lord Chancellor* (n 125) para 71 (Lord Reed). The court also commented: 'That is so, notwithstanding that judicial enforcement of the law is not usually necessary, and notwithstanding that the resolution of disputes by other methods is often desirable.' Ibid.

164 See generally British Columbia Civil Resolution Tribunal, 'Access to Records and Information in CRT Disputes: Policy 001-20151215' (2015) 1–5, 12–17 <https://civilresolutionbc.ca/wp-content/uploads/2017/02/Access-to-Info-in-CRT-Case-Records.pdf> accessed 26 August 2018 [hereinafter British Columbia CRT, Access to Records].

165 Ibid 2.

166 Ibid 3. See Darin Thompson, 'Rationalizing Openness: Access to British Columbia Court and Tribunal Records in a New Era of Technology and Privacy' (on file manuscript, 2017).

167 British Columbia CRT, 'Access to Records' (n 164) 1.

168 Ibid 2.

169 Ibid 2. To summarize, the negotiation and mediation phases are distinct from the Tribunal Decision Process, which is the phase where information can be pro-

To summarize this aspect of my discussion, a good deal of court-based ADR/ODR/reconfiguration celebrates ODR as the answer to the 'global crisis' in access to justice. These new technologies are argued to advance one sense of openness – *accessibility* for disputants – in part through lowering the cost of the process by employing new technologies. Enthusiasm in many quarters runs high.[170] But much of the discussion of ODR and ADR ignores the other sense of openness – the role of third parties welcomed to observe. Also ignored is a role for collective action. The models are focused on single-file decision-making rather than on group-based information and resource sharing. This approach exemplifies the complacency I noted earlier. The implicit assumption is that *the law as we have it is good but what we are lacking is access to it*.

But what about how the law could/would/should change – in all directions? When rejecting high filing fees in the Employment Tribunal in the UK, the Supreme Court insisted that access to courts was not 'of value only to the particular individuals involved.'[171] The Court cited a 1932 ruling (*Donoghue v Stevenson*) as an example of an ordinary dispute resulting in a rule (that producers of consumer goods were under a duty to take care for the health and safety of the consumers of those goods) which was 'one of the most important developments' in twentieth-century UK law.[172] Theorists from Habermas to Pierre Bourdieu have analyzed the interplay between fact and law and the reflexivity that constructs our professional habitus. My concern is that this functional privatization has no mechanism built in to provide for iterative exchanges in courts and/or their replacements to produce and revise the reach and function of law. Moreover, these processes are shaping a new professional habitus in which few will have experiences of public interactions and collective actions.

Procedures always allocate authority. As Bentham instructed long ago, privatization takes away the public's authority to scrutinize, let alone to

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vided publicly. See 'Information Access & Privacy Policy' (Civil Resolution Tribunal, 2018) <https://civilresolutionbc.ca/resources/information-access-privacy-policy/#will-the-crt-share-my-information-with-the-public> accessed 26 August 2018.

170 For example, the UK's Courts and Tribunals Judiciary website describes two of the effects of ODR: increasing access to justice because it 'will be cheaper, more convenient, less forbidding' and lowering the cost to individual participants in disputes. Richard Susskind, 'What is ODR?' (Courts and Tribunals Judiciary, 2018) <https://www.judiciary.gov.uk/reviews/online-dispute-resolution/what-is-odr/> accessed 26 August 2018.

171 *R (UNISON) v Lord Chancellor* (n 125) para 69.

172 Ibid.

discipline, the decision-making and the norms that undergird it. Just as I cannot know how Google is balancing the interests under EU law on data protection and access to information, I do not know the judgments made and the norms promoted in these ADR/ODR courts.

5. *Outsourcing*

What I have focused on thus far is the privatization of court-based processes. A brief account is in order of another form of ADR that mandates the use of arbitration in lieu of courts for claims arising out of employment and consumer relationships and predicated on statutory, constitutional, and common law rights.

The legislation that is at the base of this practice in the United States dates from 1925. The Federal Arbitration Act (FAA) was heavily influenced by transatlantic developments; the goal was to have courts enforce contracts crafted by businesses committing themselves to arbitrate.[173] The key repeat players propelling this statute were the Chamber of Commerce, the American Bar Association, and the New York Bar Association.[174]

For a period of about fifty years, the act was interpreted as applying only to genuine volunteers. In a 1953 US Supreme Court decision involving a form mandating arbitration between a securities broker and a customer, the Supreme Court explained that even if some buyers and sellers dealt 'at arm's length on equal terms,' the federal securities laws were 'drafted with an eye to the disadvantages under which buyers labor.'[175] Moreover, arbitrators' 'award[s] may be made without explanation of their reasons and without a complete record of their proceedings.'[176] Hence, one could not exam-

173 Pub L No 68-401, 43 Stat 883 (1925) (codified as amended at 9 USC ss 1–16 (2013)). Two key facets provide that an arbitration provision 'written … in any maritime transaction or a contract evidencing a transaction involving commerce ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' 9 USC s 2. At the time, expressly exempted were employment that Congress was then understood to have the authority to regulate ('nothing … contained [in the Federal Arbitration Act] shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce'). 9 USC s 1.

174 For a history of the development of the doctrine on the FAA, see Judith Resnik, 'Diffusing Disputes' (n 7) 2860–74.

175 *Wilko v Swan* 346 US 427, 435–36 (1953).

176 Ibid.

ine 'arbitrators' conception of the legal meaning of such statutory requirements as "burden of proof," "reasonable care" or "material fact" … '[177]

As this description reflects, the Court was concerned about inequalities in bargaining power; it was protective of the special role of courts, charged with enforcing the governing statutes through a process that included appellate oversight. This 1953 ruling reflects what I understand the law in the EU and in Canada and other jurisdictions continue to require: that arbitration clauses imposed unilaterally by large-scale commercial service and goods providers are not enforced against individual consumers.[178]

But in the 1980s, the US Supreme Court shifted its approach and held such mandates enforceable even when a less-well-resourced party objected to a boilerplate arbitration clause. At the time, the Court explained itself by noting that arbitration offered an 'effective' means of enforcing rights. Over the decades, the Court's doctrine has become increasingly insistent on using arbitration. The marketplace has responded through a proliferation of obligations to arbitrate.

To bring these mandates into sight, I provide two pages in Figure 10a/b taken from an exhibit in a Supreme Court case between the Equal Employment Opportunity Commission and Waffle House, describing itself on its form as 'America's place to work'; 'America's place to eat.'

177 Ibid.

178 European Union Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts [1993] OJ L 95/29 creates a rebuttable presumption that pre-dispute arbitration clauses in consumer contracts are invalid because of the unequal bargaining power between the contracting parties. The Supreme Court of Canada permitted a consumer to pursue a class action and did not enforce a consumer provision mandating arbitration and waiving class action proceedings. See *Seidel v TELUS Communications Inc* [2011] 1 SCR 531 (Can).

Figure 10 A/B

WAFFLE HOUSE®

AMERICA'S PLACE TO WORK
AMERICA'S PLACE TO EAT®

MUST BE COMPLETED IN THE RESTAURANT

APPLICATION FOR EMPLOYMENT

(PLEASE PRINT PLAINLY)

TO BE COMPLETED UPON EMPLOYMENT	
Work Location _____	Rate _____
Position _____	Date _____

To Applicant: We deeply appreciate your interest in our organization and assure you that we are sincerely interested in your qualifications. A clear understanding of your background and work history will aid us in placing you in the position that best meets your qualifications and may assist us in possible future upgrading.

Date: June 22, 1994

Name: Baker (Last) Eric (Middle) Scott (First) Social Security No.: ___ Telephone No.: ___

Present Address: ___ (No.) ___ (Street) Gaston (City) SC (State) 29053 (Zip)

Next of kin to be notified in event of emergency: Name: Robert & Dorsilva Baker (Name) Relationship: Father/Mother Address: Gaston, SC 29053 Telephone No.: ___

GENERAL INFORMATION

To Applicant: READ THIS INTRODUCTION CAREFULLY BEFORE ANSWERING ANY QUESTIONS IN THIS BLOCKED-OFF AREA. The Civil Rights Act of 1964 prohibits discrimination in employment practice because of race, color, religion, sex, or national origin. P.L. 90-202 prohibits discrimination on the basis of age with respect to individuals who are at least 40 years old. The following requested information is needed for a bona fide occupational qualification, business necessity, or other legally permissible reason. Answers to any questions below will not automatically bar employment to any applicant. Questions pertaining to race, color, sex, national origin, age, and marital status are necessary to insure our compliance with applicable discrimination laws.

Race: White Birthdate: 10/19/70 Sex: Male Height: 5'7" Weight: 155 lbs.

Marital Status: Single ✓ Employed ___ Married ___ Separated ___ Divorced ___ Widowed ___

Number of dependents including yourself: 0 Are you a citizen of the U.S.A.? Yes

Have you ever been bonded? NO If yes, on what job?

Have you ever been convicted of a crime in the past ten years? NO If yes, describe in detail

Are you now or have you been a user of or addicted to Drugs or Alcohol to excess? NO

What kind of car do you drive? Make: Buick Model: Skyhawk Year: 1985

Will you use your car to get to work? yes

If not, what method of transportation will you use to get to work?

Position(s) applied for: ___ Rate of pay expected $ ___ per/hr. $ ___ per/wk.

Would you work Full-Time ✓ Part-Time ___ Specify days and hours if part-time

Were you previously employed by Waffle House? NO If yes, when and where?

List any friends or relatives working for us and where: None

If your application is considered favorably, on what dates will you be available for work? (Name) This week Friday 19 94

Are there any other experiences, skills, or qualifications which you feel would especially fit you for work with the Company? I Pay A Crew; Work in the Food business for 4 years.

Have you been refused a Health Permit to work at any occupation? NO If yes, explain fully:

Can you lift 20 lbs to shoulder height? yes

Are you able to remain standing on your feet for a full 7-10 hour shift? yes

Are you able to sweep, mop, etc.? yes

MILITARY SERVICE: Are you a veteran? NO If yes, dates of service: ___ Branch: ___

Rank attained: ___ Date/Type of dismissal:

Are you a member of any Reserve organization or National Guard? NO

• IMPORTANT •

NOTICE TO APPLICANT

Before we can hire you, the Government requires that we review and verify certain information. Please bring the following items with you on your first day:

1. Drivers license with your picture AND
2. A U.S. social security card OR an original or certified copy of your birth certificate.

If you don't have any of the above, please tell the unit manager and he will tell you what of or documents are acceptable for completing the I-9 form.

This petition does not any dispute or any concerning Applicant's employment with Waffle House, Inc. or any subsidiary or Franchisee of Waffle House, Inc., or any claim, condition or benefit of such employment, including whether such dispute and/or claim is to be settled by binding arbitration. The rules of procedure and evidence shall be governed by the Commercial Arbitration Rules of the American Arbitration Association and shall be held in a mutually agreed upon location. A decision and award rendered by the arbitrator shall be final and binding on both parties, their heirs, successors, administrators, successors and assigns. The costs of depositions of the arbitrator shall be borne equally by the parties.

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FORM # 4002

EXHIBIT A

PERSON[illegible] REFERENCES (Not former Employers [illegible]elatives)

Name and Occupation	Address	Phone Number
Krita Gunter	P.O. Box 201 Gastonia SC 29053	791-0601
Dennis Adams	104 Oakdale Dr Gastonia SC 29053	986-0797
NETA Pridgen	PoBox 146 Gastonia SC 29053	986-7560

RECORD OF EDUCATION

School	Name and Address of School	Dates Attendance Mo./Year	Course of Study	Circle Last Year Completed	Did You Graduate?	GPA	List Diploma or Degree
High	Suncrest High School	90 - 94	Business	1 2 3 (4)	☑ Yes ☐ No	–	Diploma
College				1 2 3 4	☐ Yes ☐ No		
Other (Specify)				1 2 3 4	☐ Yes ☐ No		

WORK EXPERIENCE (List below last three employers, starting with last one first)

	NAME AND ADDRESS OF COMPANY AND TYPE OF BUSINESS	FROM MO.	FROM YR.	TO MO.	TO YR.	DESCRIBE IN DETAIL THE WORK YOU DID	STARTING HOURLY RATE	LAST HOURLY RATE	REASON FOR LEAVING	NAME OF SUPERVISOR
I	Little Caesars Pedrant	2	94	–	–	P.C. Run crew, handle money (cash), clean up, deliver, etc.	4.15	5.50	Still employed.	PATTI PHONE# 791-1704
II	NAME AND ADDRESS OF COMPANY AND TYPE OF BUSINESS	FROM MO.	FROM YR.	TO MO.	TO YR.	DESCRIBE IN DETAIL THE WORK YOU DID	STARTING HOURLY RATE	LAST HOURLY RATE	REASON FOR LEAVING	NAME OF SUPERVISOR
	Winn-Dixie	6	93	7	94	Deli. Ass. mgr. Run OPEN, prep food, clean, etc.	4.35	4.35	School.	Terence PHONE# –
III	NAME AND ADDRESS OF COMPANY AND TYPE OF BUSINESS	FROM MO.	FROM YR.	TO MO.	TO YR.	DESCRIBE IN DETAIL THE WORK YOU DID	STARTING HOURLY RATE	LAST HOURLY RATE	REASON FOR LEAVING	NAME OF SUPERVISOR
	Bi-Lite	12	92	5	93	Bagger. STOCKER	4.25	4.35	Manager, medical condition.	Keith Widdle PHONE#

NOTICE TO EMPLOYEES

Failure to be truthful on the application may affect the applicant's subsequent ability to receive workers' compensation benefits.

The facts set forth above in my application for employment are true and complete. I understand that if employed, false statements or omission of facts called for on this application shall be considered sufficient cause for dismissal. You are hereby authorized to make any investigation of my personal history and financial credit record through any investigative or credit agencies or bureaus of your choice. I further understand that I am an "Employee at Will" and that Waffle House, Inc. does not guarantee my employment for any specific period of time.

In making this application for employment I also understand that an investigative consumer report may be made whereby information is obtained through personal interviews with my neighbors, friends, or others with whom I am acquainted. This inquiry includes information as to my character, general reputation, personal characteristics, and mode of living. I understand that I have the right to make a written request within a reasonable period of time to receive additional, detailed information about the nature and scope of this investigative consumer report.

I FULLY UNDERSTAND THAT IF ASSIGNED TO ANY POSITION WHEREBY MONIES, EQUIPMENT, OR OTHER SUPPLIES OF WAFFLE HOUSE, INC. ARE ASSIGNED TO ME, I SHALL BE ACCOUNTABLE FOR THE AFORESAID ITEMS AND LIABLE FOR ANY SHORTAGES IN SAME. I AGREE THAT WAFFLE HOUSE, INC. MAY DEDUCT FROM ANY MONIES DUE ME, AN AMOUNT TO COVER ANY SHORTAGES WHICH MAY OCCUR AND WILL INDEMNIFY WAFFLE HOUSE, INC. AGAINST ANY LEGAL LIABILITY FOR WITHHOLDING SAID SHORTAGES FROM MONIES DUE ME AS A RESULT OF MY EMPLOYMENT WITH WAFFLE HOUSE. IF THERE ARE ANY SHORTAGES OR LOSSES IN MONEY, FOOD, OR EQUIPMENT WHICH IS ASSIGNED TO ME OR TO WHICH I HAVE ACCESS, I AGREE TO SUBMIT TO A POLYGRAPH OR OTHER SCIENTIFIC EVALUATION TEST CONDUCTED IN COMPLIANCE WITH APPLICABLE LAW DURING ANY INVESTIGATION OF SUCH SHORTAGE OR LOSS, AS PART OF THIS APPLICATION PROCESS AND AS A CONDITION OF MY CONTINUED EMPLOYMENT, AT THE REQUEST OF WAFFLE HOUSE, INC. I AGREE TO SUBMIT TO TESTING TO DETERMINE MY USE OF DRUGS OR ALCOHOL. I UNDERSTAND THAT REFUSING TO SUBMIT TO A TEST OR A POSITIVE RESULT IN ANY TEST INDICATING DRUG OR ALCOHOL USE MAY RESULT IN MY IMMEDIATE TERMINATION FROM EMPLOYMENT.

IF THE POSITION TO WHICH I AM ASSIGNED SHALL BE A POSITION WHERE I NORMALLY RECEIVE TIPS, I UNDERSTAND THAT IT IS MY OBLIGATION TO REPORT ALL TIPS TO THE INTERNAL REVENUE SERVICE FOR INCOME TAX PURPOSES. THIS MAY BE DONE EITHER BY REPORTING THEM ON THE PRELIST OR ON MY TAX RETURN AT THE END OF THE YEAR. DELIBERATELY NOT REPORTING ALL INCOME COULD RESULT IN SEVERE PENALTIES.

I UNDERSTAND AND ACKNOWLEDGE THAT WAFFLE HOUSE IS TAKING A CREDIT AGAINST MY WAGES FOR TIPS RECEIVED, IN THE EVENT I DO NOT RECEIVE TIPS EQUAL TO THAT CREDIT. I SHALL NOTIFY MY UNIT MANAGER SO THAT MY TIPS CAN BE COUNTED AND AUDITED TO ESTABLISH WHAT LEVEL OF TIPS I AM MAKING. I UNDERSTAND WAFFLE HOUSE, INC. IS ALSO BOUND TO REPORT TO THE IRS THE AMOUNT OF THOSE TIPS THAT THEY COUNT. THE TIPS COUNTED WILL BE POSTED BY THE UNIT MANAGER ON THE PRELIST.

MEAL POLICY: As a part of your compensation, Waffle House allows its employees to eat during their shift at a reduced rate. This includes 1 full meal if your workday is 4 hours or less and 2 full meals if your workday is over 4 hours. In addition, beverages and snacks as desired are allowed. The only limitation is that dinner steaks, chicken and pork chops are not offered under this meal policy. Please try to eat the meal at some time during the shift. However, this should be during a slow time and must not interfere with customer service. To cover the cost of the meal, drinks, snacks and the time to eat these items, Waffle House will deduct from your paycheck an amount based on the number of hours worked that day. Please see your Unit Manager for the schedule of meal charges.

I have read and understand the above notice and agree to comply with the provisions above.

Signed this 23 day of June, 19 94 Signature of Applicant

The micro-print on this job application is not easy to read, whether reproduced or in the original. Two key paragraphs are below. One is about inappropriate use of store equipment and taking food, and the other paragraph is about dispute resolution.

> … I agree that Waffle House, Inc. may deduct from any monies due me, in an amount to cover any shortages which may occur and will indemnify Waffle House, Inc. against any legal liability for withholding said shortages from monies due me as a result of my employment with Waffle House. If there are any shortages or losses in money, food, or equipment which is assigned to me or to which I have access, I agree to submit to a polygraph or other scientific evaluation test conducted in compliance with applicable law … .
>
> The parties agree that any dispute or claim concerning Applicant's employment with Waffle House, Inc. … will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association . … A decision and award of the arbitrator made under the said rules shall be exclusive, final and binding on both parties, their heirs, executors, administrators, successors and assigns. The costs and expenses of the arbitration shall be borne evenly by the parties.[179]

In the case in the US Supreme Court, Eric Baker was hired and then fired after he had a seizure at work. He went to the Equal Employment Opportunities Commission (EEOC), which can pursue both back pay and injunctive relief if the EEOC investigates and believes that federal discrimination laws are violated. Waffle House argued that because Baker had signed the job application, the EEOC was prevented from bringing a claim to help Mr Baker get back pay. The majority of the US Court disagreed – that such forms do not bind the government agency that had statutory authority to pursue both future and remedial relief.[180]

The next form, Figure 11, was sent to me several years ago by my cellular service but is not unique to that provider.

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179 *EEOC v Waffle House, Inc* 534 US 279 (2002) (No 99-1823), excerpted from Waffle House Application for Employment, Joint Appendix at 58–59.

180 *EEOC v Waffle House, Inc* 534 US 279 (2002).

Figure 11

DOCUMENT ACCOMPANYING THE PURCHASE OF A CELLULAR PHONE, 2002

INDEPENDENT ARBITRATION

INSTEAD OF SUING IN COURT, YOU'RE AGREEING TO ARBITRATE DISPUTES ARISING OUT OF OR RELATED TO THIS OR PRIOR AGREEMENTS. THIS AGREEMENT INVOLVES COMMERCE AND THE FEDERAL ARBITRATION ACT APPLIES TO IT. ARBITRATION ISN'T THE SAME AS COURT. THE RULES ARE DIFFERENT AND THERE'S NO JUDGE AND JURY. YOU AND WE ARE WAIVING RIGHTS TO PARTICIPATE IN CLASS ACTIONS, INCLUDING PUTATIVE CLASS ACTIONS BEGUN BY OTHERS PRIOR TO THIS AGREEMENT, SO READ THIS CAREFULLY. THIS AGREEMENT AFFECTS RIGHTS YOU MIGHT OTHERWISE HAVE IN SUCH ACTIONS THAT ARE CURRENTLY PENDING AGAINST US OR OUR PREDECESSORS IN WHICH YOU MIGHT BE A POTENTIAL CLASS MEMBER. (We retain our rights to complain to any regulatory agency or commission.) **YOU AND WE EACH AGREE THAT, TO THE FULLEST EXTENT POSSIBLE PROVIDED BY LAW:**

(1) ANY CONTROVERSY OR CLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT, OR TO ANY PRIOR AGREEMENT FOR CELLULAR SERVICE WITH US . . . WILL BE SETTLED BY INDEPENDENT ARBITRATION INVOLVING A NEUTRAL ARBITRATOR AND ADMINISTERED BY THE AMERICAN ARBITRATION ASSOCIATION ("AAA") UNDER WIRELESS INDUSTRY ARBITRATION ("WIA") RULES, AS MODIFIED BY THIS AGREEMENT. WIA RULES AND FEE INFORMATION ARE AVAILABLE FROM US OR THE AAA;

(2) **EVEN IF APPLICABLE LAW PERMITS CLASS ACTIONS OR CLASS ARBITRATIONS, YOU WAIVE ANY RIGHT TO PURSUE ON A CLASS BASIS ANY SUCH CONTROVERSY OR CLAIM AGAINST US . . . AND WE WAIVE ANY RIGHT TO PURSUE ON A CLASS BASIS ANY SUCH CONTROVERSY OR CLAIM AGAINST YOU. . . .**

(3) No arbitrator has authority to award relief in excess of what this agreement provides, or to order consolidation or class arbitration, except that an arbitrator deciding a claim arising out of or relating to a prior agreement may grant as much substantive relief on a non-class basis as such prior agreement would permit. NO MATTER WHAT ELSE THIS AGREEMENT SAYS, IT DOESN'T AFFECT THE SUBSTANCE OR AMOUNT OF ANY CLAIM YOU MAY ALREADY HAVE AGAINST US OR ANY OF OUR AFFILIATES OR PREDECESSORS IN INTEREST PRIOR TO THIS AGREEMENT. THIS AGREEMENT JUST REQUIRES YOU TO ARBITRATE SUCH CLAIMS ON AN INDIVIDUAL BASIS. In arbitrations, the arbitrator must give effect to applicable statutes of limitations and will decide whether an issue is arbitrable or not. In a Large/Complex Case arbitration, the arbitrators must also apply the Federal Rules of Evidence and the losing party may have the award reviewed by a panel of 3 arbitrators.

