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Open Justice in the Digital Age

The Relationship Between Justice and Media in Europe

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Chapter 1
Introduction to Open Justice in the Digital Age

"I am not a cat," declared a desperate lawyer in a digital hearing through Zoom before Texas' 394th Judicial District Court in 2021. "I can see that," answered the judge patiently. The lawyer's child had probably used the Zoom account and activated the "cat filter", and as a result the speaker's face was partially replaced with the face of a cat. Afterwards, the lawyer struggled for a few minutes to figure out how to turn off the cat filter. The story became famous[1] and the video made the legal world (and beyond) smile for a while.

Indeed, the dramatic Covid pandemic, which has been an enormous human disaster on a global level, had at least the positive side effect of shedding light on the potential of digital tools in the administration of justice. Pandora's box of digital open justice has now been opened and it is now impossible to imagine a return to pre-Covid times. It has been reported that some proceedings have even been held in the "multiverse" in Colombia and China; that is, by using virtual reality (VR) headsets and avatars for the participants, while the proceedings were live streamed on YouTube for the public.[2]

In Europe, the legal framework of open justice is characterized by the intertwining of EU and national legislation, judicial policies, and case-law from the European Court of Justice (ECJ), the European Court of Human Rights (ECtHR), as well national courts. In this introduction, the conceptual approach (Sect. 1.1), the methodology (Sect. 1.2) and the plan (Sect. 1.3) of the research on open justice in the digital age will be presented.

[1] Victok (2021).

[2] Hussain (2023).

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1.1 The Conceptual Approach on the Notion of Open Justice

The notion of open justice encompasses various fields of law, ranging from procedural law, privacy and personal data legislation, to human rights. Nevertheless, the ontological aspect of the notion remains autonomous. At its core, open justice pertains to communication from the judiciary to the public. The question of how, when, and why courts should communicate is not constrained by a specific legal system. On the contrary, it should be acknowledged that policies in favor of or against open justice have been adopted worldwide.

However, the terminology is notably absent in Europe, with the exception of common law countries. Strangely, there have been few attempts in continental law countries to theorize the various concepts of transparency in the administration of justice, free access to legal knowledge, and public access to hearings as general principles.

Conversely, the concept of open justice is well established in common law countries, grounded in a rich web of interdependent case law rooted in national history. Notably, in England, the Court declared in the seminal case of Scott v Scott[3] that "[i]n the darkness of secrecy, sinister interests and evil in every shape have full swing. Only in proportion as publicity has a place can any of the checks applicable to judicial injustice operate. Where there is no publicity, there is no justice," establishing a presumption of openness in the conduct of trials.

It has even been argued that the principle of open justice goes too far in some cases. For instance, the heavy use by the press in England of the names of suspects in criminal cases has been criticized as incompatible with the privacy standards imposed by the ECtHR.[4]

Therefore, this book proposes adopting the terminology of common law and applying it to a very different context. The objective is to explore whether this principle could be derived from European and EU legal principles. Additionally, it aims to determine whether the digital age influences the status quo on this issue. The research is based on a straightforward hypothesis that needs evaluation: considering the numerous upheavals in the field of communication brought about by the digital revolution, shouldn't the field of communication from the judiciary be specifically addressed?

[3] Scott v Scott [1913] UKHL 2, [1913] AC 417.

[4] Bohlander (2019), pp. 547–564.

1.2 Methodology and Scope of the Research

This study attempts to provide a complete analysis of the legal issues and challenges related to the development of the open justice dogma, defined as a fusion of principles of transparency of justice, accountability, and publicity (see Chap. 3, Sect. 3.1). It will demonstrate that these developments are not only justified but, in light of the digital revolution, must be intensified and generalized, focusing on the use of streaming technology in remote hearings and free access to online databases. There is now a consensus amongst scholars that, due to the paradigm shift in the notions of transparency and communication brought about by the digital revolution, there is a need for change in the traditional application of the open justice principle.[5]

Nevertheless, the principle of open justice was not designed as an absolute concept, but must rather be combined with privacy, national security, or specific legitimate interests such as protected secrets, the presumption of innocence or the protection of children. Therefore, even if the introduction of streaming technology would revolutionize the administration of justice, it is at the same time necessary to adapt—even reinvent—the principle of open justice itself. The ongoing transformations induced by European harmonization provides fertile ground for the experimentation with new, more innovative policies.

