

Transparency and Openness of Courts in the 21st Century.
An Issue Worth Researching on
Transparencia y apertura de los tribunales de justicia en el siglo 21.
Un problema que vale la pena investigar.

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Summary

At first sight, the transparency and openness of the judicial system does not seem to be a particularly current topic. The most important international human rights documents such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and the American Convention on Human Rights guarantee due process (right to a fair trial), including the element of the right to a public trial. In addition, trials have been public throughout previous centuries. As a consequence, the question may be raised whether it is really necessary to deal with the transparency and openness of courts in scientific research. In my paper, I attempt to justify this statement. First, I present the new levels and new elements of the transparency and openness of courts opposite the publicness of the trial. Next, I collect the new arguments for and against the transparency and openness of courts, which arose in the 20th and 21st century. Finally, I enlist some examples where transparency and openness mean a challenge for the courts, legislature, media or general public.

Keywords

Courts / Judicial System / Open Justice / Transparency.

Resumen

A primera vista, la transparencia y la publicidad del sistema judicial no parecen ser temas de particular actualidad. Los textos internacionales más importantes sobre derechos humanos, tales como la Declaración Universal de Derechos Humanos, el Pacto Internacional de Derechos Civiles y Políticos, la Convención Europea de Derechos Humanos y la Convención Americana sobre Derechos Humanos, garantizan la tutela judicial efectiva (derecho a un juicio justo), incluyendo el derecho a un juicio público. De hecho, los juicios han sido públicos desde hace siglos. En consecuencia, cabe preguntarse ¿hasta qué punto es necesario tratar en una investigación científica la transparencia y la accesibilidad de los tribunales? Este artículo busca responder dicho interrogante. En este sentido, en primer lugar presento los nuevos niveles y elementos de la transparencia y la accesibilidad de los tribunales frente a la publicidad misma del juicio. A continuación, enumero las nuevas argumentaciones a favor y en contra de la transparencia y la apertura al público de los tribunales, surgidas en los siglos XX y XXI. Por último, listo algunos ejemplos en los que la transparencia y la accesibilidad presentan un reto para los tribunales, el legislador, los medios de comunicación o el público en general.

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Palabras claves

Tribunales / Sistema judicial / Apertura de la justicia / Transparencia.

At first sight, the transparency and openness of the judicial system does not seem to be a particularly current topic². The most important international human rights documents guarantee due process (right to a fair trial), including the element of the right to a public trial. According to Article 10 of the Universal Declaration of Human Rights, everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. Article 14.1 of the International Covenant on Civil and Political Rights stipulates that “[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”. Regional human rights documents also contain a similar provision. The European Convention on Human Rights guarantees a fair and public hearing as an element of the right to fair trial (Article 6.1). The American Convention on Human Rights prescribes in its Article 8.5 that “[c]riminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice”.

In addition, it is enough to look at some paintings or photos from the past to discover that trials have been public throughout previous centuries. There was an audience at the trial of Jesus before Pilate, at the Salem witch trials in 1692-93 or at the Dreyfus case in 1899. The OJ Simpson case in 1994 was the most publicized criminal trial in the United States’ history.

As a consequence, the question may be raised whether it is really necessary to deal with the transparency and openness of courts in scientific research. In my paper, I attempt to justify this statement. First, I will present the new levels and new elements of the transparency and openness of courts beside the openness of the trial. Next, I would like to collect the new arguments for and against the transparency and openness of courts, which arose in the 20th and 21st century. Finally, I will enlist some examples where the transparency and openness mean a challenge for the courts, legislature, media or general public.

1. New levels of transparency and openness of courts

Originally, open justice meant the presence at the court: the citizens had to go to the court building to follow a trial or access court documents. It seems evident today that openness no longer means only the physical presence at the procedural steps, but also includes an electronic aspect, which can broaden the scope of open justice and lengthen its duration in time. Today, a whole country can become a virtual courtroom, and usually, we can access all the decisions and case files on a Sunday afternoon from home. The court’s website has an important role in informing the public as the court can use it to publish statistics and factsheets on its organization

² In this paper the word “transparency” means the basic principle of the democratic societies: while the citizen shall remain intransparent for the state, the state should be transparent for the citizen. It is a mechanism that should be the result of a method of governing, administration and management by the state, which allows for control and participation by citizens in public matters. This should include access to public information, the state’s obligation to generate information and make it available to citizens in a manner that allow for broad access, and the empowerment of citizens to demand that the state comply with its obligations. Openness is an element of the transparency; it can be understood as the various manifestations of a proactive policy whereby relevant information is made available to the public (Herrero y López, 2010, p. 9).

³ See for example the painting by the Hungarian painter Mihály Munkácsy entitled “Christ before Pilate”, or the “Examination of a Witch” by Thompkins H. Matteson from 1853. The Dreyfus affair, which divided the whole of French society, was covered by newspapers, with illustrations depicting scenes from the trials in the news articles.

and functioning. Providing information materials and visits for citizens can also contribute to the understanding of the court's functioning. Social media can be equally important.