(4) **IF FOR SOME REASON THESE ARBITRATION REQUIREMENTS DON'T APPLY, YOU AND WE EACH WAIVE, TO THE FULLEST EXTENT ALLOWED BY LAW, ANY TRIAL BY JURY. A JUDGE WILL DECIDE ANY DISPUTE INSTEAD;**

(5) **NO MATTER WHAT ELSE THIS AGREEMENT SAYS, IT DOESN'T APPLY TO OR AFFECT THE RIGHTS IN A CERTIFIED CLASS ACTION OF A MEMBER OF A CERTIFIED CLASS WHO FIRST RECEIVES THIS AGREEMENT AFTER HIS CLASS HAS BEEN CERTIFIED, OR THE RIGHTS IN AN ACTION OF A NAMED PLAINTIFF, ALTHOUGH IT DOES APPLY TO OTHER ACTIONS, CONTROVERSIES, OR CLAIMS INVOLVING SUCH PERSONS.**

The text prevents me from using courts and from being in class actions, whether in court or in arbitration. This image is another bad graphic, in that it cannot be easily read. Yet it is a good graphic, because there is no point in reading it. Doing so is a waste of time. When I called the provider

to object to its terms, I was told that no negotiation was possible – take it or stop using that cell phone service.

Under the law of the EU, these terms would not be enforced. Several state courts in the United States shared that view. For example, California had both a statute and a decision holding such a class action waiver unenforceable, because in

> a consumer contract of adhesion [when] … disputes … involve small amounts of damages, … the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud."[181]

But the US Supreme Court read the 1925 FAA as preempting state courts from reaching that judgment.[182] In a case in which AT&T sought to enforce a class action ban, the Court concluded that such state laws were an 'obstacle' to the federal policy supportive of arbitration.[183] The Court's approach is not limited to consumers. The Supreme Court has also read the FAA mandate to govern claims of wrongful death of individuals in nursing homes – absent a showing that an individual was subjected to an unconscionable contract aside from the arbitration clause.[184]

Moreover, in 2018, the Court concluded that class action bans are enforceable despite provisions of the 1935 National Labor Relations Act that protect the right to pursue 'collective action.'[185] Under that ruling, employers can notify employees of new terms of employment that ban group-based litigation in any forum and can thereby impose single-file

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181 *Discover Bank v Superior Court* 113 P3d 1100, 1110 (Cal 2005) (quoting California Civil Code s 1668).

182 *AT&T Mobility LLC v Concepcion* 563 US 333 (2011).

183 *AT&T Mobility LLC v Concepcion* 563 US at 351-352: 'States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons … . Because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," … California's Discover Bank rule is preempted by the FAA.'

184 See *Kindred Nursing Centers, LP v Clark* 137 S Ct 1421 (2017). The Supreme Court earlier held that the FAA contained no exception for personal injury or wrongful death claims in actions against nursing homes in West Virginia. *Marmet Health Care Center, Inc v Brown* 565 US 530 (2012). Some limits exist. Arbitrators concluded public law injunction actions were not arbitral. See American Arbitration Association, Order Regarding Claimant's Motion for Order for All Claims to Proceed in Court of Law, *DeVries v Experian Information Solutions* Civ No 01-17-0001-7722, following *McGill v Citibank* 393 P3d 85 (Ca 2017).

185 See *Lewis v Epic Systems Corporation* 138 S Ct 1612 (2018).

arbitration clauses, including for claims by workers of wrongly withheld wages.[186] In short, that dense one-page mandate from a cell phone provider has become the new governing rules for dispute resolution for tens of millions of claimants.

Proponents of enforcing such mandates to arbitrate make two claims. The first is that the parties consented in a contract to forego courts and group-based actions. But what AT&T has on its website in terms of a 'customer agreement' belies the notion of genuine consent. The company states that it 'may change any terms, conditions … or charges … at any time.'[187] This assertion of unilateral control is why I have not, in this chapter, used the term 'contract' or 'agreement' when discussing such documents. They are neither negotiated nor negotiable.[188]

The second argument advanced is that arbitration is as effective a means of resolution or is a better method than courts. That position often invoked the language of 'access to justice.' Illustrative is the statement before the US Congress in 2017 by a lawyer for the Chamber of Commerce; he argued that arbitration 'empowers individuals, freeing them from reliance on lawyers' and making 'dispute resolution easy to access and claims easy to prosecute.'[189]

But does it? I have sought to find evidence of 'empowerment.' To do so, I honed in on the wireless provider AT&T because of its leadership role in enforcing class action bans. AT&T's mandates for consumer dispute resolution use the American Arbitration Association (AAA) to administer arbitration. Because the AAA complies with California requirements that arbitration providers post information on websites about consumer arbitra-

186 Ibid 1622–23; see also ibid 1633, 1646–48 (Justice Ginsburg dissenting).

187 AT&T, 'Wireless Customer Agreement' (24 January 2018) <https://www.att.com/legal/terms.wirelessCustomerAgreement.html> accessed 26 August 2018.

188 In the 1970s, Arthur Leff argued that contract theorists had made a category error when developing doctrines of unconscionability. Rather than a 'contract,' non-negotiable obligations were 'things,' to be regulated or not. See Arthur Allen Leff, 'Contract as a Thing' (1970) 19 American University Law Review 131, 132, 143; see also Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press 2013).

189 Examining the CFPB's Proposed Rulemaking on Arbitration: Is it in the Public Interest and for the Protection of Consumers?: Hearing Before the Subcommittee on Financial Institutions and Consumer Credit of the House Committee on Financial Services, 114th Cong 4 (2016) (Statement of Andrew Pincus, Partner, Mayer Brown LLP).

tions,[190] I was able to learn about the numbers of consumers pursuing claims against AT&T through single-file arbitrations.

A first point is that in total across the United States, the AAA administers relatively few consumer filings; it reports providing about 1400 to 1600 nationwide, each year.[191] The second point is that by filtering information about thousands of posted claims, we could identify how many arbitration cases involved AT&T. From 2008–2017, the company had between 85-147 million customers. As the chart in Figure 12 summarizes, fewer than sixty people a year filed individual claims during this eight-year period.

As this chart also reflects, parallel findings come from the Consumer Financial Protection Bureau (CFPB), which analyzed consumer filings involving credit cards and loans. Again, hundreds of millions of people have credit cards, and the CFPB found about 400 filings per year during a three-year period.[192] In short, almost no consumers use arbitration to seek redress.

Of course, one explanation is that consumers have no basis for bringing claims because the companies are law-compliant. But regulatory actions brought against wireless providers belie that argument. In 2014, the US Government filed actions against the four major wireless providers in the United States; the federal government alleged overcharging of customers for services that were not provided and a failure, when customers complained, to provide compensation.[193] The companies settled with the government.

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190 For a discussion of the data and caveats on its potential for incomplete accountings, see Judith Resnik, 'Diffusing Disputes' (n 7) 2897–90; and Judith Resnik, 'Open Courts and Arbitration' (n 17) 647–656.

191 American Arbitration Association, 'Analysis of the American Arbitration Association's Consumer Arbitration Caseload: Based on Consumer Cases Awarded Between January and August 2007,' available at <https://perma.cc/LPG6-S6F9> accessed on 2 March 2015 ('Each year, the AAA administers approximately 1,500 consumer cases … '). The AAA does not publish 'statistics on [its] total consumer caseload,' but in 2017 had 3,547 new consumer arbitration filings. Email from Ryan Boyle, Vice-President, Statistics and In-House Research (6 March 2018).

192 Consumer Financial Protection Bureau, 'Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act s 1028(a)' (2015) s 1.4.2, 11 <http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf> accessed 26 August 2018.

193 See eg Stipulated Order for Permanent Injunction and Monetary Judgment, *FTC v AT&T Mobility, LLC* No 1:14-CV-3227-HLM (ND Ga 8 October 2014) 2–3.

Figure 12

Consumer Arbitration Filings with the American Arbitration Association
2009-2017

AAA Database – AT&T Wireless

July 2009 – June 2017	Average per Year	8-Year Total
AT&T 85 to 147 million customers	**56** consumer-filed **0** company-filed	451
AAA Consumer Data	**1,485** consumer-filed **238** company-filed	13,780

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Credit and Bank Consumer Filings Analyzed by the Consumer Financial Protection Bureau (2015)

2010-2012	Average per Year	3-Year Total
6 Product Markets 80 million plus consumers	**411** consumer-filed **205** company-filed	1,847

Other explanations for the non-use of arbitration comes from the challenges of following the procedures put forth by the many private providers. Individuals have to find the relevant websites and navigate bodies of rules and supplementary protocols that apply to different kinds of claims.

Further, the low value of individual claims has to be measured against the costs of filing. In the AT&T case in the US Supreme Court, the consumer sought to recoup USD 30 for an alleged violation of state consumer protection laws. In contrast, the AAA imposes a USD 200 administrative fee on consumers (and USD 1,700 on businesses), even as it also requires that employers and service providers absorb the costs of the arbitrators when employees and consumers seek redress.[194] Hence, if a consumer knew of the legal argument under the state law, that consumer would have to pay USD 200 to try to recoup USD 30.

And, of course, individuals may not know that they may have been wronged. Mandates to use arbitration function to suppress knowledge about others seeking redress. In the United States, many arbitration providers require that the proceedings be private; no third parties can attend without permission.[195] In addition, some documents imposing arbitration include confidentiality clauses. Judges enforce those clauses, even as some acknowledge the repeat player effect – that one side derives advantages from knowing the track record of past proceedings, while individual opponents do not.[196] This mix of a lack of knowledge and a need for energy and resources to figure out how to pursue remedies means that

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194 American Arbitration Association, 'Consumer Arbitration Rules' (rules amended and effective September 2014, cost of arbitration effective 1 January 2016) 34 <https://www.adr.org/sites/default/files/Consumer%20Rules.pdf> accessed 26 August 2018 [hereinafter AAA Consumer Arbitration Rules]; American Arbitration Association, 'Consumer Arbitration Fact Sheet' <http://info.adr.org/consumer-arbitration/> accessed 26 August 2018.

195 See eg 'JAMS Comprehensive Arbitration Rules & Procedures' (*JAMS*, effective 1 July 2014) <https://www.jamsadr.com/rules-comprehensive-arbitration/> accessed 26 August 2018 (limiting public access to proceedings before the Judicial Arbitration and Management Services); Better Business Bureau, 'Rules of Conditionally Binding Arbitration' <https://www.bbb.org/bbb-dispute-handling-and-resolution/dispute-resolution-rules-and-brochures/rules-of-conditionally-binding-arbitration/#ConfidentialityofRecords> accessed 26 August 2018 ('It is our policy that records of the dispute resolution process are private and confidential.').

196 See eg *Guyden v Aetna Inc* 544 F3d 376, 384–85 (2d Cir 2008) (finding enforceable arbitration mandates imposed by an employer despite recognizing that 'in the context of individual statutory claims, a lack of public disclosure may systematically favor companies over individuals' (quoting *Cole v Burns International Security Services* 105 F3d 1465, 1477 (DC Cir 1997))); *Iberia Credit Bureau Inc v Cingular Wireless LLC* 379 F3d 159, 175 (5th Cir 2004) ('While the confidentiality requirement is probably more favorable to the cellular provider than to its customer, the plaintiffs have not persuaded us that the requirement is so offensive as to be invalid.'); *Parilla v IAP Worldwide Services VI, Inc* 368 F3d 269, 279–81 (3d Cir 2004) (finding no unfairness in employee confidentiality clause because

many individuals 'lump it.' They do not proceed alone, and they are barred from collective action.

What I have just sketched is an array of repeat players seeking to reshape rules. The Chamber of Commerce and other business interests succeeded in limiting consumer and employee access to courts. In 2017, the Consumer Financial Protection Bureau (CFPB) proposed regulations that would have made unenforceable the *ex ante* waivers of both the use of courts and of class actions, if applied to consumers dealing with the financial products and services.

In addition, the CFPB also sought to require reporting on arbitration – databased on a website, with redactions if needed for individuals' privacy.[197] That proposed rule required information on the initial claim requested, the documents mandating arbitration, and communications between individual arbitrators and the program administrators related to problems if the service provider had not paid required fees.[198] (As I noted, a few states, such as California, have statutes requiring information on consumer arbitrations as well). But, the Chamber of Commerce was at the helm when opponents persuaded Congress (with the Vice President voting in the Senate) to enact a resolution in 2017 that the CFPB's proposed 'rule shall have no force or effect.'[199]

Audiences outside the United States may think that the law I have recounted reflects the exceptional, the aberrational, and the unwise approach of US lawmakers. But as political upheavals of the last few years

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'[e]ach side has the same rights and restraints … and there is nothing inherent about confidentiality itself that favors or burdens one party … in the dispute resolution process').

197 See Arbitration Agreements (proposed 24 May 2016) 81 Fed Reg 32,830, 32,838, 32,868 (to have been codified at 12 CFR Part 1040).

198 See ibid. The proposal is analyzed in Nancy A Welsh, 'Dispute Resolution Neutrals' Ethical Obligation to Support Reasonable Transparency' (unpublished manuscript on file with author, 14 November 2017). As she details, the proposal garnered 'strong support' from the American Bar Association's Section of Dispute Resolution. Ibid 7–9; see also Section of Dispute Resolution of the American Bar Association, 'Comment Letter on the Bureau of Consumer Financial Protection Proposed Rule on Arbitration Agreements' (29 July 2016) <https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/bars/dr-cfpb-comments_7-29-16.authcheckdam.pdf> accessed 26 August 2018 [hereinafter ABA Dispute Resolution Section 2016 Comments].

199 See Joint Resolution Providing for Congressional Disapproval under Chapter 8 of Title 5, United States Code, of the Rule Submitted by Bureau of Consumer Financial Protection Relating to 'Arbitration Agreements' (1 November 2017) Public Law no 115-74, 131 Stat 1243.

make plain, we do not live in insulated cultures. Across many oceans, some repeat players hope to expand the use of collective actions, just as others aim to block that expansion.

Prompts in Europe for more collective methods of dispute resolution come from recommendations from the EU to provide more by way of consumer redress[200] and for Member States to provide some forms of collective action for data protection claims.[201] In addition, Member States have shaped a variety of their own rules on collective actions.[202]

The contours of permissible methods have been debated, including in the CJEU, which in the winter of 2018, interpreted consumer-protective provisions in its ruling in *Maximilian Schrems v Facebook Ireland, Limited*.[203] The underlying claim was that Facebook had 'committed numerous infringements of data protection provisions' under Austrian, Irish, and European law. Mr Schrems, a frequent litigant, filed in Austria, his home, against Facebook Ireland, and he also sought to be permitted to proceed on behalf of others, who had assigned claims to him.

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200 Commission Recommendation 13/396/EU on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law [2013] OJ L 201/60.

201 See Regulation 16/679/EU on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data (effective April 2018) [2016] OJ L 119/01. Art 80 provides for two models of collective redress to be developed at the national level.

202 The Dutch are described as at the forefront of developing mechanisms, one for injunctive and the other for monetary relief. See Dutch Collective Settlements Act, including the 'WCAM' procedure by which liability can be established and individuals can then seek damages. Dutch Act on Collective Settlements, Law of 23 June 2005, Stb 340. That effort has been the subject of critique by the US Chamber of Commerce. See eg US Chamber Institute for Legal Reform, *The Growth of Collective Redress in the EU: A Survey of Developments in 10 Member States* (March 2017) 22–23, 42, 46, 52 <http://www.instituteforlegalreform.com/uploads/sites/1/The_Growth_of_Collective_Redress_in_the_EU_A_Survey_of_Developments_in_10_Member_States_April_2017.pdf> accessed 26 August 2018 [hereinafter *Growth of Collective Redress*].

203 Case C-498/16 *Schrems v Facebook Ireland Ltd* [2018] OJ C 104/09 [hereinafter *Schrems/Facebook*, 2018]. Mr Schrems has been described as an activist, using litigation as one means of bringing his concerns about data protection to public attention. See Case C-498/16 *Schrems v Facebook Ireland Ltd* [2018] OJ 2018/C 104/09, Opinion of AG Bobek, paras 9–17 [hereinafter *Schrems/Facebook*, 2017 Opinion of AG Bobek]. See also Case C-362/14 *Schrems v Data Protection Commissioner* [2015] OJ C 398/06.

Under EU law, special jurisdictional provisions entitle consumers to file in their own domicile rather than go to the defendant's domicile.[204] Facebook challenged Schrems' reliance on that rule because he had two Facebook accounts, one for personal interactions and another for his professional work as a critic of Facebook and a lecturer on access to legal rights.[205] The consequence, according to Facebook, was that Schrems was not eligible to bring an action as a 'consumer' and hence would have been required to file in Ireland.[206] The CJEU held that the test of a consumer was 'objective,' albeit not static, and that being in a trade or profession for some activities did not necessarily deprive an individual of being a consumer in another.[207]

The second question before the CJEU was whether, when litigating in Austria, other users who had assigned their claims to Schrems could be included in that action. The CJEU concluded that the protocol enabling filing in a consumer's domicile was focused on the 'economically weaker' party rather than designed to enable collective actions.[208] The result was that Schrems could not continue on behalf of the seven assigned claims ref-

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204 At issue were interpretations of Articles 15 and 16 of the Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters [2001] OJ L 12/01, which enabled a 'weaker party' to be protected by special rules. *Schrems/Facebook*, 2018 (n 203) paras 1–6.

205 Schrems has been described by others as a 'privacy activist,' and his non-profit organization uses 'targeted and strategic litigation' to enforce EU privacy protections. See Tobias Lutzi, 'Fifty Shades of (Facebook) Blue – ECJ Renders Decision on Consumer Jurisdiction and Assigned Claims in Case C-498/16 Schrems v Facebook' (*Conflict of Laws.net*, 26 January 2018) <http://conflictoflaws.net/2018/fifty-shades-of-facebook-blue-ecj-renders-decision-on-consumer-jurisdiction-and-assigned-claims-in-case-c-49816-schrems-v-facebook/> accessed 26 August 2018. Some 25,000 people had registered on the web to join him, and 50,000 were on a waiting list. *Schrems/Facebook*, 2017 Opinion of AG Bobek (n 203) 16.

206 Ibid paras 19–24. The Supreme Court of Austria had sent the reference to the CJEU to understand the meaning of the term 'consumer' under EU law and the impact of assigned claims.

207 Ibid paras 40–41.

208 Ibid paras 42–49; see also *Schrems/Facebook*, 2017 Opinion of AG Bobek (n 203) paras 119–123.

erenced in the decision[209] or the tens of thousands of consumers reported to have assigned claims to him.[210]

The *Schrems* decision is but one example of the law being developed in Europe on the forms and functions of collective action. Worried about that focus, the US Chamber of Commerce published a monograph in 2017 about the 'growth of collective redress in the EU'[211] that, the Chamber argued, was part of a trend of 'making it easier to sue.'[212] The Chamber sought to bring attention to what it called 'early warning signals' of problems that Europe will face if 'US class action firms' were permitted to import US-style class actions. The Chamber warned against third-party financing, which it described as an 'explosive growth of a new and unregulated litigation funding industry' that would exploit 'loopholes' and result in inappropriately-filed lawsuits.[213]

In January of 2018, the EU Commission issued a report on the implementation of its 2013 recommendations for collective redress, and the EU Parliament has called for additional reports from experts.[214] The Chamber,

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209 As the Chamber explained, 'an assignment of claims such as that at issue in the main proceedings cannot provide the basis for a new specific forum for a consumer to whom those claims have been assigned' under Article 16(1) of the Regulation no 44/2001. *Schrems/Facebook*, 2018 (n 203) paras 48, 49.

210 *Schrems/Facebook*, 2018 (n 203) paras 46–69. This case related to the Austrian collective action mechanism; a related case coming via Ireland filed by Schrems is pending before the CJEU. See David Meyer, 'Facebook Just Lost a Privacy Court Fight to Its EU Arch-Enemy' (*Fortune*, 25 January 2018) <http://fortune.com/2018/01/25/facebook-max-schrems-privacy-cjeu/> accessed 26 August 2018. The issue of assignment entailed questions of using Article 16(a) Brussels I for consumers in the same domicile, in another Member State, or in a non-member state.

211 See *Growth of Collective Redress* (n 202) 1, 2; and calls for 'safeguards,' see US Chamber Institute for Legal Reform, *Supporting Safeguards: EU Consumer Attitudes Towards Collective Actions and Litigation Funding* (September 2017) 1 <http://www.instituteforlegalreform.com/uploads/sites/1/EU_Paper_Web.pdf> accessed 26 August 2018. The monograph spoke about a 'perceived "access to justice deficit".' *Growth of Collective Redress* (n 202) 2.

212 Ibid 19.

213 'Experience with collective redress, including the notorious US class action system, demonstrates that mechanisms for the aggregation of lawsuits are prone to abuse, including the filing of weak or meritless claims.' Ibid 6.

214 See The Council and the European Economic and Social Committee, 'Report from the Commission to the European Parliament,' Brussels, 25 January 2018, Com (2018) 40 final <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0044&rid=9> accessed 26 August 2018.

a successful repeat player in the United States, aims to replicate its impact in Europe as the EU considers the parameters of collective actions.

6. *#MeToo, Aggregation, and the Pulls and Pushes of Publicity*

Return then to my overarching themes: the political economy of procedural and substantive rules of law, the roles played by repeat players, litigant asymmetries, the centuries-old calls for reforms of court processes, and the functions of publicity and privatization. Two points need to be clarified in conclusion. First, what procedures repeat players take to be in their interest is not fixed. Second, democratic commitments to participation in the social order that prescribes rules of conduct demand forms of openness for any process that has the power to impose legally-binding judgments.

Many contemporary repeat players have pushed for private and individualized procedures. But in earlier eras, similarly situated repeat players saw collective public actions as in their interests. The dynamics that can drive change can be seen from the history of collective action and privatization in the United States.

As in cases like *Schrems*, one impetus for the creation of the US class rule in 1966 was to help consumers who, individually, did not have the 'effective strength.'[215] Another was to make enforceable injunction remedies for civil rights plaintiffs, calling for racial desegregation of schools.[216] But the 1966 Federal Class Action Rule was also built on innovations from decades earlier, when the banking industry was pressing for collective action.