Open justice policies are based on a fragile dialectic between the need for transparency and publicity and the limitations based on the protection of personal data or from a human rights perspective. Even if this dialectic between privacy protection and right to be informed has not been ontologically altered by the digital revolution, it still needs to be thoroughly analyzed, as the growing social pressure for more transparency in practice influences the appreciation of the proportionality of limitations and restrictions on open justice.

Furthermore, the digital revolution has indirectly contributed to the need for the reformulation of the principle of open justice, as there has been an undeniable decline of the traditional press in favour of online media. Consequently, print media coverage of court proceedings, which was the traditional way of guaranteeing the principle of open justice, is becoming ineffective.

The pursuit of more effective open justice also encounters a structural difficulty. Due to the separation of powers, the practical administration of justice is often left to the courts, which, more or less according to the national law, have a margin of discretion whilst appreciating the need for transparency. This situation creates a paradox, as it is therefore the responsibility of the courts to decide upon establishing a mechanism of supervision and restraint. Overall, the topic is characterized by contradictions, since the same general interest in and human right to a fair trial requires, for transparency reasons, that new digital technologies be fully exploited whilst also ensuring that the use of new media does not exert undue influence on the process and authority of the judiciary.

[5] Hess and Koprivica Harvey (2019), p. 19.

1.3 The Plan

The second chapter of this research focuses specifically on the coverage of court proceedings over the years. The concept of open justice precedes the digital revolution but, in Europe at least, the relationship between the justice system and the media has always been ambiguous. There were legal objections to the intrusion of cameras in the courtroom, effectively turning the press into the public's "eyes" in court. Nevertheless, the digital revolution completely disrupted this fragile equilibrium in three ways: firstly (and obviously), it entailed the rise of streaming technology as a new medium of communication; secondly, the advent of digital communication was associated with a certain decline of the press and its financial difficulty in assuming its traditional role of court coverage; and finally, the shift of mentality related to "internet centrism" requires more transparency and questions the status quo regarding the transparency of administration of justice.

The third chapter deals with the definition of open justice in Europe. The term itself is seldom used in continental Europe, being mostly used in common law countries. However, it has the advantage of encompassing a very well-known fact: the need for publicity of court proceedings and judgments and the imperative of publishing case-law. Therefore, the use of one unique notion, posed as a principle, corresponds to an holistic approach of the relationship between the administration of justice and the public. The chapter attempts to define the concept that encompasses what is described as direct, indirect, and complementary open justice principles. It then focuses on the justifications, both theoretical and practical, of the principle, and describes how the principle has shaped various laws at the EU level.

The fourth chapter analyzes the principle of open justice from the perspective of human rights, and specifically through the lens of Article 6 (fair trial) and Article 10 (freedom of expression) of the European Convention of Human Rights (ECHR). It finds that the rich body of case-law at the ECtHR level has shown a constant evolution on this topic. It concludes with the synthetic and hybrid nature of the principle of open justice, which is acknowledged protection under both the right to a fair trial and the right to be informed. The chapter also looks at the question from the perspective of Article 47(2) of the European Charter of Fundamental Rights, as developed by the ECJ through its own jurisprudence on the question.

The fifth chapter provides an analysis of the thorny relationship between the principle of open justice, and privacy and data protection laws. It points out that the judiciary does not escape the application of the General Regulation on Personal Data (GDPR), even if some specific derogations were enacted so as to take into consideration the particularity of the judiciary's mission and its independence. Nevertheless, compliance with the privacy data regulation does not mean that the GDPR opposes the necessary transparency of the administration of justice absolutely, and consequently a compromise with the principle of open justice has to be found. The chapter, therefore, presents mechanisms allowing this compromise, with an emphasis on the techniques of anonymization and pseudonymization of judgments during

their publication. Furthermore, the digitalization of justice also raises the issues of the protection of image rights and the right to be forgotten.