In the 1940s, banks in New York lobbied its legislature to authorize them to pool assets in trust, so that smaller sums of money could be managed more economically and with a wider range of investment opportuni-

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215 Benjamin Kaplan, 'A Prefatory Note' (1969) 10 Boston College Industrial and Commercial Law Review 497, 497. I provide some of the history of the drafting of the 1966 revisions to Rule 23 in Judith Resnik, 'Reorienting the Process Due: Using Jurisdiction to Forge Post-Settlement Relationships Among Litigants, Courts, and the Public in Class and Other Aggregate Litigation' (2017) 92 New York University Law Review 1017, 1019–31 [hereinafter Judith Resnik, 'Reorienting the Process Due']; and Judith Resnik, '"Vital" State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts' (2017) 165 University of Pennsylvania Law Review 1765, 1788–95 [hereinafter Judith Resnik, '"Vital" State Interests'].

216 Judith Resnik, '"Vital" State Interests' (n 215) 1790–91. See also David Marcus, 'The History of the Modern Class Acton, Part II: Litigation and Legitimacy, 1981–1994' (2018) 86 Fordham Law Review 1785.

ties. Yet the banks worried that by merging funds, thousands of beneficiaries could potentially file claims objecting to investment decisions. To avoid that problem, the banks succeeded in obtaining a statute creating a special procedure, called a 'settlement of accounts.' Banks were authorized by the state to file a kind of declaratory action against all the beneficiaries. Upon that filing, a court would appoint a guardian *ad litem* (a kind of class representative) to protect the beneficiaries. Once the banks received a judgment that the investments had been prudent, that decision would be *res judicata* and preclude subsequent claimants.

The legal questions produced by that statute were whether New York State could create a representative structure and could exercise jurisdiction to bind beneficiaries all over the United States. In *Mullane v Central Hanover Bank*, decided in 1950, the US Supreme Court held that given the 'vital interest of the State' in this form of collective investment opportunity, New York State could constitutionally craft a new procedure to reach those beneficiaries.[217] A law review essay at the time described the ruling as 'jurisdiction by necessity.'[218] *Mullane* changed US law on territorial jurisdiction by relying on the presence of the trust in New York to permit the state to reach outside its boundaries so as to bind absentees who had not affirmatively agreed to participate.

While upholding the NY collective action procedure, the Court also found that the statutory system for providing notice to absentees was wanting. New York had required that information about this procedure be provided in the initial investment documents and through newspaper publication.[219] The Court held that the bank had the obligation to send the best notice 'practicable under the circumstances'; given that it had the names and addresses of living beneficiaries, mailed individual notice was required.[220]

In short, in its 1950 *Mullane* decision, the Supreme Court redefined the 'process due' in terms of state court jurisdiction over individuals who neither resided in nor affirmatively consented to participate in a group pro-

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217 *Mullane v Central Hanover Bank & Trust Co* 339 US 306, 313 (1950).

218 George B Fraser, Jr, 'Jurisdiction by Necessity - An Analysis of the *Mullane* Case' (1951) 100 University of Pennsylvania Law Review 305.

219 *Mullane* 339 US at 309–310. The relationship of notice to representation is complex. See Robert G Bone, 'The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions' (2011) 79 George Washington Law Review 577; Jay Tidmarsh, 'Rethinking Adequacy of Representation' (2009) 87 Texas Law Review 1137.

220 *Mullane* 339 US at 319.

ceeding.[221] When shaping the 1966 federal class action rule, its drafters used that model but expanded on it. The federal class action rule did not oblige courts to inform individuals at the outset of the pendency of cases seeking injunctive relief but were to reach individuals through notice if a class was certified for monetary damages.[222]

Critics of today's class actions in the United States complain that millions of notices are mailed, while few people reply. But the value of those notices has to be understood in the term that Jeremy Bentham provided – publicity. But those individuals rarely respond to required notices. Yet these notice requirements put the fact of claiming into the mailboxes of millions and onto the public screen.[223] Mandating notice forces knowledge about aggregate claims into the public sphere and produces the debates ongoing today about class actions' fairness and utilities.

The development of class actions undermines another dichotomy, which put disputants in one category and the public in another. Collective actions blur those lines, as the absentees are deemed to be parties (and bound, under US law) but they are also in some ways observers. No one expects participation from the hundreds or the thousands affected by the judgments.

Just as collective actions are a form of publicity, banning class actions is one way to privatize process and to cut off claims. Thus, the efforts to limit collectivity are part of the larger project making enforcement of legal obligations less likely. But collective actions are not only in service of individuals who would not otherwise make their way to court. Courts need the resources that come with group-based litigants. And courts need to have all sectors of the social order use them in order to protect their own legitimacy in democratic politics.

Figure 13 brings me to my closing point, about the need to build the public into the dispute resolution system. The pictogram below comes from the same volume on ODR that has the eight frames shown in Figure 9.[224]

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221 See Judith Resnik, 'Reorienting the Process Due' (n 215) 1037–39.

222 For details of history and of distinctions drawn, see Judith Resnik, '"Vital" State Interests' (n 215) 1788–95.

223 My discussion assumes that aggregation is taking place under the supervision of a court, and hence has a layer of regulation which non-court aggregates lack. See Linda Mullenix, 'Reflections from a Recovering Aggregationist' (2015) 15 Nevada Law Review 1455.

224 HiiL, 'ODR and the Courts' (n 120) 11.

Figure 13

HiiL, 'ODR and the Courts: The Promise of 100% Access to Justice?' Online Dispute Resolution, 2016

The judge is shown weighing the law symbolized through the books against the claims of disputants who are shown as two people. Missing in this triangle are all of us – whether part of aggregates in collective actions or in the audience. Unlike the courtroom shown in figure 8, the federal courthouse in Boston, no benches are lined up for another set of participants – the public – to view the disagreements about what law means, how it applied, and whether it should change. No stick figures represent a dialogue among disputants, decision-makers, and the many public(s) sitting both to be educated and to educate those authorized to impose judgment.

These pictures of the new court-based ODR do not reflect a need to demonstrate the propriety of the exercise of authority entailed. In contrast, Google's reports on 'transparency' acknowledge a need to explain itself, but as of now, it controls all the information on what it decides to report.

My goal is not to impose an unfettered public on ODR and on the replacements for courts but to transpose the norms of public engagement in courts to their replacement/alternatives. Openness under these conditions requires the many publics to behave respectfully whenever present, be the procedures styled ADR, ODR, or something else. Google's 'Transparency Report' aims to account for its decisions, but until it is obliged – rather than choosing – to provide information and until underlying materials are made available in some form, Google's private authority remains unbounded. The challenge is to craft rules to recognize the risks and harms of dissemination of private information on the web while also recognizing the risks and the harms of outsourcing the authority to decide on how to do so.[225]

Moreover, rules need to permit collective actions not only in courts that are live but also online and, if mandates to arbitration remain in force, in that forum as well. Doing so is not fanciful, as class action arbitrations in the United States have taken place with rules that the AAA modeled on the federal class action provisions. Binding absentees is an evident concern,[226] and one response has been to craft a 'hybrid,' in which judges certify classes and arbitrators rule on other claims.[227]

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225 See David S. Ardia, 'Privacy and Court Records: Online Access and the Loss of Practical Obscurity' [2017] University of Illinois Law Review 1385, 1387; Karen Eltis (n 80); Nancy S. Marder, 'From "Practical Obscurity" to Web Disclosure: A New Understanding of Public Information' (2009) 59 Syracuse Law Review 441; see also British Columbia CRT, *Access to Records* (n 164) 1–5, 12–17.

226 Whether absentees can be bound is a question that, as of this writing, is before a federal appellate court. See *Jock v Sterling Jewelers, Inc* 2018 WL 418571 (SDNY 15 January 2018); appeal pending, No 18-153 (18 January 2018). The lower court judge had held that an arbitrator had no power to bind absentees unless they opted into the proceedings.

227 See also Lindsay R. Androski, 'A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses' (2003) University of Chicago Legal Forum 631, 632–33; Carole J. Buckner, 'Due Process in Class Arbitration' (2006) 58 Florida Law Review 185, 191; Joshua S. Lipshutz,'The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits' (2005) 57 Stanford Law Review 1677, 1692. Using aggregation in settlements more generally raises yet other issues. See Robert Bone, 'Replacing Class Actions with Private ADR: A Comment on "Settlement, ADR, and Class Action Superiority"' (2012) 5 Journal of

Generating more methods to create group-based litigation to provide resources for litigants and to seek public processes requires political will. The question is whether repeat players do or will understand the utility of a system that includes both public access and collective action. Above, I pulled together a range of rules pressed by repeat players aiming to privatize process.

Yet pressures for some form of interaction with the many vectors of the public also must be part of an analysis of the contemporary situation. As I have discussed, Google understands itself as needing to explain something – to be 'transparent' – about its delisting decisions. Likewise, UNCITRAL rules for investment arbitration have embraced 'transparency' as the way to shore up its authority.[228] These self-imposed disclosure obligations could be founded in a political commitment to enable oversight, from concerns to ward off regulation, or to gain a market share as competition emerges – such as the potential to create a Multilateral Court for Investment Disputes[229] and the prospect that the CJEU could have authority over arbitral fora when member states are parties.[230]

Rejection of privatization is vivid in the context of the popular mobilization of '#MeToo.' The outpouring of stories about predatory behavior shows that secrecy has its costs, both for third parties who might have

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Tort Law 127; Andrew Bradt and Theodore Rave, 'The Information-Forcing Role of the Judge in MDL' (2017) 105 California Law Review 1259.

228 Information is also emerging through online reporters and databases (ORDs) that create windows into investor-State dispute settlements and can be understood through different lenses in terms of their impact and utility. See Pietro Ortolani, 'Online Reporters and Databases: Four Narratives of their Role in Investor-State Disputes' in Freya Baetens (ed), *Unseen Actors in International Adjudication* (CUP, forthcoming).

229 See 'Recommendation for a Council Decision Authorising the Opening of Negotiations for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes,' Commission Decision No COM/2017/0493 (Renault), 1988 OJ L 220/30 (3 September 2017). See also Case C-377/13 *Ascendi Beiras Litoral e Alta, Auto Estradas da Beiras Litoral e Alta SA v Autoridade Tributária e Aduaneira* [2014] ECR I-1754; Case C-555/13 *Merck Canada Inc v Accord Healthcare Ltd, Alter SA, Labochem Ltd, Synthon BV, Ranbaxy Portugal* [2014] ECR I-92.

230 The claim is that because states permit such proceedings, those arbitrators become courts of a Member State from which references can be taken. Judgment of 12 June 2014 in Case C-377/13 *Ascendi Beiras Litoral e Alta, Auto Estradas da Beiras Litoral e Alta SA v Autoridade Tributária e Aduaneira* [2014] ECR I-1754; Order of 13 February 2014 in Case C-555/13 *Merck Canada Inc v Accord Healthcare Ltd, Alter SA, Labochem Ltd, Synthon BV, Ranbaxy Portugal* [2014] ECR I-92.

avoided being put in harm's way and for those directly involved. The suppression of the results of investigations into misbehavior has resulted in a reiterated *cri de coeur* for accountability.

These pressures have had an impact. In the fall of 2017, members of the US Congress proposed to protect court-based remedies for sexual harassment claims filed by employees by exempting them from being routed exclusively to closed arbitration.[231] Arbitration providers are likewise concerned about their market share and reputation. They have new incentives to distinguish arbitration from 'closed' proceedings per se, and some are reconsidering how to treat sexual harassment claims. Those worries were given new grounding when Microsoft announced it would discontinue arbitration requirements for sexual harassment claims. The public sector weighed in soon thereafter, in an unusual letter sent to the congressional leadership in February of 2018 by all fifty state Attorneys General. They 'strongly support[ed] appropriately-tailored legislation to ensure that sexual harassment victims have a right to their day in court.'[232]

The appeal of a day in court ought to be seen for those accused as well as for those accusing individuals of misbehavior. #MeToo exemplifies the ways in which the dissemination of information without the constraints of legal process makes it hard to sort among different kinds of harms, to probe the accuracy of information, and to calibrate sanctions.[233] This rebellion against secrecy should therefore serve as a reminder of what court-based, public processes can offer: deliberate decision-making that insists on due process norms of even-handedness and that requires analysis of liability and remedies appropriate to the misconduct, when established.

The need for regulated disclosure and mechanisms to constrain dissemination of information have to be put into the context of the risk of the exercise of power without any sense of a need to account for that authority.

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231 Parallel bills were introduced in December of 2017 in the US House of Representatives and in the Senate. See Ending Forced Arbitration of Sexual Harassment Claims [6 December 2017] HR 4570; S 2203, 115th Cong.

232 Letter from Pamela Jo Bondi, joined by all the other Attorney Generals to the Congressional Leadership, regarding 'Mandatory Arbitration of Sexual Harassment Disputes' (National Association of Attorneys General, 12 February 2018) <https://www.mass.gov/files/documents/2018/02/12/NAAG%20letter%20to%20Congress%20Sexual%20Harassment%20Mandatory%20Arbitration.pdf> accessed 12 February 2018.

233 These are issues for courts and for administrative decision-making in colleges and universities as well. See Alexandra Brodsky, 'A Rising Tide: Learning About Fair Disciplinary Process from Title IX' (2017) 66 Journal of Legal Education 822.

Not only does the act of rendering judgments require knowledge, but assessing the justice of those judgments requires that third parties be able to understand particular cases, watch interactions, and know the systems in which individual judgments are made. Without some forms of public access, one cannot know whether fair treatment is accorded regardless of litigants' status, and that the remedies required are appropriate.

Without oversight, one cannot ensure that judges are independent of parties. Without independent judges acting in public and treating disputants in an equal and dignified manner, outcomes lose their claim to legitimacy. And without public accountings of how legal norms are being applied, one cannot consider the need for revisions of underlying rules, remedies, and procedures by which to decide claims of right. We lose the very capacity to debate what our forms and norms of fairness are. Whether we call it 'court,' or 'ADR,' or 'ODR,' without openness, we cannot decide whether the processes or resolutions are just.

Open Justice and the Privatisation of English Civil Justice

John Sorabji

1. *Introduction*

In 2017, the Supreme Court of the United Kingdom (the UKSC) heard the case of *R (UNISON) v Lord Chancellor*.[1] It concerned the question whether the fees charged to issue proceedings in the Employment Tribunal and Employment Appeals Tribunal were unlawful. The fundamental question was whether they were set at a level that meant they breached the right to access to justice; a right guaranteed at both common law (as a constitutional right) and under Article 6 of the European Convention.[2] It held that they were unlawful. The leading judgment, with which the other Justices agreed, was given by Lord Reed.[3] During the course of that judgment he took the unusual step of explaining what was meant by the 'rule of law' and what the court's role was in respect of it. He explained why it was that litigation before the civil courts was not a 'purely private activity'[4]; that – at heart – it was a fundamentally public activity; that it was a public and not merely a private good. What was perhaps most remarkable was that he did so in an appeal where the respondent was the government Minister, the Lord Chancellor, who was under a statutory duty to uphold the rule of law.[5]

Lord Reed's judgment made a number of what might be thought to be basic points. First, it noted that access to justice is inherent in the rule of law. This was not always understood, and such a lack of understanding laid

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1 *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

2 See *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn Ltd* [1981] AC 909 at 977; *R v Secretary of State for the Home Department, Ex p Saleem* [2001] 1 WLR 443.

3 Lords Neuberger, Mance, Kerr, Wilson and Hughes concurred. Lady Hale concurred save in respect of an issue relating to discrimination.

4 *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 at [67].

5 Constitutional Reform Act 2005, s 1. For a discussion of the nature of this role, see House of Lords, Select Committee on the Constitution, *The Office of Lord Chancellor*, (6th Report of Session 2014-2015) HL Paper 75 <https://publications.parliament.uk/pa/ld201415/ldselect/ldconst/75/75.pdf> accessed 29 October 2018.

the misconception that the provision of accessible courts and tribunals by the State was a public service: that they were simply service providers to users. Secondly, this misconception underpinned the belief that the services courts provided were simply of value to their users and not to Society as a whole ie they simply provided private goods.[6] From this idea came the assumption that those benefiting from the service should pay for it, as otherwise the State is simply losing the public's money to the sole benefit of private individuals.[7]

Secondly, this conception of courts, their role and the benefits they provide was 'demonstrably untenable'.[8] In this he echoed what senior judges in England and Wales have been stating extra-judicially since the 1990s. As Lord Scott put it in 1995, the view that courts simply provided 'a service to be offered at cost in the market place, and to be paid for by those who choose to use it, profoundly and dangerously mistakes the nature of the system and its constitutional function'.[9] A point reiterated by, for instance, Lord Neuberger MR in 2010 and Lord Thomas CJ in 2015[10] and again, shortly before Lord Reed delivered his judgment, in 2017.[11] As Lord Thomas CJ noted it is a perspective which is not confined to England and

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6 The classic argument questioning whether adjudication before courts is a public or private good is set out in William Landes & Richard Posner, 'Adjudication as a Private Good' (1979) 8 Journal of Legal Studies 235, and see Paul Carrington, *Adjudication as a Private Good – a Comment* (1979) 8 Journal of Legal Studies 303. For a detailed critique of the issue in England and Wales see, Hazel Genn, *Judging Civil Justice* (Cambridge University Press 2010). Also see, Judith Resnik, *Diffusing Disputes, The Public in the Private of arbitration, the private in courts and the erasure of rights* (2015) 124 Yale Law Journal 2804.

7 *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 at [66].

8 *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 at [67].

9 Lord Scott of Foskett cited in Michael Zander, *The State of Justice* (Sweet & Maxwell 2000) 39.

10 Also see the restatement of the rejection of the idea by the senior judiciary of England and Wales and the comment that such a philosophical change must be subject to Parliamentary debate and decision in, Judiciary of England and Wales, 'The response of the senior judiciary to the Ministry of Justice consultation paper court fees: proposals for reform (Cm 8751)' (2014) at 1 and 55 <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Consultations/senior-judiciary-response-court-fees-proposals-for-reform.pdf>.

11 Lord Neuberger MR, *Has mediation had its day?*, (Keating Lecture, 10 November 2010) at 10: 'To conceive of the civil justice system, any more than the family and criminal justice systems, merely as a self-financing service which the state offers, indeed which the state almost happens to offer by historical accident, is to make a profound and dangerous constitutional mistake.' <http://webarchive.nationalarchives.gov.uk/20131203071742/http://www.judiciary.gov.uk/Resources/JCO/Docume

Wales, but has also been noted and deprecated in, at least, two other common law jurisdictions: Canada and Australia.[12]

Thirdly, having outlined the fallacy, Lord Reed made the following fundamental points: the central role of courts was to give effect to the rule of law; they did so through ensuring that laws created by Parliaments and by the common law were 'applied and enforced'.[13] As such they ensured that the democratic process, through which law was made, was given effect. Access to the courts was, on this view, an inherently public and not private good. The public service provided by courts was not therefore one akin to any other the State provided.[14] Or as Lord Thomas CJ put it previously, access to the courts was access to one of the 'pillars of democracy'.[15]

It is rare for a court in England and Wales to restate the nature of its role; rarer still to explain its role. Lord Reed's judgment is arguably the most detailed attempt within such a court judgment to do so. It goes far beyond the explanations of the nature and importance of the constitu-

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nts/Speeches/moj-speech-mediation-lectureA.pdf>; Lord Thomas CJ, *The Centrality of Justice: its contribution to Society and its delivery* (Lord Williams of Mostyn Memorial Lecture, November 2015) 7 – 14 <https://www.judiciary.uk/wp-content/uploads/2015/11/lord-williams-of-mostyn-lecture-nov-2015.pdf>; Lord Thomas CJ, The Judiciary within the State – the relationship between the branches of the State, (Ryle Lecture, June 2017) at 13-14 <https://www.judiciary.uk/wp-content/uploads/2017/06/lcj-michael-ryle-memorial-lecture-20170616.pdf>.

12 As Lord Thomas CJ notes in *The Centrality of Justice* ibid at 9 – 10, it is considered in respect of Canada by Trevor Farrow, *Civil Justice, Privatization and Democracy* (University of Toronto Press 2014), and criticised in respect of Australia by French CJ of the High Court of Australia in Robert French, *Essential and Defining Characteristics of Courts in an Age of Institutional Change* (Supreme and Federal Court Judges Conference, Adelaide, 21 January 2013) at 3: <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj21jan13.pdf>.

13 *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 at [68]. Also see Harry Woolf, 'Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales' (HMSO 1995) at 2, 'A system of civil justice is essential to the maintenance of a civilised society. The law itself provides the basic structure within which commerce and industry operate. It safeguards the rights of individuals, regulates their dealings with others and enforces the duties of government.'

14 *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 at [68] – [69]. Lord Reed's judgment has not been without criticism, see for instance, Andrew Higgins, 'The Supreme Court turns the judicial rhetoric on access to justice up to 11 as it strikes down unaffordable and disproportionate employment tribunal fees, but key questions about the funding of civil justice remain: R (on the application of Unison) v Lord Chancellor [2017] UKSC 51' (2018) 37 CJQ 1, 1.

15 Lord Thomas CJ (n 11) at 64.

tional role of the courts and of the centrality of access to justice therein given in previous decisions such as *Attorney General v Times Newspapers Ltd* [1974] AC 273 or *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn Ltd* [1981] AC 909.[16] Its significance here stems from its immediate circumstances and their wider context. The former – the issue on appeal before the UKSC – was, as noted above, the legality of fees for issuing proceedings in the Employment and Employment Appeals Tribunal. The latter was the philosophical move away from the idea Lord Reed articulated that the courts, and tribunals, provide a public good and the ways in which this had manifested itself since the 1980s in the development of the English and Welsh civil justice system.[17] It was, and is, a philosophical shift which as antipathetic to the concept of open justice as explained by those such as Sir Ernest Ryder SPT,[18] Professor Dame Hazel Genn,[19] Professor Judith Resnik,[20] and, of course, Profess Fiss.[21] As Genn put it, echoing Ayn Rand,[22] it was a shift that has seen the State 'shrugging off' its 'responsibility for providing effective and peaceful forums for resolving civil disputes'; a 'shrugging off' that conceptualises 'civil justice as a private matter rather than a public and socially important good.'[23]

It is, as they have argued, an approach that undermines: equal access to courts; public access to, and scrutiny of, judgments; and, undermines the explication and giving force to the values embodied in the constitution and the laws such that the framework for socio-economic and human rights is undermined.[24] In the present paper I outline the four developments which highlight this shift and how it has been implemented. I then,

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16 Its closest equivalent in terms of detailed consideration of access to justice was the UKSC's judgment in *Al Rawi & v The Security Service* [2011] UKSC 34, [2012] 1 AC 431. The issue there was whether the common law court endorse a form of process that amounted to a fundamental denial of open justice. In the course of the various judgments, as in Lord Reed's later judgment, the point was made that open justice – an aspect of accessibility to the courts by parties and the public – lay in democratic governance: see Lord Dyson at 572 and the discussion there to Lord Neuberger MR's judgment in the court below at 543.