The sixth chapter discusses the statutory limitations and exceptions to open justice. The limitations are set by Article 6 of the ECHR, which allows for in camera proceedings and/or the adoption of protective measures against media coverage for reasons of national security, protection of children, privacy protection, or where publicity would prejudice the interests of justice. Through extensive recourse to the relevant case-law, this chapter highlights the omnipresent use of the principle of proportionality in the assertion of the legitimacy of limitations to open justice.

The seventh chapter proposes a comparative approach to open justice policies as developed in the United Kingdom (UK), France, and the European Institutions. The chapter will focus on the challenges faced by the judicial authorities in regulating new communication technologies and the policies adopted to integrate them into the functioning of justice. The comparative study of the situations in the UK and France will show considerable differences at the national level in the enforcement of the principles of open justice, as these two countries have adopted diametrically opposite models. Even at the EU level, a clear tension can be perceived between the proponents of more transparency and the resistance of the judicial sector.

The eighth and final chapter deals with the influence of social media on open justice. First, social media create new kinds of relationships, such as Facebook "friendships" and the legal issue here is whether the existence of such a relationship between the various protagonists of court proceedings may affect the impartiality of justice. Second, social media provide a direct means of communication, a potential way for justice to explain its functioning and legal reasoning, and to justify its conclusions. However, the potential dangers of this tool should not be underestimated and its use should be examined through the jurisprudence relating to restrictions on a judge's freedom of expression. Finally, the role of social media within the context of remote access to recordings is discussed, with an emphasis on the administrative law obstacles that it entails.

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Chapter 2
Presenting the Concept of Openness in the Administration of Justice

From the ancient Roman arenas to Emile Zola's open letter "j'accuse", the publicity of the administration of justice was first instrumentalized by the government, before turning against it (Sect. 2.1), crystallizing a certain defiance against too much openness in this context. The revolutionary changes in communication brought about by the digital era have built the economic and social environment for the generalization of the use of information technology in the administration of justice (Sect. 2.2).

2.1 Justice and the Media in the Pre-digital Age

2.1.1 Press Coverage of the Court

It is a euphemism to state that the relationship between media and justice is old and complicated. Indeed, since ancient times, justice and the media have developed an ambiguous relationship. In Rome, for instance, jurists extensively advertised through posters or public announcements, considering it crucial to inform the public of hearings and judgments.

In ancient Greece, in addition to this informative function, advertising also had a persuasive function:[1] the public announcement of the decision ensured the ruling more legitimacy in a situation where public peace could be endangered. Media coverage of court proceedings progressively developed, and the dates and topics of court hearings were widely publicized on city and temple walls. Occasionally, the decision was also published in an attempt to increase the efficiency of justice. For instance, in ancient Greece, fines against the city were sometimes inscribed on

[1] Cassayre (2010), pp. 13–25.

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wooden or stone slabs (steles) in a public place, the purpose being to ask the population to contribute to the enforcement of the decree.

The ancient Roman institutionalized and formalized the role of the media in covering judicial proceedings. It appears that from the Roman's perspective, it had already been understood that justice does not only need to be done but must also be seen to be done.[2] This idea was realized through the installation of courts in open fora. On a darker note, it also explains public executions and their incorporation into cruel "games" in the arena.