17 See, for instance, John Sorabji, *Justice in a Market State – An English Prolegomenon, in Citizen-State-International Community: A Collection of Studies* (CH Beck 2014).

18 Sir Ernest Ryder SPT, 'Securing Open Justice' in this Volume.

19 Hazel Genn, *Judging Civil Justice* (Cambridge University Press 2010).

20 Judith Resnik, *Diffusing Disputes,* 'The Public in the Private of arbitration, the private in courts and the erasure of rights' (2015) 124 Yale Law Journal 2804.

21 Owen Fiss, 'Against Settlement' (1984) 93 Yale Law Journal 1073.

22 Ayn Rand, *Atlas Shrugged* (Random House 1957).

23 Hazel Genn, *Judging Civil Justice* (Cambridge University Press 2010) 25 – 26.

24 For a summary see Sir Ernest Ryder SPT (n 18) and see Hazel Genn ibid 20ff.

finally, turn, to draw the threads together to consider where that leaves the commitment to open access to justice.

2. *Court Funding*

There are three broad approaches that could be taken by a State to the funding of its civil justice system: it could fully fund it out of general taxation; it could operate via co-funding, ie the State funds the system from general taxation with individual litigants defraying some of cost through court fees; or, it could require the system to be fully-funded by litigants – its direct users – with the State subsidising any funding shortfall. Historically, the English and Welsh civil justice system was co-funded via the second model. As Sir Henry Brooke explained it, the settled approach was that 'the taxpayer paid for the provision of the judges and the court buildings while the rest of the cost of providing civil justice was met out of court fees'.[25] In other words the bulk of the cost of the system was borne by the State, with the shortfall paid for by litigants. The rationale for this was, as Lord Gardiner LC put it in 1965, that the provision of justice was a public service that provided a public good; it was 'for the benefit of all'.[26] Hence the State bore the bulk of the costs, with individual litigants bearing the cost of case and trial management reflective of the private benefit that they would obtain from the civil process.

The equitable balance struck by the historic funding model was rejected in the early 1980s; a time when liberal free market economics was taking hold in the United Kingdom.[27] In 1983, the first inroad into the idea that the primary responsibility for the provision of the justice system lay upon the State was made, without Parliamentary scrutiny, by the government: individual litigants through court fees were to bear the cost of the court estate. The State was now to pay for the provision of judges and supplement any shortfall in court fee income.[28] In 1992 a further and final step was taken. As Sir Henry Brooke reported it,

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25 Henry Brooke, 'Should the Civil Courts be Unified?' Judicial Office (2008) 29 – 31 <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/brooke_report_ucc.pdf>.

26 Lord Gardiner LC cited in Henry Brooke (ibid) at 29. The same reference is also cited by Lord Reed, [2017] UKSC 51, [2017] 3 WLR 409 at [73].

27 For an interesting discussion see, Monica Prasad, *The rise of neoliberal economic policies in Britain, France, Germany, and the United States* (Univ. Chicago Press 2006).

28 Henry Brooke (n 25) 29.

> ... The Treasury now decided to equate the provision of civil and family justice with the provision of every other Government service supplied to paying customers. It insisted that its entire cost (including, now, the cost of the judges) must be met from court fees, subject only to any remissions or exemptions or subsidies that might be agreed with Treasury ministers from time to time.[29]

Again, as he went on to note this fundamental change in approach was neither subject to consultation nor Parliamentary scrutiny and debate. Underpinning the idea that the system should be funded by 'paying customers' was the attendant idea that, except in a limited class of claims where the courts clarified the law ie test cases, the court's functions was simply to provide a consumer service. Its primary role, as one civil justice reform report put it, is to secure the 'the resolution of private disputes' as 'part of the service sector of the economy.'[30] More than that, as part of the service sector it was expected that the customer would, and should, be willing to pay more for the service provided in a rising economy.[31]

By the turn of the century then it was firmly established, albeit as noted by Dingwall and Cloatre not often admitted by government, that the civil courts provide no more than private benefits. As they put it,

> Essentially, successive U.K. governments have decided that, although civil justice may be a public service, it is not a public good ... Although, ... governments have been reluctant to defend the policy in public, their communications with the Civil Justice Council made it clear that they see the system as providing only private benefits for individuals rather than collective benefits for the society as a whole.[32]

Such communications with the Civil Justice Council, a non-departmental advisory body whose remit encompasses making recommendations to improve access to justice, may not have been widely publicised. However, in 2013, thirty years after the philosophical shift in governmental understanding of the role of the courts commenced, the, then Justice Minister, made the point explicitly in a governmental consultation paper on court fees. He put it this way: 'For many years [now], the civil and family courts

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29 Ibid.
30 Peter Middleton, 'Report to the Lord Chancellor', (HMSO) (1997) 10.
31 Ibid.
32 Robert Dingwall and Emilie Cloatre, 'Vanishing Trials?: An English perspective' (2006) 7 Journal of Dispute Resolution 51, 67.

have operated under the principle that those who use the courts should pay the full cost of the service they receive.'[33]

From there it was a step to propose that those who received significant private benefits from the system should be required to pay more than the cost price of access, which the court fee consultation did.[34] The fallacy at the heart of this approach, which Lord Reed's judgment in *Unison*, would make clear was the assumption that the users, the customers, who received a service were and only were litigants whereas such private benefits they received, were secured as a consequence and a discrete part of the wider public benefit – public good – provided by the courts and civil justice system.

From 2007 UK governments have implemented wide-ranging public sector funding cuts. The courts have not been exempt.[35] One consequence of this was that the taxpayer subsidy to the justice system had to be eliminated. The courts thus had to be in fact, as well as in theory, fully-funded by their users: they were to be a consumer service paid for entirely by consumers.[36] Given the philosophical shift in understanding of the court's role since the early 1980s, in one sense this conclusion was inevitable. It was in line with the theory. Austerity was simply the spur to giving full effect to it. The pursuit of full user funding continues.[37]

3. *Privatising Legal Aid*

The second limb of the shift towards a consumer service understanding of the civil courts can be seen in the approach that has been taken to the provision of civil legal aid. England and Wales has had a civil legal aid scheme

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33 Ministry of Justice, 'Court fees – proposals for reform' (2013) CM 8751, 4.

34 Ministry of Justice ibid at 4 and 7, '... those using the civil court system would, in future, be expected to meet the cost of the service where they can afford to do so, and for certain types of proceeding would be expected to contribute more than the cost.'

35 Ibid 4.

36 For a detailed discussion see, John Sorabji, 'Austerity's effect on English Civil Justice' (2015) 4 Erasmus Law Review 159.

37 It is noteworthy that the civil courts are fully-self funding. The funding shortfall from fee income arises due to the fact that the civil court fees are used to subsidise funding shortfalls in the family courts, as noted by the senior judiciary in 2014: Judiciary of England and Wales, 'The response of the senior judiciary to the Ministry of Justice consultation paper court fees: proposals for reform (Cm 8751)' (2014) at [11].

since 1949, when it was introduced as part of the, then, Labour government's, welfare state reforms.[38] When introduced it provided 80% of the population with financial support for claims within its scope. [39] That it was conceived of as providing, and securing, a public good is perhaps best seen by reference to what was intended to be created in its place.

A public civil legal aid scheme was one possible alternative mechanism in the 1940s through which the impecunious were to be provided with the means to access the courts. The alternative approach was, according to Cook, to have been the nationalisation of legal services and the creation of a National Legal Service (NLS) analogous to the National Health Service.[40] Just as the public good of health care, as part of a 'comprehensive policy of social progress'[41] (to borrow from the Beveridge Report) available to all members of society was promoted as an aspect of the welfare state, so was access to the civil courts to be promoted. Neither was predicated on a view that they simply or primarily delivered private, consumer, benefits to individuals. They were both to deliver a public good: the former health care, the latter practical access to civil justice. The question in both cases was how best to secure a public good, and through that deliver the private benefit to individual members of society. The question concerning access to the courts was answered not by an NLS but via a legal aid scheme; one that would guarantee that 'no one [would] be financially unable to prosecute a just and reasonable claim or defend a legal right.'[42]

Since the 1990s, there has been a consistent retreat from the provision of public legal aid. That retreat has moved in step with the approach to court funding and the consumer service conception of the court's function. The figures are stark: in 1998, 52% of the population were eligible for legal aid. By 2007 this had dropped to 29%.[43] The figure now is significantly lower than that, as following legal aid reforms enacted in 2013 access to civil legal aid is available in a vanishingly small number of areas;[44] so small that following the reduction in civil legal aid in 2013 there was a drop of 62%

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38 Legal Aid and Advice Act 1949; Report of the Committee on Legal Aid and Legal Advice in England and Wales (Cmd 6641, 1945) (HMSO).

39 Steve Hynes & Jon Robins, *The Justice Gap*, (2009) (LAG) 21. Provision was however subject to a means-test.

40 Michael Cook, *Cook on Costs 2012*, (Lexis Nexis 2012) 693 – 694.

41 William Beveridge, '*Social Insurance and Allied Services*' (Cmd. 6404, 1942) (HMSO) 6.

42 Cited in S Hhynynes & J Robins (n 39) 70.

43 S. Hynes & J. Robins (n 39) 71.

44 Legal Aid, Sentencing and Punishment of Offenders Act 2013. The Act and its impact on legal aid is subject to review in 2018, Ministry of Justice, *Post-Implemen-*

in civil cases funded this way.[45] As figures obtained by the Law Society demonstrate post-2013 there has been a continued decline in cases funded by legal aid.[46]

The immediate cause of the 2013 legal aid reforms was public sector spending reductions.[47] Prior reductions were however linked with the transfer of state-support for litigation funding to private forms of funding. The first major inroad into public funding was effected by section 58 of the Courts and Legal Services Act 1990. It permitted, for the first time in England and Wales, the use of a form of contingency fee agreement, known as a conditional fee agreement or CFA. The provision came into force in 1995. [48] The explicit reason why this reform was effected was to create greater access to justice, as it would be available to individuals who would previously have not qualified for legal aid but would equally not have been wealthy enough to afford to litigate. It was equally designed to provide the litigant, or in the words of the then Lord Chancellor, Lord Mackay, 'the consumer' more choice in a market place of funding.[49] Originally then it was viewed as an addition to public legal aid, rather than a substitute for it in limited areas of civil proceedings.[50] That being said, that it was intended to create greater choice in the market place is, at the very least, suggestive of the view that public and private funding sources were competitors. It is but a step to consider that in such a market place there would be an expectation that more efficient funding private funding models would develop to supplant the public one, enabling it to then wither on the vine.

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tation Review Evidence Gathering Exercise Terms of Reference, (2018), <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/686576/pir-laspo-terms-of-reference.pdf>.

45 Ministry of Justice Legal Aid Figures, June 2014 <http://static.guim.co.uk/sys-images/Guardian/Pix/pictures/2014/9/3/1409762794943/Legalaidgraphic.jpg?guni=Article:in%20body%20link>.

46 The Law Society, *Access denied? LASPO four years on – A Law Society Review*, (June 2017) <http://www.lawsociety.org.uk/support-services/research-trends/laspo-4-years-on/>. Also see, Bach Commission, *The Right to Justice – The Final Report of the Bach Commission*, (Fabian Society, 2017) <http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission_Right-to-Justice-Report-WEB.pdf>.

47 John Sorabji (n 36) 163.

48 Conditional Fee Agreements Order 1995; the Conditional Fee Agreements Regulations 1995.

49 Lord Mackay cited in John Peysner, *Access to Justice – A critical analysis of recoverable condition fees and no-win no-fee funding* (Palgrave, 2014) at 27.

50 Ibid at 28.

The introduction of CFAs in 1995 as a complement to public legal aid, as with the step change in funding in 1983, breached the dam. In 1998 the availability of CFAs was extended so that they were available for all forms of civil proceeding.[51] They were also subject to further reforms aimed at making their use more attractive in the market place both to lawyers who would act on them and litigants.[52] This extension went hand-in-hand with a reduction in scope of legal aid availability, eg it would post-1999, via the Access to Justice Act 1999 (the 1999 Act)[53], no longer be available for personal injury claims.[54] A competitive market was no longer in place: the private had replaced the public. Competition via a complementary public and private schemes having been introduced, the rationale on which the elimination of the public scheme in this way was put straightforwardly by Middleton in 1997: there was no reason for the State to provide via public funds what was available via private funds. The State need no longer bear a responsibility. That this conclusion came in the very same reform report prepared by Middleton where the point was made that the civil courts provided a consumer service which delivered private goods other than in exceptional forms of claim (test cases), is important. It illustrates the policy underpinnings of the move away from legal aid post-1999, as the then Labour government built on Middleton's recommendations in the reforms that gave statutory effect to the replacement of legal aid by post-1999 CFAs: a policy based on the idea that it was a matter for individuals to pay for services for which they and they alone benefit.

The expansion of CFAs as a replacement for legal aid in 1999 was not the only way in which the shift to private funding in place of public funding was to be effected. The 1999 Act did not seek to transform CFAs into the primary means of civil litigation funding. It also made provision for

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51 Conditional Fee Agreements Order 1998. For a discussion see John Sorabji & Robert Musgrove, *Litigation, cost, funding and the future*, in *The Civil Procedure Rules Ten Years On* (ed Dwyer OUP 2009.).

52 For a detailed history of these reforms and the problems they engendered, problems which resulted in fundamental restructuring of CFAs in 2013, see John Peysner (n 49) at 40-78; Rupert Jackson, *Review of Civil Litigation Costs: Preliminary Report* (Judicial Office, 2009) and Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (Judicial Office, 2009) the recommendations from which concerning CFAs where implemented by the Legal Aid, Sentencing and Punishment of Offenders Act 2013.

53 See sections 26 and 27, which amended the Courts and Legal Services Act 1990.

54 Access to Justice Act 1999, John Sorabji & Robert Musgrove, *Litigation, cost, funding and the future*, in *The Civil Procedure Rules Ten Years On* (ed Dwyer) (OUP 2009); John Peysner (n 49).

the growth of a further form of private litigation funding: third party litigation funding. This was originally intended to come into force as a complementary measure to the expansion of CFAs in 1999, ie the removal of legal aid was to be matched by the introduction a new, and previously unlawful, form of private litigation funding as well as the expansion of CFAs. Hence there would be greater competition in the consumer market place for funding. The provision authorising the use of third party funding was not however brought into force. There is, as far as can be seen, no publicly available rationale for this.

The absence of statutory authorisation for the introduction of third party funding was not however the end of the story.[55] In 2002, the Court of Appeal endorsed, at common law, the use of third party funding. It did so on the basis that not all such funding arrangements would be void on public policy grounds.[56] This approach was endorsed two years later, again by the Court of Appeal. The endorsement was predicated on such funding acting as a replacement of legal aid, ie on the basis that it could secure access to the courts for those who were impecunious. As Lord Phillips MR put it,

> Public policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure those who are involved in litigation have the benefit of legal representation.[57]

Public policy had effected this shift, and had done so without reference to the unimplemented statutory power to regulate third party funding, due to a gap left by the withdrawal of legal aid. The courts were, in essence, authorising the use of a further form of private legal funding to make up a short fall in cover resulting from the 1999 Act reforms. In doing so they unwittingly helped entrench the shift from public to private. The logical next step in the progression, as yet untaken, would be – in the light of the growth of third party funding to a sufficient level – for the state to step back from the provision of civil legal aid, such that it would only be available for public interest cases; a point made by Kenneth Clarke MP, a former Lord Chancellor, when he suggested that legal aid should not generally be available, but rather should be reserved for cases that raise a 'public

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55 For a discussion see, Rachel Mulheron & Peter Cashman, *Third-Party Funding of Litigation: A Changing Landscape* (2008) 27 CJQ 312.

56 *R (Factortame) v Secretary of State for Transport (No 8)* [2003] QB 381 at 400.

57 *Gulf Azov Shipping Co Ltd v Idisi* [2004] EWCA Civ 92 at [54]. And see, *Arkin v Borchard Lines Ltd* [2005] 1 WLR 3055.

interest'.[58] In other words, legal aid should not be available for proceedings, the vast majority of which simply confer private benefits. That final step has not been taken.[59] The underpinning to justify it however remains in place, albeit that must now be considered in the light of the UKSC's decision in *Unison* and its rejection of the consumer service philosophy of civil justice.

4. *The promotion of ADR*

The third strand to the philosophical shift away from the idea that the civil justice system is a public good has been the promotion of alternative dispute resolution (ADR) by government and the judiciary; a development which has been cogently and forcefully analysed and criticised by Genn.[60]

The starting point for here was the Heilbron & Hodge Report on English civil justice; issued in 1993. It suggested that, rather than the civil process seeking to secure trial and judgment, it ought to primarily promote the settlement of disputes. Settlement could properly be achieved either through the court process (trial and judgment) or 'alternative means of dispute resolution'.[61] The rationale for this was entirely pragmatic: most litigants simply wanted to resolve their disputes and the use of ADR was an effective, cheaper and quicker, means to do that. This view was accepted and endorsed by Lord Woolf in the Access to Justice Review. Its reforms, which culminated in the introduction of the Civil Procedure Rules in 1999, were predicated on the idea that 'the philosophy of litigation should be primarily to encourage early settlement of disputes'.[62] This shift formed part of a wider philosophical movement in English civil procedure, one which by giving greater weight to proportionality as a fundamental procedural principle reduced the commitment to the delivery of substantive justice in individual proceedings in favour of an approach that gave greater

58 In this he echoed Middleton, see Peter Middleton (n 30) at 10.

59 Clarke K, MP cited by Monidipa Fouzder, *Clarke proposes 'public interest' hurdle for legal aid*, Law Gazette (31 March 2015) <https://www.lawgazette.co.uk/law/clarke-proposes-public-interest-hurdle-for-legal-aid/5048014.article>.

60 Hazel Genn, *Judging Civil Justice* (Cambridge 2010).

61 Hilary Heilbron & Henry Hodge, *Civil Justice on Trial – A Case for Change* (1993) Joint report of The Bar Council and Law Society, at 6 'philosophy of litigation should be primarily to encourage settlement of disputes whether through the court process or by alternative means of dispute resolution'.

62 Harry Woolf (n 13) at 5.

weight to distributive justice. Post-1999 access to justice was to be rationed for individual claims, so that no more than a proportionate share of the individual litigants' resources and the court's resources were to be expended on specific claims. In this way, the civil justice system was to secure equitable access to its scarce time and resources across all potential litigants.[63] The shift towards the promotion of settlement via ADR was understood to be part of that wider philosophical shift.

While ADR was to be promoted under the CPR and its new guiding philosophy it was not, however, to be understood to be either the primary means of dispute resolution in the sense that its promotion should stand as a fetter to access to trial and judgment. It was to be promoted both as a means of promoting both the public good, in that it would help conserve court resources for those disputes that truly needed to call on them,[64] while also reducing the cost to society caused by litigation.[65] It was equally a means to promote private benefits to litigants, in terms of cost, time and quality of resolution. [66] It was not however despite this to act as a barrier to trial and judgment. It was not to be made compulsory, nor treated as if it was equal to trial and judgment. Its promotion was not to undermine the public good inherent in access to trial and judgment.[67] ADR was thus not to be viewed as equivalent to dispute resolution through the courts, even if it was to be promoted as the primary means of dispute resolution.

The judiciary may have adopted this approach, and in doing so maintained a conceptual distinction between judgment and consensual, ADR-based dispute resolution,[68] but that must be seen in the wider context of government promotion of ADR. First, as Genn notes, from 2001 the government department responsible for the civil justice system, the Department of Constitutional Affairs now known as the Ministry of Justice, pursued 'an explicit strategy', the aim of which was to reduce the number of

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63 For a detailed account see, John Sorabji, *English Civil Justice and Woolf and Jackson*, (CUP 2014); Lord Dyson MR, *The application of the amendments to the Civil Procedure Rules*, (2014) 33 C.J.Q. 124.

64 Harry Woolf (n 13) at 136.

65 *D v NSPCC* [1987] AC 171, 232, settlement was 'very much in the interest of society'. It was – and is – because lawsuits are 'wasteful of human and material resources . . . [and because] litigation is wasteful and disruptive, society benefits if disputes can be settled out of court . . .'

66 *Cowl* v *Plymouth City Council* [2001] EWCA Civ 1935, [2002] WLR 803 at [25].

67 Heilbron H & Hodge H (n 61) at 4 – 5. Woolf H (n 13) at 5.

68 Genn has, however, powerfully argued that the judiciary's promotion of ADR has helped, whether unwittingly or not, undermine the idea that the civil courts secure a public good, see Hazel Genn, *Judging Civil Justice*, ibid.

disputes resolved by the civil courts.[69] The aim, as she notes, was straightforward. It was to simply divert claims from the courts. The rationale was to reduce state funding of the civil justice system for the future and justify previous such reductions.[70] As she put it, the government's development and promotion of court-annexed mediation schemes, consideration of mandatory pre-action mediation[71]promotion of Ombudsman and arbitration schemes, reduction in court-funding, all pointed in one direction. As she argued, it was

> ... hard not to draw the conclusion that the main thrust of modern civil justice reform is about neither access nor justice. It is simply about diversion of disputants away from the courts. It is essentially about less law and the downgrading of civil justice.[72]

When considered in the context of the shift away from the view that civil courts deliver a public good, a point emphasised by Genn,[73] the downgrading is readily understandable. If the civil courts provide private benefits, which are equally available via ADR, there is no reason not to divert litigants from the courts to the less expensive, quicker alternative consumer service.

Secondly, the downgrading in status of adjudication in the civil courts has been compounded by the promotion of an equivalence in policy terms between court adjudication and settlement via ADR. That equivalence arose in respect of the provision of legal aid. As part of the process of limiting the availability of legal aid the, then, Legal Services Commission's[74] Guidance on civil legal aid from 2005 precluded its provision where there was a viable alternative to litigation. ADR was such a viable alternative. It was because, consistently with the broader approach taken to legal aid outlined above, it was understood that all forms of ADR had 'at least equal validity to court proceedings'.[75] It was not a question whether ADR was equivalent to court proceedings. That was understood to be the case. It

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69 Hazel Genn, *Judging Civil Justice*, 105.

70 Ibid, *passim*.

71 See Ministry of Justice, 'Solving disputes in the county courts', (March 2011) Consultation Paper CP6/2011 available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/238301/8045.pdf> accessed 26 October 2018.

72 Hazel Genn, *Judging Civil Justice,* 69.

73 Hazel Genn, *Judging Civil Justice,* 24ff.

74 The body responsible for legal aid. It was restructured as the Legal Aid Agency in 2013 via the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

75 Cited in Hazel Genn, 'What Is Civil Justice For? Reform, ADR, and Access to Justice', 24 Yale Journal of Law & the Humanities 1, Article 187 at 7.

went beyond that in policy terms: ADR was understood to arguably be of greater validity to litigants, ie consumers of dispute resolution services, than litigation. As a former Attorney-General is reported to have put it by Genn, the question was not, why choose ADR, but rather why was it thought that a dispute should be subject to litigation.[76]

5. Conclusion – Drawing the Strands Together

At no point since the earlier 1980s has any government or policy-maker suggested that the State need to provide civil courts or a properly functioning, accessible and open civil justice system. None has suggested that the civil courts be privatised. What can be seen, however, are three interconnected developments which, taken together, strand in contrast to the view of the civil courts and their constitutional function articulated by the UKSC in the *UNISON* case. First, the funding structure of the civil courts has shifted from one where they were primarily funded by the taxpayer with litigants providing what was in effect a use-based subsidy to one where they are to be paid for wholly by litigants. Secondly, State-responsibility for the provision of legal aid to enable impecunious citizens to access the civil courts, introduced as part of the Welfare State settlement of the late-1940s has been replaced by private forms of litigation funding. Thirdly, ADR has been promoted not simply as a valid alternative to litigation and as a means to promote a greater form of distributive justice within the civil courts. It has been promoted as being capable of delivering at least as good a form of resolution for litigants as adjudication. It is thus understood to be a better means to deliver benefits to litigants than court process.

Underpinning each of these developments, either explicitly or unwittingly, is the idea that the civil justice system is no more than a consumer service provided by the State, and one which moreover does no more than deliver private benefits to its consumers. That underpinning was finally exposed and rejected in unequivocal terms by the UKSC in 2017. The question remains though whether and to what extent its rejection of the philosophical underpinning of government policy going back over three decades will influence future policy-making. At the present juncture in England and Wales, with a very substantial court reform programme underway and the transformation of the civil courts by way of digitisation and digitalisation, the answer to that question is particularly pressing. It is

76 See Genn (2010) 123.

likely to determine the way in which the commitment to open, accessible civil courts is manifested in the first half of the 21st century.

German Courts Open Their Doors (a Little Bit) Wider to the Media

Joachim Jahn

1. Introduction

Until very recently any broadcasts, live or recorded, from German courtrooms were not allowed. Although cameras and microphones were not completely banned, they could not be used during the official part of a hearing.[1] This restriction was legally introduced in 1964. In practice, judges have since then allowed television teams to film only them, the prosecutors, and lawyers before, between, or after the hearings. There have been certain restrictions regarding depiction of the faces of criminal trial defendants.[2] When too many photographers and cameramen wish to attend, the respective chief judge orders the creation of pools so that similar media can send only one representative and have to share the material. Additionally, court spokespersons, the prosecution, defence counsel, and lawyers of plaintiffs quite often give statements in front of cameras and microphones when a hearing is in recess or is finished. An exception applies to the Federal Constitutional Court where broadcasting is already allowed.[3]

In October 2017 the German Federal Parliament adopted a law which modifies this regulation.[4] It is called (in the shorter form of the official title) 'Law concerning the Extension of the Media-Publicness in Court Pro-

1 Art 169 Courts Constitution Act (Gerichtsverfassungsgesetz, GVG).

2 Some chief judges enact those restrictions in a particular order. Besides civil courts have, based on law suites, decided that the press law does not allow to show every legally taken picture from defendants, and not even to report every sentence which has been said in public hearings.

3 Art 17a (1) Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz, BVerfGG).

4 This happened unanimously (Federal Parliament, plenary proceedings 18/240, 24636). Funnily enough, the speeches of the MPs in all three readings were not actually held but only submitted to the protocol due to the late hour (plenary proceedings 18/209, 20979 and 18/240, 24636).

ceedings'.[5] It alters mainly provisions of the Courts Constitution Act, the Federal Constitutional Court Act and the laws which regulate the hearings of other courts. The new law contains three changes.

The most controversially debated change is permitting the recording and broadcasting of the delivery of judgements 'on special occasions',[6] including even livestream video and audio. This affects the main ('highest') federal courts, ie the Federal Constitutional Court, the Federal Supreme Court (the highest penal and general civil law court), the Federal Labour Court, the Federal Administrative Court, the Federal Social Court and the Federal Tax Court.[7]

The second change allows a hearing to be broadcast into another room in the court building which is reserved for the accredited journalists.[8] This has come about in response to the concerns regarding the lack of space in the courtroom which have arisen in some high-profile trials, not only in the recent past. Examples include the trial against alleged members of, or accessories to, a right wing terrorist group[9]; or the case against a prominent football-manager for fiscal evasion.[10] Though not previously explicitly prohibited by law, judges did not encourage this practice.[11] However, it is now explicitly allowed by an amendment to the Courts Constitution Act (Arti-

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5 Abbreviated as 'EMöGG'; Federal Law Gazette 2017, part 1, 3546–48.

6 Art 169(3) of the Courts Constitution Act (GVG).

7 Originally it had been considered to be confined to the opening of criminal cases (draft law – reasoning of the Federal Government, Federal Parliament document 18/10144, 17). Now it applies to all the main federal courts (20–21). Available at <*dip21.bundestag.de/dip21/btd/18/101/1810144.pdf*>.

8 For the controversy in the legal literature about the former legal situation see: Draft law – reasoning of the Federal Government, Federal Parliament document 18/10144 (n 7) 11, 13.

9 The *NSU-case*: For the debate about the lack of space for reporters in the court see <http://www.spiegel.de/panorama/justiz/nsu-prozess-oberlandesgericht-muenchen-a-894375.html> accessed 23 October 2018. This even led to a decision of the Federal Constitutional Court: BVerfG, Beschluss der 3. Kammer des Ersten Senats vom 12. April 2013 - 1 BvR 990/13 - Rn. (1-28) Available at <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2013/04/rk20130412_1bvr099013.html> accessed 23 October 2018. Additional capacity-shortage resulted from the large number of lawyers representing relatives of the murder victims as accessory prosecution (art 395 StPO (Code of Criminal Procedure)).

10 Joachim Jahn, 'Gericht: Hoeneß war getrieben von Angst, The case against Ulrich Hoeneß', *Frankfurter Allgemeine Zeitung* (Frankfurt, am Main31 October 2014) 1, 21.

11 For the controversy in the legal literature about the former legal situation see: Draft law – reasoning of the Federal Government, Federal Parliament document 18/10144 (n 7) 11, 13.

cle 169(1)). Courts have frequently even rented a hall in a public building to provide enough space for the audience: this was especially difficult in terror-trials due to safety concerns.

The third change permits audio-documentation of prospective trials for scientific and historical reasons (Article 169(2)). Here the law-makers have thought again of the *NSU-case*. But there was an even more eminent trial — the (first) *Auschwitz-Process* in Frankfurt/Main in 1963–1965 — which (initially under the penultimate version of the Courts Constitution Act) was recorded for internal purposes and has until now been widely observed.[12]

2. *New Rules*

All the parliamentary political parties agreed that changes in media technologies and user behaviour in recent decades prompted a moderate change of the law.[13] Indeed, in a democracy courts can only gain trust and acceptance when citizens can understand the reasoning for the decisions of the courts. As citizens cannot regularly attend hearings (though hearings are generally public)[14] they have to follow reports in the press, on television, radio and increasingly online. This indirect publicity should serve to strengthen the public confidence through appreciation. This is even more so since interested parties, including members of the Bar and their clients, appoint 'Litigation PR' experts in order to serve their own interests and try to abuse the public opinion.[15]

On the one hand, it is undisputed that individuals can invoke the right to freedom of information and the media can rely on freedom of the

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12 Heinz Düx, 'Der Auschwitzprozess in Frankfurt/Main (2013) Die Rosenburg - 2. Symposium - Die Veranwortung von Juristen im Aufarbeitungsprozess 41–55. Available at <https://www.bmjv.de/SharedDocs/Publikationen/DE/Rosenburg_Symposium_2.html> 41–55, accessed 23 October 2018.

13 For the first stage of this reform-debate see profoundly Ana Koprivica, 'Revisiting the Principle of Public Hearings in the Light of the Ongoing Reform in Germany: Much Ado about Nothing?', in Selena Clavora/Thomas Garber (eds), *Grundsätze des Zivilverfahrensrechts auf dem Prüfstand: 5. Österreichische Assistententagung zum Zivil- und Zivilverfahrensrecht der Karl-Franzens-Universität Graz,* (NWV 2017) 73–89.

14 For exceptions see paras 170–177 of the Courts Constitution Act.

15 Joachim Jahn, 'Zwischen Erpressung und Dienst an der Gerechtigkeit', in Volker Boehme-Neßler (ed), *Die Öffentlichkeit als Richter? Litigation-PR als neue Methode der Rechtsfindung* (Nomos 2009) 11–19.

press.[16] Furthermore, every person has, in his or her own case, the right to a public trial.[17] Bearing the significance of these rights and freedoms in mind, legislators in some countries referred to legal changes for opening the doors to the media, eg in the UK.[18]

On the other hand, under the rule of law the personality rights of defendants have to be protected, as well those of witnesses (especially those who are victims of the alleged wrong).[19] Therefore everybody has the right to a fair trial.[20] The impact of television broadcasts may cause even greater harm than articles in the printed press because they may seem more credible and leave a stronger impression. Furthermore the presence of cameras may influence the behaviour of witnesses and so impair the truth-finding process. Thus, there have to be certain restrictions on any coverage in electronic media. The lawmakers have tried to balance those conflicting interests with quite a moderate reform. The government has announced that it will evaluate the reform after five years.[21]

2.1. Public Broadcasting

The main federal courts may permit the recording and broadcasting of the pronouncements of judgements 'on special occasions'.[22] This includes video footage and audio-recordings including livestream. However, this is

16 Both laid down in art 5(1) of the German Constitution as well as in art 10 ECHR and art 11 CFR; though not for sheer sensationalism.

17 Art 6(1) ECHR and art 47(2) CFR.

18 See 'Interim report of a common work group on the planned reform with representatives of the federal government and those of the 16 states (appointed by the regular conference of the justice ministers), 12–13 <http://www.bundesgerichtshof.de/SharedDocs/Downloads/DE/Bibliothek/Gesetzesmaterialien/18_wp/Medienoeff_Gerichtsverf/zwischenbericht.pdf?__blob=publicationFile>. Cf Ana Koprivica, 'Revisiting the Principle of Public Hearings in the Light of the Ongoing Reform in Germany: Much Ado about Nothing?', in Selena Clavora/Thomas Garber (eds), *Grundsätze des Zivilverfahrensrechts auf dem Prüfstand: 5. Österreichische Assistententagung zum Zivil- und Zivilverfahrensrecht der Karl-Franzens-Universität Graz* (NWV 2017), 85–87.

19 Laid down in art 2(1) in combination with art 1(1) of the German Constitution as well as (partially) in art 8 ECHR and art 7 CFR.

20 Art 20(3) of the German Constitution; art 6 ECHR and arts 47–48 CFR.

21 Draft law – reasoning of the Federal Government, Federal Parliament document 18/10144 (n 7) 26.

22 Art 169(3) of the Courts Constitution Act.

thought to be an exception for particular cases.[23] It is at the court's discretion to allow filming and broadcasting. Nevertheless, this does not mean a licence to arbitrariness: There are certain criteria the lawmakers have considered.[24] The Federal Constitutional Court has already, under the previous law, made several decisions about media access to a trial and accordingly drafted some strict guidelines.[25] Moreover, in the future it may check if a federal court has correctly denied television crew admittance.

In any case, the reform is quite conservative. The possibility to broadcast refers exclusively to the announcement of a verdict and its reasoning, not to the prior discussions during hearings – not even the pleadings. It is also restricted to the main federal courts because they have to decide about fundamental questions which reach much further than the immediate case. Therefore, an exceptional need exists here to explain the verdicts to a broader public; quite often they affect widely controversial topics, for instance those of criminal or family law,[26] or the interpretation of recent law reforms.[27]

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23 The government expects in total 50 such cases per year: Draft law – reasoning of the Federal Government, Federal Parliament document 18/10144 (n 7) 25.

24 Draft law – reasoning of the Federal Government, Federal Parliament document 18/10144 (n 7) 29–30.

25 See the above mentioned *NSU* case, BVerfG, Beschluss der 3. Kammer des Ersten Senats (12 April 2013) 1 BvR 990/13 - Rn. (1-28), available at: <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2013/04/rk20130412_1bvr099013.html>, the *Honecker* case, BVerfG, Beschluss des Ersten Senats (14 July 1994) 1 BvR 1595/92 - Rn. (1-51), <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/1994/07/rs19940714_1bvr159592.html> and the *n-tv* case, BVerfG, Urteil des Ersten Senats (24 January 2001) 1 BvR 2623/95 - Rn. (1-110), <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2001/01/rs20010124_1bvr262395.html> and the '*n-tv-case*' <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2001/01/rs20010124_1bvr262395.html> all accessed 23 October 2018.

26 Recent examples are the questions: if an illegal car-race with deadly consequences may be condemned as murder; how to deal with the 'third gender' and the homosexual marriages; and how the traditional civil laws are to be attributed to online sales.

27 So even more than ten years after the legendary 'Hartz-reforms' of the social laws the Federal Social Court has to deal with questions about details of these laws for the support of unemployed people.

2.2. Press Rooms

Due to the lack of space for reporters in courtrooms commonly occurring in prominent trials, such trials may from now on be broadcast into another room,[28] with entry restricted to journalists. Only audio may be relayed. This, of course, does not allow reporters to see everything that happens in the hearing, eg the look, posture and gestures of participants. The experience from the Federal Constitutional Court where this has already been in practice for some time shows that even experienced correspondents sometimes have difficulties to correctly assign a disembodied voice to the respective speaker.[29] The original audio may not be recorded or broadcast by the media.

This expansion of the public beyond that which is physically present does not harm the dignity of the defendants and other participants in the trial. Also unfounded are misgivings that judges could lose control over proceedings this way; as is the practice at the Federal Constitutional Court, a judicial officer will usually be present to control what happens in the separate room. Additionally, the court may order an accreditation procedure for any reporters. In reality, larger problems usually arise with the 'ordinary' audience: sometimes people exclaim or applaud, let their mobile phone ring or post messages on the internet for instance via Twitter, in blogs or on other websites.[30]

2.3. Archiving

The lawmakers have allowed the complete[31] audio-documentation of trials if they are of 'outstanding contemporary historical importance for the Federal Republic of Germany'.[32] The government expects this to happen only

28 The government expects about 30 cases each year fitting for the new regulation: Draft law – reasoning of the Federal Government, Federal Parliament document 18/10144 (n 7) 3.

29 Thomas Hoeren, 'Medienöffentlichkeit im Gericht – Die Änderungen des GVG' (2017) Neue Juristische Wochenschrift 3339, 3340 deplores the loss of eye-contact; he expects an alienated and unauthentic form of public.

30 Such practice is precarious because witnesses may not listen to the hearing before giving their own testimony (art 243(2) of the Code of Criminal Procedure; art 394(1) of the Code of Civil Procedure).

31 Although the court may order exceptions for parts of the hearing.

32 Art 169(2) of the Courts Constitution Act.

once every five years.[33] In contrast to the original draft which also wanted to include videos,[34] this option is restricted to sound recordings. Despite being a much-cited example of the reasoning behind the reform, this did not apply to the murder trial concerning the right-wing terrorist-organisation 'NSU', which was ongoing when the law was enacted in March 2018 as it had started (long) before. Future recordings may only be transferred to state archives, where the right to access is strictly regulated by law with a focus on future generations.[35] They may not be used in other law suits nor by higher courts in the same process.

3. Conclusion

In all three aspects the legislator has chosen quite a moderate and cautious approach to opening the judiciary to the media and thus to citizens. It was a compromise to minimize objections from leading judges. There should be no fear of show-trials. The call for a reform came, for instance, from a Karlsruhe-based public television journalist who has – as well as a national newspaper colleague of his – been heard by the judiciary committee of the parliament.[36]

Nevertheless, the effect of the new possibility to broadcast decisions of federal courts will probably be small: Even the public service broadcasters nowadays (though financed compulsory by nearly all citizens in order to provide a quality programming) allow very little space and time for verbal statements; they focus on viewing statistics and the resulting ad revenue and expect their audience to have a short attention span. But three or four sentences from a chief judge in a news broadcast convey no additional content to that which the news announcer has to say – it is no more than yet another form of entertainment to make the TV report more watchable.

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33 Draft law – reasoning of the Federal Government, Federal Parliament document 18/10144 (n 7) 3, 24.

34 Draft law – reasoning of the Federal Government, Bundesrat document 492/16,26; but the judiciary committee of the parliament voted against that (Federal Parliament document 18/12591, 5). The documents available at < https://www.bundesrat.de/drs.html?id=492-16 > and <dipbt.bundestag.de/doc/btd/18/125/1812591.pdf> accessed 23 October 2018.

35 The second (federal) chamber of the Parliament ('Bundesrat') had asked for even stronger and especially uniform restrictions (draft law – reasoning of the Federal Government, Federal Parliament document 18/10144 (n 7) 36).

36 Federal Parliament document 18/12591 (n 34) 4.

On the other hand, there are several disadvantages.[37] Presidents of federal courts have told the author personally that in some of the cases which are broadcast they will in future postpone the delivery of the judgement in order to better prepare.[38] That means that all reporters (including press) will have to attend the court once more and then tell their viewers, listeners or readers the same story again – but this time with the 'ending'. This is also a burden for the parties involved in the respective lawsuit who await the judgement. There may also be damage to the reputation of the judiciary when it is mocked in satire-programs or when a citation is distorted by means of cutting out sentences and presenting them out of their context.

There were better alternatives to this reform. To prevent manipulative camera-angles, for example, some international courts provide the footage from their own cameras of whole hearings and stream them on the internet.[39] Some measures against scandalising, falsification and mockery were also discussed in the UK concerning the Crime and Courts Act 2013.[40]

Outright support is, however, appropriate for the extension of the working conditions for reporters by broadcasting (at least) audio into another room in the court building. By appropriate interpretation of the law this should have already been possible before the amendment. But, the judges in the lower court who are always in fear of their decisions being reversed by higher instances may have thought 'better be safe than sorry'.

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37 Sceptical also Hoeren (n 29) 3339-3341, who warns of a 'reduction and flattening of the judiciary' (translation by the author). Thomas Hoeren; 'Medienöffentlichkeit im Gericht – die Änderungen des GVG(2017) 46 Neue Juristische Wochenschrift, 3339.

38 Chief judges there are already being trained by PR experts (at the cost of the tax payers) on how to act in front of a camera. For the controversy see also Frank Bräutigam/Joachim Jahn, 'Die Urteilsverkündung als Fernsehereignis?' (2015) 11 Deutsche Richterzeitung (DRiZ) 378-79.

39 So eg the European Court of Human Rights (ECtHR): <https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=3692507_28032018&language=en&c=&py=2018> accessed 23 October 2018.

40 Interim report of a common working group on the planned reform with representatives of the federal government and those of the 16 states, 12, available at <http://www.bundesgerichtshof.de/SharedDocs/Downloads/DE/Bibliothek/Gesetzesmaterialien/18_wp/Medienoeff_Gerichtsverf/zwischenbericht.pdf?__blob=publicationFile> accessed 23 October 2018.

Epilogue: Past and Looming Challenges to Open Justice

Michal Bobek[*]

This volume has explored a remarkable range of issues. Judging from the number of citations of Bentham, Beccaria, Locke, or Kant, at least some of the themes are classical, not to say ancient. Principled reasons as to why justice must be administered in public, and why it should be transparent and accessible, are as immutable and persuasive as centuries ago, when they were still on paper rather than applied in practice. The need to explain those principles over and over again to populists of all sorts mushrooming across Europe exists. So does the imperative to staunchly defend them against those with illiberal tendencies. However, the importance of those values is not being really questioned.

The common theme of most contributions in this volume is however slightly different. It boils down to one key question: how are those classical principles and values to be applied in a changing technological environment? Are they to be adapted to the new technologies, changing just the medium, with the content remaining the same? Or do the new media represent such a technological leap that they will start changing, gradually or even suddenly, those principles themselves?

As noted by Jean-Claude Wiwinius in his contribution to this volume, until not so long ago, judicial transparency meant allowing anybody to freely enter the courtroom, observe court proceedings and hear the court's decisions. However, in view of the rise of new (ICT) technologies, now it presumably means more.

But what exactly is 'more'? That is indeed the transversal issue in this volume. One cannot give full credit to and reflect on all the richness of thought contained in this volume in an epilogue. Instead I offer a few personal reflections on six of the topics discussed, beginning by (1) the need to identify the exact aim and to select the proper means to enhance those values in all discussions about judicial transparency and openness;[1] (2) applying those considerations to the issue of streaming court hearings; (3)

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* All opinions expressed are strictly personal to the author.

1 I shall employ these notions similarly to the definitions provided by Judith Resnik in her chapter, reflected also in the introduction to this volume by

external communication of a court, in particular the perennial topic of communication between the courts and the press; (4) as well as to greater calls for transparency in the process of selecting judges to sit in higher courts, national as well as European. Finally, I will (5) briefly address issues of privatisation of the judicial process, before (6) concluding on the challenges that protection of personal data poses to the idea of open and transparent justice.

1. Yes, we can. But should we?

In discussions concerning judicial transparency, especially in the political discourse within some Member States, a rather simplistic equation is sometimes devised. *Proposition one*: we all want more transparency, because it is good. *Proposition two*: now that data sharing and remote access are technically possible and at low cost, we have the technical means to be properly transparent. *Conclusion*: let's be transparent, because we can.

The same argument may, however, occasionally be heard in various academic fora. There the political nature of the argument transforms into a rather abstract restatement of Bentham: let there be light, because where there is light, no evil can prosper.[2] Thus, maximum transparency becomes an inherent, intrinsic value. Any means technically available should be employed to enhance that value. With the ensuing debate typically unfolding at a very high level of abstraction, who would dare to say that they are not in favour of more transparency?[3]

In a number of ways, new ICT technologies are revolutionary. They indeed make it possible to have a truly transparent society, including the judiciary. Access to information, information sharing, and distribution, became not only possible at a large scale, but also quite inexpensive. Thus, it is indeed technically possible, for example, to share all the source information that a judge uses for her decision-making. In most jurisdictions, judicial case-files are becoming increasingly or fully digitalised. What is available on an intranet can be made accessible with relative ease through

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Burkhard Hess and Ana Koprivica Harvey: *transparency* as the narrower notion of seeing into activities, while *openness* is the broader concept, including not just transparency, but also issues of access, publicity, accountability and other elements.