With the development of modern societies, the media's influence on the crystallization of public opinion intensified and the press acquired the unofficial position of the "fourth estate of society" (together with the clergy, the nobility, and the commoners). In some languages, it is also traditionally characterized as the "fourth power",[3] by reference to the traditional constitutional distinction between executive, legislative and judiciary powers. On some occasions, journalism does not confine itself to coverage of the court proceedings; investigative journalism has from time to time demonstrated surprising resources in gathering critical evidence that has influenced the course of trials.[4]

Overall, the source of the tension lies in the fact that judges request serenity while journalists are accused of provoking sensationalism, and, conversely, journalists demand respect for their freedom to inform while judges are accused of enforcing secrecy. New professions emerged as a meeting point between these two contrasting realities. Courtroom artists exist in countries where photography is not allowed, who sometimes have to sketch the courtroom based on their memory as they are not even allowed to draw during the hearings. This technique has become a certain form of art, with famous artists and exhibitions.[5]

In the same way, the profession of the legal columnist appeared in newspapers that have the duty to report and comment on the court proceedings that are deemed to interest the public. Perhaps the most famous example of press coverage that has influenced the course of a trial is the Dreyfus affair of 1898. After Colonel Dreyfus was accused by the French army and condemned as a traitor, Emile Zola published a column entitled "I accuse", in the form of an open letter to the President of the Republic. This provoked a huge public debate, as the author accused the justice system of miscarriage and antisemitism. The author intended to provoke the army into suing him for libel, which would allow him to produce new evidence of Dreyfus' innocence before the court. Although Zola was convicted and sentenced

[2] Verboven (2017).

[3] For instance, in Italian quarto potere, in German Vierte Gewalt, in Spanish Cuarto poder, and French Quatrième pouvoir.

[4] Fass (1993), pp. 919–951.

[5] In 2017, the United States Library of Congress organized an exhibition entitled "Drawing Justice: The Art of Courtroom Illustration" (https://www.loc.gov/exhibitions/drawing-justice-courtroom-illustrations/about-this-exhibition/).

to jail, Dreyfus eventually received a presidential pardon and was fully reinstated in the army, in order to avoid a new trial that would definitively acquit him.

Furthermore, it should be noted that not every element of the administration of justice can be revealed. With the notable exception of common law countries, where a judge's dissenting opinion is published and acquires recognition and value as an alternative legal solution which could be discussed in future cases (for instance, Lord Denning, famous for his insights on contract law, was also known as "the dissenting judge"[6]), the majority of European legal systems opt for secrecy. This secrecy does not only apply to jury trials but also acts as a positive obligation for judges not to disclose internal struggles or even disagreements with their colleagues.

As consequence, the press is bound by a series of criminal laws protecting the secrecy of proceedings or sometimes the secrecy of the investigation in countries that acknowledge an "investigating magistrate" ("juge d'instruction" in French). This role was predominant in continental law and although France, the Netherlands and Spain for instance still feature investigating magistrates, many countries such as Germany, Italy and Portugal have now abolished it, presaging a decline of the role.[7]

The general climate of defiance against the press' influence on justice is crystallized in the traditional sub judice rule. Sub judice, literally "under a judge", is a doctrine that forbids the publication of materials on ongoing cases, which would endanger due process. It is argued that sub judice rule encapsulates the need to balance the conflicting interests of freedom of expression and the good administration of justice and therefore "*every democratic country has a version of the sub judice rule*".[8] Nevertheless, it will be demonstrated that the open justice principle, as enshrined in Article 6(1) of the European Convention on Human Rights, greatly restricts the practical impact of the sub judice rule (see Chap. 4).

2.1.2 *Television Broadcasting of Court Hearings and the Fear of the Media Circus*

The second part of the twentieth century was marked by the rising power of television. TV broadcasting was used as entertainment and as a medium to provide information but, generally speaking, the passiveness of the audience, the lack of opportunity to pause and assert critical thinking, and the business model based on advertising (that promotes large audience numbers and therefore sensationalism) had contributed to the generation of a great deal of suspicion from the justice sector towards the television sector.

In parallel, the courts become suspicious of this growing influence. For instance, in France, the law on freedom of the press of 1881 prohibits "*from the opening of the*

[6] Wright (1980), pp. 179–199.

[7] Gilliéron (2014).

[8] Shnoor and Menashe (2017), p. 39.