2 Jeremy Bentham, 'Essay on Political Tactics, in *Works* II (1791)', in John Bowring (ed), *The Works of Jeremy Bentham*, *1838-1843* (Russell & Russell 1962) 314.

3 See also the opening of the contribution of Maciej Szpunar in this volume.

the internet. Hearings can be web-streamed, captured in a podcast, or shared in other formats. It appears that judicial deliberations can also be broadcast.[4] Thus, in a nutshell, every member of society can be put in the (virtual) shoes of a judge.

If one embraces the vision that transparency is an intrinsic goal in itself, to be pursued in any and every area of public activity, then the advent of new ICT technologies has enabled that goal. The answer to the question of why all that information ought to be publicly and freely accessible becomes an axiomatic restatement of the Obama campaign slogan: (because) 'Yes we can'.

Where such a sweeping vision is not embraced with regard to judicial activity, what is often lacking in the debate about the type and degree of judicial transparency is the identification of a concrete, specific aim to which such a transparency should lead. However, the clear articulation of that aim is crucial for a discussion about the means to reach that target.

Judicial transparency (or the 'principle of publicity' applied to judicial activity) can potentially serve a number of goals: public control of the judicial activity; fostering the independence and impartiality of courts; protection against arbitrary and secret trials; enhancing trust and democratic principles in society; as well as others.[5] However, each of these specific aims may require a nuanced type of transparency in terms of what should be disclosed and to what extent it should be disclosed. The situation that gave rise to the Court's decision in *Commission v Breyer*[6] might provide an illustration in that regard. That case concerned a request for access to pleadings submitted to the Court: who should grant such access and under what conditions? [7] The broader issue raised by that appeal was the scope of the post-Lisbon Article 15 TFEU, providing for the principle of openness, and its applicability to the Court of Justice of the European Union. While Article 15(1) TFEU states that all the institutions of the EU shall conduct their work as openly as possible, the third subparagraph of Article 15(3)

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4 See the contribution of Judith Resnik in this volume, 182, mentioning the example of the Brazilian Supreme Court, where since 2002 the deliberations of the plenary sessions of the Supreme Court have been televised.

5 See the contribution of Katrin Gierhake in this volume, 106-107, identifying four such aims. See also my Opinion in *Commission v Breyer* (C-213/15 P, EU:C:2016:994, points 93 to 104).

6 CJEU, Judgment of 18 July 2017, *Commission v Breyer* (C-213/15 P, EU:C:2017:563).

7 See, already, CJEU judgment of 21 September 2010, *Sweden and API* v *Commission* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541) and the Opinion of Advocate General Poiares Maduro (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2009:592).

TFEU limits the access to documents foreseen by that provision only to situations when the Court is exercising administrative tasks.

At that level of abstraction, no one would contest that transparency is good, including with regard to access to documents. However, what is the purpose of judicial transparency in such a context? If the goal is *public control* of the judicial function, then maximum access would be called for, in fact to both administrative as well as judicial documents of the Court. There would be no reason to exclude judicial documents, including those pertaining to the deliberations. After all, all that judicial activity is done for the people and in the name of the people, so why should the people not see it all? If the goal is *prevention of secret trials*, then access only to documents pertaining to the public side of the procedure, the public hearings and their outcome in the form of the judgment, would be entirely sufficient. If the goal is informing the public and in particular practitioners about how the judiciary operates and fostering *better understanding* of the judicial system, then only certain types of judicial documents should be disclosed, those that can realistically contribute to that goal. The most complex aim is one of *enhancing trust* in an institution. To state in general that greater transparency is always conducive to promoting public confidence and greater trust in an institution is rather a bold statement. Whether or not the aphorism about it being better not to know how laws and sausages are made can indeed be attributed to Bismarck[8] does not deprive that statement of a great degree of wisdom. If conceived of incorrectly, in particular when overreaching in terms of disclosure, greater transparency may not lead to enhancing the confidence of the public, but rather in the opposite direction.

In sum, the ICT technical revolution is certainly a great opportunity to enhance, where appropriate, judicial transparency and overall openness. However, such steps should be preceded by clear and careful articulation of the precise type and degree of transparency desired for that particular type of activity and the choice of corresponding means for achieving it.

8 As did Antonin Scalia in his opening to *Community Nutrition Institute v Block* 749 F 2nd 50 (1984), at that time sitting as judge in the United States Court of Appeals, District of Columbia Circuit. The author of that quote, however, appears to be disputed.

2. *Web-stream, podcast, and broadcasting the courtroom on TV*

The discussion of the appropriateness of 'bringing the courtroom to the world' by either streaming hearings in real time or recording them and then making them accessible online provides another example of the same theme. Of course, it is now technically possible to do both. But would it be a good idea?

The tune struck by all the contributions in this volume touching upon that idea is a cautious one. For the purposes of discussion, it is useful to distinguish two types of recording of hearings at the outset, as Robert Magnus does in his contribution: the one for 'internal use' only and the one for 'external use'.

Recording for *internal use* means video or at least audio recording of a hearing which is then stored internally by the court, should the judges require them. That can include appellate judges, and, upon request, the parties to the case. In this way, that recording is effectively a part of the case file, being governed by the same principles.[9] The same would then also be applicable if third party access to a recording were to be requested: in a number of jurisdictions, the public (researchers, but also simply nosy individuals) may be allowed access to a judicial file in a case that has already been closed. That might also be under the condition that a certain period of time has lapsed. That type of recording of hearings does not appear to be contested by anyone. Moreover, as the contribution by Cécile Chainais suggests, the recent Spanish experience in this regard is rather positive: the judges' awareness that the hearing is fully on the record might increase the sense of accountability and quality of the hearing.

By contrast, the idea that a judicial hearing would be *immediately available to everyone,* in the sense of being streamed to the general public is met with much more caution in the contributions in this volume. The most frequently voiced concern is that both sides of the bar, lawyers as well the bench, would stop representing and judging, but would instead start acting for the cameras. The parties themselves, as well as witnesses and other participants in oral hearings might also simply talk, act and react differently if they know that everything they say will be immediately accessible online. [10]

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9 For an illustration of the same logic, see for example art 85 of the Rules of Procedure of the Court of Justice.

10 See in this regard the contributions of Maciej Szpunar, Robert Magnus, and Cécile Chainais.

At first glance, such suggestions might appear to be strange if one considers that court hearings are already public by default, so that any member of the public can walk in. In more high profile or interesting cases, members of the public and journalists are likely to be present. Thus, the argument 'if anybody else is watching, the actors start behaving differently' could already be used as an argument to exclude members of the public now already.

As strange as it may sound, on a psychological level, even with the public present in the courtroom, an exchange occurring in a courtroom that is not being recorded is still perceived to proceed in the 'intimacy' of a courtroom. There simply is a difference between a public hearing and a reality show. When the persons in the courtroom know that they are live on camera, or being recorded for a later broadcasting, they cease addressing the court. They start turning to the outside audience, whether or not that is done consciously.

Furthermore, continuing with the film metaphor, not many films are shot unscripted, in settings in which actors would be invited to improvise. However, assisting a court, in particular a higher court that delves deeper into points of law rather than elements of fact, requires exactly that type of improvisation. In a hearing before such a court, a lawyer will be often invited to go beyond her script, and while of course still defending the interests of her client, to engage with and to reply to a number of the questions posed by the court. Live-streaming hearings is likely to act as a disincentive to such joint intellectual expeditions, which in turn renders such a hearing somewhat futile: if the representatives of the parties would be unwilling to engage beyond their (pre-approved and re-polished) written submissions, with the fear that the general public is watching them improvise, and/or expose themselves to potential claims of negligence from their clients, why even have a hearing that just repeats the written pleadings? If that is the case, however, then the counterproductive effects of (not properly considered) open access[11] are very likely to materialise here: what started off as the implementation of a noble idea (greater transparency) might actually bear rotten fruit (the real act of judging being pushed outside of public control completely, because it ends up being based only on the written pleadings).

The contribution by Ruth Herz in this volume is unique. That is not only because it does not often occur, certainly not on this side of the

11 To borrow the term used by Cécile Chainais in her contribution in this volume, 64 et seq.

Atlantic, that a judge becomes a TV star. That contribution is special because it offers, instead of arguments that might be summarily dismissed as the 'normal' judicial excuses as to why something new should not be introduced, a personal account of something that comes as close as possible to a social experiment: after 20 years of judging in Köln, judge Herz was 'seconded' to *Jugendgericht* for four years, a reality TV youth court broadcast on RTL. For anyone doubting what TV cameras are likely to do to judicial proceedings, it will suffice to read her rather damning account on how profoundly the world of courts differs from the world of TV, and why these two worlds ought to be kept separate.

However, in line with what was suggested in the previous section, it should be made clear what exact aim in terms of type of transparency the means of streaming or televising court hearings should be pursuing. If the aim were to be *control*, then it could be suggested that in view of the problems it causes of a likely mutation of judicial hearings into a rather unhelpful reality show, that interference with the proper conduct of court hearings is simply too great and cannot be justified, also in view of the simple fact that control can already be exercised today. That aim is already achievable by means that are less damaging to the quality of exchanges in the courtroom.

Education of the public, raising democratic *awareness*, and thus seeking to generate trust in the judicial system, would represent different aims. What the eye cannot see becomes the object of conjecture and myth. Or rather, as far as judicial hearings go, becomes filled with an alternative TV reality, with almost everyone, and in my experience including law students, believing that normal judicial proceedings are similar to how they are portrayed in a local reality TV show or the latest episode of an American law TV series. It is a strange mixture of Schadenfreude and regret to see the disappointment of those young minds once they have attended their first real hearing, when they realise that, in the same way as the general public would certainly realize if they were allowed to see it on screen,[12] compared with hearings in some cases, it might be more exciting to watch paint dry.

However, precisely for such educational purposes, be it with regard to law students and trainee lawyers, and maybe also the general public, one could see the utility and virtue of putting at least a few selected recorded

12 'On screen' being an important qualification here, because of course the public is already allowed to see, but that would require getting up from the sofa and going, one afternoon, into the nearest courtroom. But apparently that price is too high to pay nowadays.

hearings of a given jurisdiction online.[13] That selection could be made by the president of a court or the presiding judge, and could perhaps be representative of a variety of types of cases which are dealt with by a court, and would occur on the condition that all the parties to the case (including their lawyers) and relevant persons (such as witnesses) consent to that in advance. However, the aim and thus the setup of such access would not be control, but education and rising awareness.

3. Courts and the press (never the twain shall meet?)

The calls for 'more visibility' and 'more communication' of courts vis-à-vis the public, in particular better cooperation with the media, are indeed a judicial evergreen. Such calls come in regular intervals, typically when a new minister of justice, or a new chief justice, or a president of a higher court has been appointed. They also come from outside of the judiciary. What is nonetheless new in this context is the availability of social and media technologies, that have for their consequence the democratisation of communication. That translates, also for courts, to potentially changed rules of engagement with the public. Similar to any other individual or a group, courts or judges can now also, should they wish to, bypass the traditional forms of press, and communicate with the public directly.

First, the evergreen: certainly within the Czech judiciary, calls for greater judicial engagement with the press, responsiveness and the willingness to (pro-actively) communicate with the public through the press have been a recurring theme. The pattern of the discussions also bears a remarkable similarity every time.

There is a range of approaches at the judicial side, as many as there are judicial personalities. On one end of the spectrum, there are the 'ultras', suggesting that a judge has no business talking to journalists. A judge and a court only communicate with the public through their judgments. On the more 'moderate' end, some judges are ready to engage with the press. They might even try to do so once or twice, going on record for the press, agreeing to be filmed, explaining their decision. Their statements might then be shortened and/or edited, and, if one looks at them through a judi-

13 In particular those that are physically rather from the majority of the public, ie supreme national, European, or international jurisdictions, with regard to which the vast majority of the public has much more difficulty with coming and seeing for themselves, in contrast to the situation captured in the preceding footnote.

cial lens, be extrapolated and oversimplified. The last nail in the proverbial coffin of goodwill tends to be seeing the article or reportage itself, in which basic terminology is mixed up beyond recognition in the process of 'simplification for the public', starting with the name of the court in which decision was rendered.

The reaction from journalists to (later) judicial reproaches about distorted reporting, a lack of understanding of basic terminology, and the inherent drive for sensationalism also tends to be remarkably similar: the audience/the readership wills it. The audience is not interested in the tedious details of the type of remedy sought, the novel legal arguments used by the court, and even less in the use of proper legal terminology. They are interested in crime and punishment, drama, the big money, ideally with a bit of sex and rock and roll thrown in as well. Whether insinuated or direct, the message is rather clear: what you do is boring and, if I am to report about it, I must make it interesting.

Never the twain shall meet? This is normally the breaking point, at which a judge often retreats and declares that in the future, she will only talk to journalists once the latter start understanding the basics of what they are supposed to be reporting about and stop the sensationalism and nonsense, and when journalists stop asking for statements from those boring and pedantic personages who are judges. Neither of the two sides appears to be ready to climb down from their positions. A court will then typically employ a press official. To the outside world, that shows how open and ready the court is to communicate with the public. But, on the inside, that person will often be rather seen as a buffer, so that judges can avoid the actual press.

Overcoming such divisions may not be easy, but it is certainly possible, with goodwill and patience on both sides. Judges have to accept the shortening of and simplification of their language and terminology, resulting in the occasional inaccuracy. A good beginner's exercise is to (co-)draft a press release, seeking to draft it in a way that even one's great aunt would understand. Such an occasional exercise of 'translation' out of the legalese domain might already be useful for one's own judicial work (who am I writing for if nobody is able to understand my normal 'prose'?).

Finally, direct communication of the courts with the public through various types of social media, blogging, podcasting or web-streaming and so on, is a phenomenon in need of further sociological research. A number of higher courts in Europe is now on Facebook and Twitter, has its own media service, newsletters, news alerts, and may even develop its own applications for case-law research and so on. Have those phenomena changed the modes of judicial communication at all? Or does the reach of

such direct communication remain within specialised communities as always, the same specialised lawyers that have already 'listened' before ('on paper'), and therefore not able to reach the general public directly? Thus, in spite of the advent of a direct means of communication for courts, do courts still need journalistic 'translation' of legalese in order to reach the general public?

So far, the role of social media and other means of direct digital communication, in particular in the blogosphere, appear to have been tested and judged in rather deontological than sociological terms. The internet and social media meant the true democratisation of publishing. For better or for worse, there are no more gatekeepers in terms of newspaper or journal editors. The issue that arose in that context, in particular in the form of disciplinary proceedings against judges in some Member States, required reconfirmation of the dividing line for judicial communications on the internet, as well as the line between what is private and what is not. Thus, for example, what about a judge who publicly comments on his blog, sometimes in a praiseworthy manner, but sometimes in less candid terms, on judgments that have been delivered by his court and those from other courts in the same Member State? What about a judge who has joined a Facebook group and is not shy of sharing with the whole Facebook community his or her stance on immigrants, suggesting that the fact of being part of that Facebook group and expressing him or herself in it is protected by the personal freedom of expression and political convictions?

4. Selection, interviews, and public hearings

Transparency in and of the judicial selection procedures is said to fuel the legitimacy of the court in question. For that reason, in his contribution, Thomas Giegerich calls for greater transparency in the selection procedures that must be followed for appointment to the German Bundesverfassungsgericht, the Court of Justice of the EU, and the European Court of Human Rights. The common suggested denominator is public hearings of the candidates: a public hearing before the Election Committee (of the Federal Diet) of candidates who have been shortlisted for the Bundesverfassungsgericht; a public hearing in the European Parliament, which should also be given the power to elect members of the Court of Justice; a public hearing of candidates in the Committee on the Election of Justices to the ECtHR.

I admit that I am intrigued by that proposition, for two reasons in particular. First, is the lack of public hearings really the vice of those procedures that needs to be fixed? With regard to the Bundesverfassungsgericht,

the author acknowledges himself that in spite of the distinct selection procedure that he thinks is in need of reform, the current procedure has 'so far ensured the selection of highly qualified judges with a distinct sense of duty beyond political partisanship', and that it has also produced 'a well-balanced bench whose decisions have been both well-reasoned and politically sound' and that 'the public confidence in the FCC has constantly been high in Germany, and also internationally the Court's reputation is excellent'.

I am certainly no expert on German constitutional law or politics. I might thus be missing an important piece of the puzzle. But the 'diagnosis' as presented would hardly warrant the conclusion that this particular 'patient' needs an urgent injection of public hearings in order to decrease the transparency gap and thereby gain some legitimacy.

Equally, the Article 255 Panel within the EU system has been established as a tool of inter-governmentalism. The Panel is an advisory body of the Council, which has been established for and derives its legitimacy from the technical expertise of its members, while the appointment procedures rest firmly in the hands of the Member States: first a Member State making a selection and then a collective appointment by all Member States. Suggesting that candidates should go, after having been nominated by their Member State and then confirmed for the position by the Article 255 Panel, to a hearing before the European Parliament, and that it ought to be the role of the Parliament to elect the members of the Court from three candidates (similarly to the ECtHR), is certainly possible. But it would be a completely different procedure and appointment model. I might only add that that model, certainly as it had been practiced in the Parliamentary Assembly of the Council of Europe with regard to the ECtHR, is in fact not said to be producing optimal results.[14]

Second, would such parliamentary public hearings of candidates, apparently televised or web-streamed, increase the transparency and thus legitimacy of the courts concerned? I personally have serious doubts about such a proposition. The (hardly positive) example that is likely to immediately jump to one's mind are the confirmation hearings before the Judiciary Committee of the U.S. Senate, with the most recent memory being the confirmation hearings for the (by now Associate Justice) Brett

14 For critical voices, see eg David Kosař, 'Selecting Strasbourg Judges: A Critique', in Michal Bobek (ed), *Selecting Europe's Judges* (OUP 2015) 120 or Norbert Paul Engel, 'Mehr Tranparenz für die Wahrung professionneller Qualität bei den Richter-Wahlen zum EGMR' (2012) *EuGRZ* 486.

Kavanaugh.[15] Giegerich dismisses such parallels, stating that one cannot 'uncritically extrapolate the politicised conditions in the U.S. that are related to the life tenure of the Justice and the fact that their confirmation requires no more than the simple majority in the Senate'.[16]

It is certainly true that the debate in the U.S. is defined by a different context. The atmosphere might indeed be polarised and stakes be high with regard to lifetime appointments to the Supreme Court. However, it is also true that lacking any tradition and experience with such hearings in Europe, one is naturally bound to look for inspiration to the arguably still nearest and familiar non-European system.

In any case, whether it would be done in a polarised and openly political way or not, the fact remains that political questions and a political agenda, likely to be raised by (whatever) political assembly participating in judicial selection, are simply different from those relating to judicial knowledge and expertise. However, in the European tradition, and on this account also including the English common law tradition, judges are supposed to be experts. Their legitimacy is an expert, knowledge based one. It is not entirely clear how much more, if anything at all, could be added to such type of legitimacy by a political interview being televised, with the later decision by a parliamentary body of whatever sort naturally being taken on political grounds. Could a judge wishing to maintain her reputation as an apolitical professional, even answer questions asked by a member of a parliament? Even if she could,[17] would the open display of political considerations then somehow enhance the legitimacy of judges? That

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15 But certainly not limited to those: it is often suggested that it was the confirmation hearing of Robert Bork in September 1987, televised and widely watched by the public, that changed the parameters of the entire process for good.

16 Thomas Giegerich in this volume, 171.

17 As little experience as there is with such type of hearings, the efforts to combine both types of selection (and legitimacy) within one and the same procedure appear to be problematic in practice. For example, in the Czech Republic, a person nominated as a member of the Court of Justice of the EU (judge or advocate general at the Court of Justice or a judge at the General Court) is obliged to, after being selected as a candidate by an (expert) selection panel and before that nomination being confirmed by the Government, take part in a hearing before the EU Select Committee of the Chamber of Deputies of the Czech Parliament. That hearing is not live-streamed, but minutes from that hearing are saved in a public record. In the past, the members of that committee expressed their disagreement or disappointment at the candidates refusing to answer the questions posed by the MPs, because the candidates considered them political. Such refusals even led a number of MPs to abstain from voting on the candidature with the stated reason that their endorsement can only be political, not an expert one, and since the

would hardly happen with regard to their expert legitimacy, so would a different, political legitimacy be generated? Could both types of legitimacy be built up together, allowing for synergies between them? Or would the original type of expert legitimacy be undermined, without being replaced by something else?

In my view, before making suggestions on the need for or utility of public hearings for judicial selections in any of the three systems, questions of this type would have to be analysed seriously. Otherwise, repetitive calls for greater transparency whatever the context or consequences are likely to be easily discarded as a type of an empty tantric chant.

5. Online justice, private justice, corporate justice

In terms of judicial institutions and procedures, privatisation and digitalisation appear to be the main buzzwords of the day. The extent to which online dispute settlement will be a matter only for some specialised communities, and the extent to which it will become a general feature of the future administration of justice can safely be left to future developments. By contrast, 'privatisation' of justice is said to be a phenomenon already present today, as a number of contributions, in particular that of Judith Resnik, would suggest. However, is the fact that certain types of disputes are taken out of the state-run system of public dispute settlement (the general court system) and are now on the docket of private courts, courts administered by non-state (public) bodies, alternative dispute resolution, and so on, that revolutionary?

First of all, the idea that all dispute settlement must be a state-run, public enterprise is in fact relatively new. For most of human history, the administration of justice had been remarkably diffuse and pluralist, with various actors and bodies participating in it, without making any ultimate claims for jurisdictional supremacy. It had first been the papal claim of authority in the 12th century[18] and, later on, the intolerant-of-parallel-systems modernist state and state authority from the 18th century onwards

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candidate is refusing to provide any answers to their political questions, there is nothing they could vote on (eg the statement of Mr Peksa, MP in the 21st meeting of the EU Select Committee on 12 December 2018 in the discussion on the nomination of Mr Jan Passer and Mrs Petra Škvařilová-Pelzl as judges of the General Court).

18 See Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press 1983) 94f.

that had monopolised 'state violence' and also a dispute settlement mechanism in the form of one, uniform and centralised system of public courts.[19] Seen in this light, partial (re)privatisation of justice is nothing new, but rather very, very old.

Second, apart from very state-centred visions, a number of actors within the judicial system, including the judges themselves, are unlikely to protest against such developments, in particular as far as specialised courts for certain specialised activities or communities are concerned, but also the channelling of certain types of disputes out of the judicial system to alternative dispute resolution or mediation. In the former type of cases, the judges themselves are likely to acknowledge that they lack the requisite expertise. In the latter type of cases, the common theme is one of unburdening the judicial system of masses of low value, often trivial cases.

There is, however, a clear limit to such 'outsourcing'.[20] On the one hand, the parties to any such dispute must, at one stage or another, have voluntarily accepted the jurisdiction of any such body. On the other hand, the state will retain some sort of residual control over the results of such a dispute settlement mechanism, often in the form of various types of extraordinary appeals or revisions, limited to ground of public policy, and/or the state indirectly controlling the content of such a decision at the stage of enforcement.

Furthermore, any such 'outsourcing' might have broader systemic consequences. In contrast to complaints which are often heard, I do not think that the case-law of the Court of Justice could be characterised as being 'hostile' to alternative dispute settlement or arbitration, certainly in so far as any such 'internal outsourcing' (i.e. within the Member State) is concerned. The Court has been indeed cautious with 'external outsourcing' of dispute settlements, either those between the Member States themselves or between the Member States and private parties, because of the imperative

19 On the mutation from the medieval (non-exclusive) perception of law and its sources into a modern (exclusive) legal system, see generally: Harold J Berman (n 18) 273ff, or André- Jean Arnaud, *Pour une pensée juridique européenne* (Presses universitaires de France 1991) 46ff.

20 With the case-law perhaps being most articulate (and for obvious reasons most protective) in the field of consumer protection, with some types of 'outsourcing' in cases of consumer contracts as being in violation of rules on consumer protection. See eg judgment of 26 October 2006, *Mostaza Claro* (C-168/05, EU:C:2006:675).

of protecting the autonomy of EU law.[21] However, the Court has to my knowledge never objected to 'internal outsourcing' within a Member State, under the authority and the control of that state. Any such arrangements are clearly the prerogative of each Member State and their national procedural autonomy. The Court has rather simply observed that such internal delegation also has consequences, both horizontally for cooperation amongst the Member States,[22] as well as for the interaction of such bodies with the Court of Justice on preliminary rulings.[23]

In sum, privatisation of justice might not be, from a broader perspective, either entirely novel or, under certain conditions, an unwelcome development. What appears to be, however, the more challenging issue for the immediate future is perhaps the trend of turning companies into administrative authorities, referred to by Resnik as the phenomenon of 'corporation as courthouse'. The recent example of this phenomenon can be found in the area of data protection, in particular with regard to the implementation of the decision of the Court of Justice in the *Google Spain*.[24] Following that judgment, search engines engaged in data processing had to decide on requests for delisting or erasure. However, how they go about meeting that obligation, following what criteria they decide, what instructions they pass on to the (third party) webmasters who are affected, is all subject only to that company's self-reporting. Moreover, in contrast to the above outlined privatisation of justice, the data subject is likely to have never consented to subjecting her claim to the decision-making power of the data processor, including, if they exist, the company's own review procedures. Certainly, ultimately, any such a dispute is likely to arrive either before the national regulator, or before the national courts. However, the preliminary rounds (and apparently the vast totality of cases

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21 See in particular Opinions 1/09 (*Agreement creating a unified patent litigation system*) of 8 March 2011, EU:C:2011:123, and 2/13 (*Accession of the EU to the ECHR*) of 18 December 2014, EU:C:2014:2454, as well as judgment of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158).

22 Thus, a Member State can naturally empower, for example, notaries to carry out certain acts of civil law enforcement within that Member State. That does not, however, necessarily mean that their acts must be recognised by other Member States authorities in cases of horizontal cooperation in civil matters that presuppose the act of a court or tribunal of a Member State – see judgment of 9 March 2017, *Pula Parking* (C-551/15, EU:C:2017:193). For similar conclusions with regard to judicial cooperation in criminal matters, see judgment of 10 November 2016, *Poltorak* (C-452/16 PPU, EU:C:2016:858).

23 See, already, judgment of 23 March 1982, *Nordsee* (C-102/81, EU:C:1982:107).

24 Judgment of 13 May 2014, *Google Spain and Google* (C-131/12, EU:C:2014:317).

as far as numbers are concerned) end up before and within a company which is effectively a self-policing 'administrative authority' and sometimes even a 'court of first instance'.

6. *Data protection, anonymity, and open courts?*

The new technologies that have an impact on traditional principles relating to open justice can be roughly divided into three boxes. *First*, the medium or the way information is provided has changed, while the governing principles remain the same. For example, the issue of the medium through which information concerning judicial work is received, such as written submissions to a court, as discussed above in *Breyer v Commission*,[25] might fall into that category: whether an applicant eventually receives access to the pleadings on paper, or in an electronic format, is just a technical question of the how the information is delivered. The rules governing access are the same in both scenarios. *Second*, in some cases, the medium might gradually start changing the principle and approach itself. The already discussed video recording of hearings might fall into that category, certainly if recordings initially made only for internal use were gradually to start being made public, as mentioned by Chainais as possible in the future. *Third*, there might also be cases in which a new technology, or a new legal development, begins to change considerably the up to date principles. Anonymisation of judicial decisions in the name of the protection of personal data might be mentioned as a potential example in the third category.

In his already quoted contribution, Jean-Claude Wiwinius warns against the 'over-anonymisation' of judicial decisions. He suggests that the right balance must be struck between the protection of personal data, on the one hand and the publication of judgments, on the other. With a pinch of something that, if read between the lines, might be perceived as jealousy, he mentions having recently participated in the opening of the judicial year at the ECtHR where President Raimondi (of the ECtHR) and President Lenaerts (of the Court of Justice) were quoting the key judgments from their respective jurisdictions by the name of the parties. He points out the ease with which international courts might quickly quote their judgments in this way.

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25 CJEU, *Commission v Breyer* (n 6).

I know that feeling. Coming from the Czech judicial system, which shares the Germanic/Austrian heritage of judicial anonymity, we felt similar jealousy in early 2000, when deciding how to (re)structure the way judgments would be published, and looked at the practice of both European courts, as well as a number of national systems. In the past, Czech tradition dictated that all names be anonymised. In the title (header) of the judgment, for the purposes of publication in court reports,[26] a person would be anonymised by the adoption of her initials for the case. In the text of the judgment, the persons participating in judicial proceedings would also be anonymised, or preferably be referred to just by the 'generic function' they had within those proceedings: the applicant, the respondent, the accused, the joint party, and so on, without using their real names.

Such a style has deep roots: it can be found in the court reports from the Czechoslovak interwar period (1918 to 1938), but also, for example, in Austria.[27] In the Communist period, judicial 'anonymity' reached, for rather obvious reasons, new and rather surprising dimensions: not only were the name of parties and other persons participating in the proceedings anonymised, including legal persons, but some zealous anonymisers would also anonymise the names of judges participating in the decision, as well as redacting or deleting the facts of the case. Eventually, what was published in the official court reports would often be a truncated statement of 'what the law is supposed to be', decreed independently of and separated from any facts, context, and the details of a particular case.

In discussions after 1989, two types of arguments gained ground and led to the gradual de-anonymising of judgments: constitutional and pragmatic.[28] At the *constitutional* level, the reasons for a political push and value-driven departure from Communist judicial secrecy would be rather self-evident. Justice must not only be made in public, its outcomes must

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26 Naturally only after a full judgment, containing all the information, would be signed by the judge or chamber in question, publicly pronounced, and served on the parties.

27 Thanks to Alex (*Historische Rechts- und Gesetzestexte Online* at http://alex.onb.ac.at), a collection of the Austrian National Library, the court reports of the Imperial Court (*Reichsgericht*) between 1869 – 1918, as well as those of the Administrative Court (*Verwaltungsgerichtshof*) between 1876 – 1934 can be viewed online.

28 For a review of the discussions, see eg Ladislav Derka, Zdenek Kühn, 'Je anonymizace publikovaných soudních rozhodnutí vskutku nutná?' (2005) 14 *Jurisprudence* 21; or Zdenek Kühn, Hynek Baňouch, 'O publikaci a citaci judikatury aneb proč je někdy judikatura jako císařovy nové šaty' (2005) 13 *Právní rozhledy* 484.

also be made subject to full public review and scrutiny. Beyond that, however, it was also suggested that the basis for judicial legitimacy and effective judicial law-making in the individual case are the facts and the details of the individual case. The further a judicial decision departs from, hides, or disregards the facts and the circumstances of the case, the less legitimate it is as a judicial decision. At the level of supreme jurisdictions, judgments devoid of facts and details become decrees by quasi-legislative assemblies.[29]

The pragmatic reasons for de-anonymisation were of two types: technical and systemic. On the *technical* side, anonymisation of decisions is quite dull but labour-demanding work that yields meagre results and is prone to mistakes. Moreover, judicial hearings are by default public, where of course the names of the parties are fully disclosed, unless the identity of a party or a witness is specifically protected. In addition, under Article 96 (2) of the Czech Constitution, a judicial decision must always be pronounced publicly, even if the public had been, for whatever reason, excluded from part of or the whole hearing. The combination of these factors, together with the then incoming internet boom, meant in practical terms that the Czech courts were spending quite some money and human resources on becoming increasingly ridiculous. Not only were there entire lists of amusing anonymisations, which always served as a good starting joke at any legal dinner party, but even in those cases where it was not immediately obvious who was 'hiding' under those initials, it was normally a matter of few moments on the internet to find out the identity of the persons in question, if one wished to.

Finally, there were also pragmatic considerations relating to the *system* of case-law and work with it that called for a departure from anonymization, in particular at the supreme judicial level. Stated in a nutshell, numbers do not make precedents. Names and individual stories may, but a list of anonymous numbers never will. Without cases that are easy to refer to, normally by the name of the claimant, it is very difficult to have a sustained and reasonable judicial discourse about the case law. Jean-Claude Wiwinius already alluded to that by highlighting the ease of referring to

29 For the same reasons, the instrument of 'legal resolutions' or 'interpretative statements' issued by supreme jurisdictions, whereby (typically) a division of a supreme court or the plenary would provide binding interpretation of the law it chooses *outside* of any pending judicial proceedings before it, has been viewed with quite some caution or directly discontinued in a number of those systems. In English, see eg Zdenek Kühn, 'The Authoritarian Legal Culture at Work: The Passivity of Parties and the Interpretational Statements of Supreme Courts' (2006) 2 *Croatian Yearbook of European Law and Policy* 19.

and thus discussing the case-law of the ECtHR and the Court of Justice. By contrast, one realises rather quickly that it is virtually impossible to have a discussion in the courtroom, or with students or peers, on the delicacies of the approach that, for example, the (Czech) Supreme Administrative Court originally embraced in 9 Afs 407/2015-118, but then came 6 Afs 56/2016-98, to which 5 Afs 369/2016-225 added another condition, while of course the systemic consistency with 2 Ans 36/2014-66 ought to be maintained, with all of those naturally being referred to on the spot from the top of one's head.[30]

It was perhaps on this account that also the more sceptical and traditional judges started seeing that without names that enable ease of reference, the impact of their work is simply being constantly undermined. Without a reasonably easy and reliable reference system, few lawyers refer to individual cases in their submissions. Instead, there are vague references to 'established case law', with the need for a judicial response in decisions repeating the same content again, and again, and again. In addition, a precedent is a story. It is the accuracy, detail and the distinct elements of that story that not only make a case memorable, but also help convincing the reader and provide that case with the necessary legitimacy. Again, judicial legitimacy is case based. The inability to refer to and have a reasonably easy discourse about individual cases hinders those cases from becoming individual precedents.[31]

For such systemic reasons, but also seeing that on the more practical level, even if the entire world knew that Flaminio Costa was a lawyer from Milan who refused to pay an electricity invoice amounting to 1925 lira;[32] that Ian William Cowan was a UK national subject to violent assault at a metro station exit during a brief stay in Paris;[33] that Tanja Kreil was trained in electronics and applied for voluntary service in the German Bundeswehr

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30 In some of the legal systems of the Germanic legal family, the legal scholarship (or sometimes even the court itself) is then forced to give imaginary (or subject-matter descriptive) names to such cases, in order to have the possibility of at least some kind of referencing system. The discussion then becomes between 'Sugar Quota III' decision as opposed to 'Milk Quota IV (from 2011)', in the light of 'Sugar Quota V'.

31 After all, it is not without reason that those systems that recognise and accept the value of single precedent must have accordingly advanced reference systems for case-law that are easily identifiable and recognisable. For an (older but still remarkable) comparative study in this regard, see Neil MacCormick and Robert S Summers (eds), *Interpreting Precedents: A Comparative Study* (Aldershot 1997).

32 CJEU, Judgment of 15 July 1964, *Costa* (C-6/64, EU:C:1964:66).

33 CJEU, Judgment of 2 February 1989, *Cowan* (C-186/87, EU:C:1989:47).

but was rejected because of her sex;[34] or that Johannes Martinus Lemmens was caught drunk driving in Maastricht, but, when facing criminal charges for that offence, rather cleverly wondered whether his breath had been validly tested with breath-analysis apparatus that had 'not been notified to Brussels';[35] it does not appear (or it has certainly never come to light) that their personal lives were ruined because their name has been associated with a leading case. That is even more strongly the case with regard to the ECtHR case law, in which an even greater number of information provided could be classified as 'sensitive', ranging from the information that Frau Dorothea Vogt was a Communist (would be teacher) from Jever in Lower Saxony;[36] to the fact that Anthony Tyrer was birched at school when he was 15 years old;[37] or that Christine Goodwin was a post-operative male to female transsexual;[38] as well as so much other sensitive data regarding issues of religion, sexuality, race, health, and other deeply personal circumstances.

However, in all those cases, or sometimes even particularly in such cases, it is fair to assume that a number of those persons, be it before the European courts but also in similar leading cases in national supreme jurisdictions, would instead of seeking anonymity in fact protest if their name were to be removed from 'their' case. It is thus often not just the systemic requirements of the judicial function, but also its individual actors that categorically demand public justice and public satisfaction, or even wish to be publicly associated with certain cause.

Moreover, an additional factor is the level of a court in a judicial system or hierarchy. Certainly, all courts operate in the public interest. Equally, bringing an individual case will be in the private interest of the claimant. However, the equilibrium between those and other interests in an individual case is likely to change with the case´s progression within the judicial system. At the first instance level, the interest in litigation is predominantly private. At the appellate level, that private interest gets mixed with public interest in controlling and correcting individual decision. At the

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34 CJEU, Judgment of 11 January 2000, *Kreil* (C-285/98, EU:C:2000:2).

35 CJEU, Judgment of 16 June 1998, *Lemmens* (C-226/97, EU:C:1998:296).

36 ECtHR, *Vogt v Germany*, 26 September 1995 (CE:ECHR:1995:0926JUD001785191).

37 Including the fact that the birching raised, but did not cut, the applicant's skin and he was sore for about a week and a half afterwards – ECtHR, *Tyrer v the UK* of 25 April 1978 (CE:ECHR:1978:0425JUD00058567).

38 ECtHR, *Christine Goodwin v the UK*, 11 July 2002 (CE:ECHR:2002:0711JUD002895795).

level of supreme courts, however, the interest becomes predominantly public: to clarify, to unify, and to further develop the law, with, arguably, the private interests in the individual case retreating to the background.[39] This shifting balance should then also be reflected in the degree of appropriate anonymization: a first instance divorce decision is clearly a rather private matter, not necessarily to be publically known, and perhaps, unless there is a categorically formulated control requirement in a legal system, has not to be published. By contrast, a landmark case of a supreme jurisdiction on family law that will form the law for years to come is a very different matter.

All those and other considerations led the Czech supreme jurisdiction to gradual retreat from anonymization. For a person with such a background, it is indeed rather surprising to encounter not (dis)similar discussions some 20 years later at the European level, this time around in the context of the new General Data Protection Regulation (GDPR)[40] and/or the right to be (judicially) forgotten[41] that are said to impose anonymity of all natural persons in judicial proceedings.[42] Certainly, with the development of new ICT technologies, the emphases and balance might be changing over time. But also there, in my strictly personal view, I believe that the correct balance referred to by Jean-Claude Wiwinius still needs to be found. I wish to make three remarks in this regard.

First, judicial openness and transparency must remain the rule from which derogations might naturally be possible in individual cases. Such a possibility already exists in the European systems as well as on the national level. In cases where special interests so require,[43] the anonymity of a pri-

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39 Further see eg John A Jolowicz, 'The Role of Supreme Court at the National and International Level', in Pelayia Yessiou-Faltsi (ed), *The Role of Supreme Courts at the National and International Level: Reports for the Thessaloniki International Colloquium, 21-25 May 1997* (Sakkoulas Publications 1998).

40 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, 1).

41 CJEU, Judgment of 13 May 2014, *Google Spain and Google* (C-131/12, EU:C:2014:317).

42 See the press release of the Court of Justice of the EU of 29 June 2018, No 96/18, at https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-06/cp180096en.pdf.

43 Ranging from interests such as the protection of minors or other vulnerable persons and their identity to the protection of business secrets and professional reputation, with the protection of the latter legitimate interests naturally not limited to just natural persons, but legal persons as well.

vate party can and will be granted. However, unless judicial openness is to mean something rather different for the future, it is hardly possible for anonymity to become the rule and openness the exception. There is no *general* right to an *anonymous* trial, with the claimant stepping into the public agora effectively demanding private justice, hidden from public view and control. Ever since antiquity, reborn after the end of cabinet justice, Star Chamber(s), and other tried and dismissed visions of secretive justice,[44] the key condition and the source of judicial legitimacy has been the *default transparency* of judicial proceedings and their outcome.

Second, it still remains to be explored how precisely and to what extent the GDPR is applicable to judicial work and if so, what exactly it requires of courts when acting in their *judicial capacity*.

On the one hand, unless a judge is seen as a computer, it is doubtful how far judging an individual case and drafting an individual decision in that case is actually the 'processing of personal data wholly or partly by automated means' in the sense of Article 2 (1) GDPR. Of course, the judgment is likely to be typed up on a computer. But does that mean that anything done by an individual on a computer amounts to processing of personal data? Since any aspect of any activity today will, sooner or later, be connected to a computer, then everything in the human society is in effect processing of personal data by automated means.[45] Moreover, a judgment or information about parties will, sooner or later, become 'part of a filing

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44 For instance, in the practice of the Parlement de Paris in the 14th century, reasons for a decision had to be kept secret. They were seen as a part of the judicial deliberation process, which was to be kept confidential – see John P Dawson, *The Oracles of the Law* (The University of Michigan Law School 1968) 286–7. Generally see: Jacques Krynen, *L´État de justice France, XIIIe–XXe siècle: L'idéologie de la magistrature ancienne* (Gallimard 2009) 79ff. It was roughly from the end of the 18th century onwards that reasoning a judicial decision started being stated in full and in writing – see generally: Philippe Godding, 'Jurisprudence et motivation des sentence, du moyen âge à la fin du 18e siècle' in Chaïm Perelman and Paul Foriers (eds), *La motivation des décisions de justice* (Bruylant 1978); Tony Sauvel, 'Histoire du jugement motivé' (1955) 61 *Revue du droit public* 5.

45 It is fair to acknowledge that part of this problem of 'application overreach' of the personal data legislation is due to the rather expansive case-law of the Court, which early on effectively negated the exceptions provided in art 3 of the Directive 95/46. See in particular, judgment of 6 November 2003, *Lindqvist* (C-101/01, EU:C:2003:596, paras 37-48) and judgment of 20 May 2003, *Österreichischer Rundfunk and Others* (C-465/00, C-138/01 and C-139/01, EU:C:2003:294, para 41). By contrast, see the more cautious approach in the Opinion 4/2007 on the concept of personal data of 20 June 2007 of the Article 29 Data Protection Working Party (WP 136), 4-5.

system' in the sense of the same provision. But the inclusion of those data about the parties in a court's automated registry is simply a different operation than drafting a judgment.

It is thus necessary to be specific about what exact operation is supposed to be covered and why. Part of the problem in this regard is a somewhat static and party-centred vision of what constitutes personal data, and the ensuing sweeping vision of the notion of processing, not recognising that the processing of personal data is much more fragmented but dynamic notion. The key question is not 'who', but rather first 'what', and from that follows the question of 'who' for that specific type of operation. The notion of personal data and its processing ought to be operation focused and driven.[46]

On the other hand, and perhaps more importantly, even if (an element of or even all) the judicial activity of the courts were to be found to fall under the GDPR, any potential processing of personal data carried out for that purpose is clearly lawful, without the consent of the data subject needed, under either Article 6 (1) (c) or 6 (1) (e) GDPR. The same is even valid for the processing of sensitive data under Article 9 GDPR, with Article 9 (2) (f) GDPR explicitly excluding 'courts acting in their judicial capacity'. Finally, Article 55 (3) of the GDPR, read in the light of Recital 20, excludes the competence of data protection supervisory authorities to 'supervise processing operations of courts acting in their judicial capacity'.

Thus, even if the GDPR were said to be applicable to courts when acting in their judicial activity, the scope of any obligations arising thereunder appears to be notably 'light'. Any processing of 'normal' personal data as well as that of sensitive data in the course of judicial activity, including the publication of judgments which, on any reasonable construction, is part of the 'judicial activity' of a court, is *ex lege* lawful and permitted. That could hardly be any different: the essence of judging is solving individual disputes, in which personal data form the bedrock for reasoning, finding a solution, and the legitimacy of the judgment. Courts are not legislators and are not entitled to decree legislation in the abstract.

That of course does not deprive the courts, even when acting within their judicial activity, of the obligation to protect the privacy of individual parties in individual cases, in which the conditions of the case require such protection. However, it is necessary to stress again that any such protection can already be accommodated within the standing procedural rules of a

46 Critically on this point see my Opinion in *Fashion ID* (C-40/17, EU:C:2018:1039, points 71-110).

court, allowing for anonymity orders, non-disclosure of sensitive data or information, and a number of other measures justified *in individual cases*.

The 'right to be forgotten' does not lead to a different result. Suffice to recall that pronouncement becomes relevant only *with passage of time*, after which the even initially lawful processing of accurate data may become no longer necessary in the light of the purposes for which they were collected or processed. That is so in particular where they appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed.[47] Again, leaving aside the issue in how far such pronouncement could even be applicable to published case law that remains of ongoing relevance for quite some time, because its primary purpose is not to contain the information about the actors, but about the law, the 'right to be forgotten' after the appropriate passage of time could hardly be stretched to 'right to pretend the one was never there' or even 'right to ab initio anonymity'.

Third and final, since no generalised obligation of anonymisation of judicial decisions follows, from my point of view, from the GDPR, the varied judicial and constitutional traditions of the Member States are to be fully respected, even (or rather in particular) in a multi-layered judicial system based on cooperation. The rules on drafting style for judgments, including the (non-)anonymisation of parties and the referencing system for cases within each national system reflect deeper choices, values, and compromises, being of a much older date than any data protection rules on the European level. Moreover, in so far as it would indeed be applicable, even the GDPR allows for specific national measures adapting the application of its rules, thus allowing for the accommodation of such judicial diversity.[48]

The nature of the alternative, in which the efforts for a reasonable, in individual cases justified balance between open justice and transparency on the one hand, and privacy and the protection of the personal data, on the other, will be replaced by a Kafkian dystopia of NKs, Xs, Ys, XCs, LMs or LHs, with further additional factual elements likely to permit identification of the individual persons censored away from an individual decision, might only be underlined by the fact that if such standards were to be applied, Kafka's Process[49] would also be in need of anonymisation before it

47 Judgment of 13 May 2014, *Google Spain and Google* (C-131/12, EU:C:2014:317, para 93 and ff.).

48 See in particular arts 6 (2) and 6 (3) (b) GDPR.

49 Franz Kafka, *Der Prozess* (Fisher 1962).

could ever be published as a judicial decision. Most readers of that novel, which is often referred to as the embodiment of remote, inaccessible and incomprehensible justice, might only remember the main character: Josef K. However, it would appear that Josef himself was improperly anonymised, as Josef was his ('real' first) name and 'K.' was merely an abbreviation of his surname. Different initials should have been used in order to make sure that he cannot be identified indirectly.[50] Moreover, as far as correct anonymisation techniques were concerned, it clearly went further downhill from there: Mrs Grubach, watchman Franz, state prosecutor Hasterer, Ms Bürstner, Uncle Karl, and many others, have also all been improperly anonymised.

Leaving aside the issue of how and against whom those persons could bring a civil liability claim for damage caused by unlawful processing of their personal data, and the violation of their right to be (finally) forgotten, the rather perturbing concluding questions remains: how far down the personal data rabbit hole are we if Kafka's writings are now becoming an open, transparent novel, in need of 'proper' anonymisation?

50 See further on the necessary robustness of efficient anonymisation, Opinion 05/2014 on Anonymisation Techniques of 10 April 2014 of the Article 29 Data Protection Working Party (WP 216).

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Index

access to
– court, 17, 29, 63, 125, 181, 189, 209, 229, 241, 255, 256
– documents, 183-186, 280
– hearings, 20, 36, 59, 60, 61, 63, 65, 66, 72, 74, 77, 83, 85, 87
– justice, 18, 38, 48, 49, 97, 100, 125, 129, 132, 140, 194, 214, 218, 229, 237, 244, 253, 255, 256, 257, 258, 261, 263, 265

accessibility, 10, 29, 68, 83, 88, 134, 181, 208, 229, 256

accountability, 11, 15, 47, 59, 60, 70, 72, 73, 74, 77, 101, 127, 128, 129, 135, 136, 147, 171, 174, 185, 251, 278, 281
– indirect public accountability, 147, 174

administration of justice, 6, 11, 14, 18, 50, 57, 60, 82, 88, 109, 129, 130, 131, 132, 136, 137, 140, 215, 289

ADR, 5, 24, 25, 38, 43, 178, 180, 183, 188, 189, 190, 191, 197, 210, 211, 213, 222, 225, 226, 229, 230, 249, 252, 264, 265, 266, 267

Advisory Panel of Experts, 167, 168, 169

Aeschylus, 65

ALI-Unidroit Rules of Transnational Civil Procedure, 63

anonymisation of judgments, 17, 84, 100, 101, 292, 293, 294, 297, 301

arbitration, 5, 23, 25, 26, 43, 73, 74, 178, 190, 220, 230, 231, 234, 235, 236, 237, 238, 239, 240, 241, 249, 250, 251, 254, 256, 290
– commercial arbitration, 23, 26
– consumer arbitration, 237, 241
– investment arbitration, 25
– mandatory, 249, 251

archiving, 30, 36, 80-83

Arnold, William, 67

audience, 19, 34, 43, 66, 72, 79, 93, 94, 95, 110, 120, 122, 209, 248, 271, 274, 275, 282, 285

Australia, 60, 65, 78, 255

Austria, 13, 23, 52, 53, 143, 186, 242, 243, 293

Beccaria, Cesare, 107, 277

Belgium, 13, 30, 31

Bentham, Jeremy, 8, 11, 15, 16, 44, 59, 60, 72, 73, 74, 77, 127, 177, 191, 192, 193, 194, 195, 196, 197, 198, 199, 201, 204, 205, 208, 209, 222, 229, 247, 277, 278

Brazil, 34, 44, 182
– Supreme Court of Brazil, 34, 44, 182, 279

Breyer v Commission, 38, 292

broadcast, 5, 20, 31-37, 42, 44, 54, 67, 71, 74, 78-85, 95, 98, 104, 110, 119, 182, 269-276, 281, 283

Calamandrei, Piero, 68

cameras, 31, 33, 36, 37, 42, 53, 54, 55, 57, 78, 79, 98, 118, 119, 120, 122, 150, 269, 272, 276, 281, 283

Canada, 39, 82, 139, 215, 231, 250, 255
– British Columbia Civil Resolution Tribunal, 38
– Code of Civil Procedure of Quebec, 88
– Ontario Courts of Justice Act, 82
– Supreme Court of Canada, 33, 60, 62, 78, 82, 87, 214, 215, 231
– *Canadian Broadcasting Corp v Canada*, 60

Cappelletti, Mauro, 13, 60, 68, 126

CFR (Charter of Fundamental Rights of the European Union), 14, 47, 48, 49, 50, 51, 56, 241, 272
– Art 47 (2), 14
– Art 52 (1), 51
– Art 52 (3), 49, 50, 51
Chiovenda, Giuseppe, 68
civil proceedings, 43, 60, 62, 76, 84, 97, 98, 220, 221, 261
CJEU (Court of Justice of the European Union), 24, 37, 38, 42, 101, 147, 157, 158, 159, 160, 161, 162, 163, 167, 170, 172, 173, 174, 184, 185, 186, 187, 199, 203, 204, 205, 242, 243, 244, 250, 279, 292, 295, 296, 297
Committee of Ministers of the Council of Europe, 79, 166, 167, 169
communication, 19, 21, 28, 35, 37, 41, 42, 43, 62, 67, 71, 81, 86, 196, 278, 284, 285, 286
confidentiality, 25, 62, 75, 87, 146, 154, 168, 188, 226, 240, 241
consumer, 24, 197, 229, 230, 231, 236, 237, 238, 240, 241, 242, 243, 258, 259, 260, 261, 262, 263, 264, 266, 267, 290
counter-majoritarian difficulty, 143, 144, 146
court funding, 25, 211, 257, 260
courtroom drama, 20, 66, 97, 285
coverage, 30, 31, 32, 34, 36, 78, 79, 83, 84, 86, 104, 110, 119, 221, 272
credibility, 40, 53, 92, 119, 120, 146
criminal proceedings, 5, 16, 31, 32, 40, 52, 54, 79, 97, 104, 105, 107, 111, 112, 113, 114, 115, 116, 118, 178, 181, 269, 270
Czech Republic, 15, 50, 284, 288, 293, 294, 295, 297
data
– confidential economic data, 76
– data protection, 101, 200, 230, 242, 291, 299, 300
– GDPR, 85, 297, 298, 299, 300
– open data, 67, 86
– personal data, 85, 101, 146, 168, 169, 199, 203, 204, 278, 292, 297, 298, 299, 300, 301
deliberations, 181
dematerialisation, 41, 61, 62, 66, 67, 68, 69
Denmark, 30, 31
depublication, 183
digital
– biography, 75, 76
– court, 128
– era, 41, 61, 65, 68, 75, 77, 89
– justice, 38, 126, 201
– person, 75
– records, 73
– revolution, 20, 75, 91
– technology, 20, 21
digitalisation, 139, 140, 179, 189
ECHR (European Convention of Human Rights), 7, 13-16, 26, 47, 49-56, 78, 147, 162-167, 169, 172, 189, 208-209, 272, 291, 296
– Article 6, 13, 15, 26, 49, 50,-52, 63, 125, 253, 299
ECtHR (European Court of Human Rights), 8, 13, 14, 15, 16, 26, 29, 37, 41, 47, 49, 50, 51, 52, 53, 54, 84, 86, 101, 107, 143, 147, 157, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 174, 183, 189, 276, 286, 287, 292, 295, 296
education, 15, 38, 60, 248, 251, 283
efficiency, 11, 23
electronic technologies, 20, 71, 72
eligibility criteria, 144, 146, 148, 169, 172
ELI-UNIDROIT, 86
emotions, 120
Enlightenment, 11, 12, 105, 106, 107, 108, 196
entertainment, 120, 275

exceptions to right to public access, 30, 51, 53, 63, 79, 80, 81, 82, 83, 84, 87, 110, 182, 187, 204, 271, 274, 298
Expert Panel, 159
experts, 5, 37, 41, 55, 67, 68, 85, 92, 118, 119, 131, 139, 147, 171, 177, 219, 244, 271, 276, 287, 288, 289
fair trial, 14, 17, 49, 50, 64, 71, 75, 82, 83, 86, 87, 189, 272
fairness, 177, *See* fair trial
federal representativeness, 145
Feuerbach, Ludwig Andreas, 12, 107, 109, 110, 111
filibuster, 151, 152, 172
Fiss, Owen, 127, 128, 256
footage, 37, 78, 84, 272, 276
Foucault, Michel, 73
France, 13, 16, 30, 31, 53, 60, 67, 71, 79, 80, 93, 107, 158, 202, 203, 257, 290, 298
– Audiovisual Archives of the Legal System, 80
freedom of expression, 11, 15, 54, 199, 286
French Revolution, 59
Garapon, Antoine, 21, 62, 67
Garland, Merrick, 72, 77, 152
general public, 34, 36, 113, 116, 117, 121, 122, 181, 281, 282, 283, 286
Genn, Hazel, 21, 27, 43, 60, 177, 179, 254, 256, 264, 265, 266, 267
Germany, 8, 12, 13, 14, 30, 31, 32, 34, 35, 50, 60, 94, 95, 101, 103, 107, 110, 114, 118, 120, 143, 148, 153, 154, 155, 156, 158, 160, 167, 170, 172, 178, 202, 257, 272, 274, 287, 296
– *Auschwitz-Process*, 271
– BVerfG (German Federal Constitutional Court), 29, 54, 104, 110, 115, 152, 153, 154, 155, 156, 157, 161, 170, 172, 174, 287
– Election of Judges Act, 160, 161, 167
– EMöGG, 118, 270
– Federal Diet, 152, 153, 154, 155, 156, 161
– GVG (Courts Constitution Act), 21, 22, 31, 32, 35, 54, 94, 95, 103, 104, 110, 114, 269, 270, 274, 276
– *NSU-case*, 270, 271
Google Spain, 199
Gorsuch, Neil, 151, 152
governance, 61, 133, 134, 135, 138, 181, 186, 256
Hegel, Georg Wilhelm Friedrich, 12, 107, 109, 110, 111, 112
Hungary, 28, 30
ICC (International Criminal Court), 37
ICCPR (International Covenant on Civil and Political Rights), 63
ICJ (International Court of Justice), 36, 173
ICSID (International Center for Settlement of Investment Disputes), 74, 85, 209
ICTY (International Criminal Tribunal for former Yugoslavia), 36-37
image, 18, 42, 45, 81, 83, 86, 117, 122, 196, 207, 226, 235
immediacy, principle of, 41, 62, 67
impartiality, judicial, 9, 13, 14, 18, 48, 49, 60, 64, 76, 103, 110, 111, 120, 121, 129, 145, 146, 158, 159, 163, 164, 165, 279
independence, judicial, 9, 13, 14, 18, 28, 29, 37, 44, 45, 48, 49, 97, 99, 103, 115, 117, 119, 123, 127, 134, 135, 136, 141, 143, 144-147, 153, 154, 157-159, 161, 162, 164-166, 174, 181, 252, 279
India, 62, 78, 125, 182, 253, 256
information technology, 9, 38, 59, 63, 65, 74, 76, 98, 277, 278, 279, 280, 297
integrity, 6, 11, 20, 44, 61, 64, 65, 75, 77, 109, 117, 150, 174, 181

Italy, 13, 15, 31, 50, 60, 107, 158
journalists, 32, 34, 35, 65, 97, 99, 120, 121, 123, 270, 274, 275, 282, 284, 285
judicial ritual, 20, 67
Kafka, Franz, 74, 122, 300, 301
Kant, Immanuel, 12, 107, 108, 112, 277
legal aid, 25, 49, 260, 261, 262, 263, 264, 266, 267
legitimacy, 18, 104, 117, 120, 144, 145, 146, 147, 150, 154, 169, 170, 171, 173, 174, 175, 185, 252, 286, 287, 288, 289, 294, 295, 298, 299
– federal legitimacy, 150, 154, 170
– input legitimacy, 145
– operational legitimacy, 18, 175
– output legitimacy, 145
– output legitimacy, 145
– social legitimacy, 145
Lithuania, 31, 208
Locke, John, 107, 277
Luxembourg, 5, 6, 8, 9, 17, 29, 37, 60, 97, 98, 99, 100, 101, 103, 125, 143, 171, 173, 177, 178, 184
management, 134, 135, 137, 138, 139, 140, 257
media
– mass media, 121
– print media, 91
– radio, 21, 31, 54, 91, 182, 271
– social media, 5, 14, 16, 17, 19, 20, 21, 29, 32, 34, 35, 42, 43, 57, 99, 198, 285, 286
  – blogs, 21, 91, 94, 274
  – Facebook, 21, 34, 40, 96, 242, 243, 244, 285, 286
  – Twitter, 21, 34, 38, 274, 285
  – YouTube, 42, 44, 84, 93, 182
– television, 19, 20, 21, 30, 31, 34, 42, 53, 54, 55, 57, 71, 72, 79, 95, 96, 98, 104, 110, 118, 119, 120, 121, 122, 182, 269, 272, 273, 275, 281, 282, 283
modus vivendi, 155
morals, 57, 166
national security, 14, 15, 48, 51, 63, 103, 194
negotiated deals, 22
newspapers. *See* media: print media
non-renewable nine-year term of office, 165
Norway, 31
ODR, 38, 39, 67, 139, 178, 180, 188, 190, 210, 211, 213, 214, 222, 227, 228, 229, 230, 247, 248, 249, 252
online court, 38-39
open court, 11, 12, 14, 16, 17, 18, 21, 29, 32, 35, 40, 60, 75, 103, 104, 105, 108, 123, 128, 158, 177, 181, 189, 197, 205, 207, 208, 211, 221, 292
open judgments, 16, 17
openness, 9, 10, 13, 17, 18, 20, 25, 28, 38, 39, 60, 61, 101, 117, 127, 139, 146, 163, 180, 181, 182, 185, 187, 189, 190, 193, 194, 196, 205, 209, 222, 228, 229, 245, 252, 277, 278, 279, 280, 297, 298
– doctrinal, 10, 25, 205
– functional, 10, 25
– openness as accessibility, 10, 181
oral hearing, 5, 22, 30, 36, 37, 39, 51, 53, 63, 94, 99, 281
outsourcing, 23, 24, 26, 249, 290, 291
PACE, 165, 166, 167, 168, 169, 172
– Committee on the Election of Judges to the ECtHR, 165, 168, 170, 171
packing a constitutional court, 172
panopticon, 20, 66, 70, 71, 72, 73, 74
participation, 10, 25, 129, 154, 161, 186, 245, 247
plea bargains, 105
Poland, 28, 30, 31, 57, 144, 158
political patronage, 155, 157
politicisation of judicial selection procedure, 156, 171, 173

populism, 6, 9, 28, 29, 42, 44, 118, 128, 144, 157, 277
Portalis, Jean-Étienne-Marie, 71
Portugal, 30, 250
predictive justice, 67, 68
press
– freedom of the press, 95, 117
– press conferences, 42
– press officers, 19, 285
– press release, 42, 285, 297
– press room, 274
privacy, 11, 15, 17, 19, 20, 32, 44, 48, 51, 62, 63, 64, 66, 70, 74, 75, 76, 82, 83, 85, 86, 87, 88, 95, 100, 101, 103, 105, 156, 171, 182, 187, 193, 194, 198, 201, 202, 203, 204, 210, 228, 229, 243, 244, 299, 300
privatisation of justice, 8, 15, 16, 18, 23, 60, 177, 178, 180, 188, 189, 205, 255
– external, 22, 23, 24
– functional, 22, 190, 191, 210, 229
– internal, 21, 22, 23
public confidence, 6, 18, 29, 41, 44, 50, 82, 109, 129, 144, 148, 152, 154, 156, 157, 162, 271, 280, 287
public confirmation hearing, 150
public hearing of candidates, 156, 169-171, 175, 287
public opinion, 110, 117, 123, 147, 193, 199, 271
public order, 15, 48, 51, 63, 103, 194
public service, 21, 41, 98, 215, 254, 255, 258, 275
public sphere, 9, 44, 247
public trust. *See* public confidence
publicity, 8, 11, 15, 16, 20, 22, 25, 29, 30, 31, 32, 38, 44, 47, 48, 50, 52, 53, 54, 56, 59, 60, 61, 62, 63, 65, 66, 68, 70, 71, 72, 73, 74, 75, 76, 77, 79, 83, 86, 89, 98, 103, 104, 105, 106, 107, 108, 109, 110, 111, 113, 114, 115, 116, 125, 127, 156, 171, 177, 182, 190, 192, 193, 194, 197, 198, 201, 204, 205, 209, 210, 245, 247, 271, 278, 279
– courtroom publicity, 72, 92
– electronic publicity, 72
– party-dimension of, 75
– presential conception of, 79
– worldwide audience publicity, 72
qualified parliamentary majority, 172
R (UNISON) v Lord Chancellor, 126, 215, 228, 229, 253, 254, 255
recording, 20, 30, 31, 32, 33, 38, 57, 67, 69, 70, 74, 78, 79, 80, 81, 82, 83, 84, 85, 86, 93, 95, 98, 99, 119, 270, 272, 281, 292
– audio recording, 31, 32, 275, 281
– video recording, 32, 85, 93
reform, 12, 30, 32, 34, 40, 67, 81, 115, 129, 130, 131, 132, 133, 135, 136, 138, 139, 140, 161, 178, 183, 191, 192, 193, 194, 238, 242, 244, 245, 253, 260, 261, 262, 263, 264, 267, 271, 272, 273
renewable term of office, 162, 174
repeat players, 200, 213, 214, 240, 245
replacements for public adjudication, 180
right of individuals, 209
right to a public hearing, 5, 13, 15, 47, 48, 51, 53, 55, 75, 209
right to be forgotten, 199, 300
rule of law, 6, 9, 10, 11, 18, 27, 28, 29, 44, 45, 61, 99, 101, 117, 125, 127, 129, 135, 140, 143, 144, 215, 253, 255, 272
safety, right to, 62, 66
Schrems v Facebook, 242, 243, 244, 245
Scott v Scott, 60, 129
scrutiny, 14, 15, 16, 22, 28, 29, 39, 50, 106, 107, 115, 117, 127, 128, 135, 139, 140, 197, 256, 257, 258, 294
secrecy, 11, 12, 14, 22, 50, 73, 75, 87, 97, 106, 108, 109, 110, 115, 116, 119, 121, 129, 149, 155, 158, 182, 188, 250, 251, 279, 280, 293, 298

show-trial, 275
Spain, 8, 31, 53, 60, 69, 70, 76, 78, 83, 86, 93, 101, 158, 177, 193, 199, 200, 202, 291, 297, 300
spectacle, 42, 68
standard of physical presence, 67
Star Chamber, 298
statization, 26, 188
subsidiary mechanism, 152, 172, 173
super-injunctions, 88
Sweden v API, 184, 185, 187
televising. *See* media: television
terror-trials, 271
the Netherlands, 26, 32, 94
therapeutic function, 15, 60, 76
trade secrets, 15, 62, 63, 66, 74, 76, 86, 87
– EU Directive on Trade Secrets, 87
transparency, 5, 8, 10, 11, 17, 18, 20, 25, 29, 33, 36, 39, 47, 57, 58, 61, 62, 64, 65, 71, 73, 74, 83, 85, 87, 97, 98, 99, 101, 104, 115, 117, 119, 122, 135, 143, 144, 145, 146, 147, 148, 150, 154, 156, 157, 158, 160, 162, 163, 166, 169, 170, 171, 172, 173, 174, 178,179, 180, 181, 185, 187, 190, 200, 201, 202, 204, 205, 222, 227, 228, 241, 249, 250, 277, 278, 279, 280, 282, 283, 286, 287, 289, 297, 298, 300
– democratic transparency, 83
– of the selection procedure, 16
– of the selection procedures, 29
two-thirds majority, 149, 154, 155, 172
UNCITRAL Rules on Transparency in Investor-State treaty-based Arbitration, 25, 73, 74, 85, 179, 250
United Kingdom, 8, 11, 13, 16, 18, 21, 24, 26, 33, 40, 42, 53, 54, 60, 61, 67, 87, 88, 92, 107, 118, 123, 125, 131, 137, 153, 161, 166, 181, 182, 189, 191, 192, 195, 197, 221, 253, 254, 255, 256, 257, 258, 259, 260, 264, 265, 268, 288, 294
– Online Civil Court, 21, 139
– UK Supreme Court, 33, 78, 84, 96, 122, 126, 129, 130
United States
– American Arbitration Association, 201, 234, 237, 238, 240, 249
– Colorado, 83, 202
– impeachment procedure, 149
– Nevada, 83, 225, 247
– New Deal, 148, 207
– nuclear option, 151
– packing the Supreme Court, 148
– Standing Committee on the Federal Judiciary, 150
– US Constitution, Fourteenth Amendment, 215
– US Constitution, Sixth Amendment, 13, 209
– US Supreme Court, 29, 33, 61, 147-150, 161, 170-173, 207, 209, 212, 215, 216, 230, 231, 234, 236, 240, 246
– Utah Code of Judicial Administration, 83-84
– Washington, 63, 83, 150, 173, 197, 203
video-conference, 39, 40, 41, 67
virtual, 69, 71
– audience. *See* virtual: public
– court, 39, 67
– jury, 69
– public, 34
– rooms, 79, 92, 220, 269
visibility, 28, 41, 78, 96, 98, 211, 221, 284
vote of cloture, 151
webcasting, 20, 30, 33, 37, 62, 64, 71, 73, 74, 82, 84
witnesses, 15, 25, 26, 31, 32, 33, 35, 37, 40, 41, 42, 55, 60, 62, 64, 67, 68, 79, 80, 82, 84, 85, 92, 93, 94, 95, 98, 111, 118, 119, 120, 192, 208, 272, 274, 281, 284, 294