At the same time, the range of persons who are interested in the court's operation has also broadened. It is no longer only the party of the procedure and the general public who should know about a procedure or how the courts operate in general: the media and NGOs (civil society oversight organizations) also play a mediatory role and watch the activity of the courts.

Finally, today, openness is more than the "circus" of the criminal procedure all procedures should be open, even civil and administrative law cases. Naturally, "[u]nlike criminal cases, civil cases seldom garner newspaper headlines or coverage on television news programs before the first commercial. Yet individual cases often have fundamental effects on people's lives, and the work of the courts in civil cases shapes government policy on significant issues" (Miller, 2015, p. 135).

In the case of constitutional review, both at ordinary courts and at constitutional courts, openness and transparency is even more important because these decisions are taken in the political sphere, sometimes limiting the power of the two other branches, the legislative and executive branches.

2. New elements of transparency and openness of courts

The transparency and openness of the courts can be divided into two main parts: the procedural openness and the institutional-organizational openness.

The main element of procedural transparency is the public trial, which is required by international human rights documents, as we saw above. Public hearings or trials are the occasions where openness is carried out most intensively: the presence of the press, visitors, radio and television broadcasts, publishing of the minutes and audio recordings are all possible tools for ensuring publicity.

A basic component of procedural transparency is the accessibility of court documents, which can contain most of the documents that were submitted to the court or created by the court during the procedure. The minimum requirement here is access to the decisions of the court. However, in common law systems, traditionally the whole case file is open.

Sometimes the decisions include the results of the votes, and in several judicial systems, especially in case of the highest courts, it is also allowed for the justices to attach a dissenting opinion to the decision. Although decision-making is usually not public, the announcement of the decision should be.

After the decision-making, the court can provide press releases and commentaries about the decisions to help the public understand the text. The president of the court or the judges can interpret the decisions in scientific publications and interviews. However, it is always a requirement that judges cannot comment on pending or impending cases⁴.

At the same time, the institutional-organizational form provides a transparency that is broader than the one concerning the procedures. This type of transparency includes access to information on the administration of the courts (judges' appointment process, transparency of budget and procurement, access to judges' assets and income disclosure statements, etc.)⁵, access

⁴ In the United States, the basic rule is that the written decisions speak for themselves because any additional comment might endanger the respect and reverence the public has for judges. Recently, however, more and more justices are allowing their public speeches to be televised, and some have been interviewed on television programs (Miller, 2015, p. 219.)

⁵ One aspect of institutional-organizational transparency is the regulation and practice of ethical judicial conduct. There is a debate in the United States that the ethics legislation on the judiciary is not applicable to the Supreme

to information on the operation of the courts (statistics, distribution of cases among judges, timing of cases, etc.). The precondition of this type of transparency is the publication of internal regulations concerning the rights of the parties in the cases, which gives the public an overview of how the court works. Internal regulation materializes in the daily operation; therefore it is of utmost importance to give access to this information, which concerns the administration and operation of the court. Finally, today, the transparency of the court is sometimes even emphasized in the design of the building.

3. New arguments for and against the transparency and openness of courts

The most important argument for the transparency of courts is the right to a fair trial, as transparency ensures that bias, arbitrariness and unlawfulness are avoided in the procedure. Having access to the case file is both a precondition of the right to have a hearing and an element of a fair trial. If the law or internal regulation does not regulate the distribution of cases among the judges, but it is arranged arbitrarily, this can be a violation of the right to fair trial.

However, there are much more fundamental rights and constitutional principles that demand the transparency. A democratic state should guarantee and protect its citizens' right to public information. This fundamental right is a precondition for freedom of information, without which citizens would not have the information necessary to engage in decision-making and the exercise of power. This right is generally ensured in two ways. First, state organs are obliged to publish information on their organization and activities. Second, a procedure should be established through which citizens may demand information from the state organs which would otherwise not be published automatically. As courts form part of the state system, they are also subject to these regulations and should be as transparent as possible.

In addition, they are also special organs of the state system. The separation of power and the system of checks and balances are basic principles of modern democracies. Freedom can only be ensured and tyranny can only be avoided if the three branches of power function separately and have a degree of control over the others. However, in order to guarantee its independence, judicial branch cannot be controlled by the legislature and the government; although this is not to say that the courts should operate without control, with prejudice, unlawfully or inefficiently. Because no state organ can control the functioning of the courts, the only way to ensure that they are monitored and controlled is if their operations are open to the public. If the functioning of the court is transparent, it is also controllable; if it is open, it is accountable, like the other state organs.

Transparency can also generate conditions for greater independence of the court. Undue influence and pressure by the executive branch, political parties and other powerful actors are more likely to come to light if the procedure is public. It can eliminate the margins for discretion, corruption and arbitrariness. In this way, transparency can enhance the independence of the judicial branch while also protecting the individual against the State's unlawful influence on the courts (Engelmann, 1977, p. 49).

Openness undermines the ability of the government to control the social meaning of conflicts and their resolution. The public as an audience has an important role in witnessing, interpreting, owning, and disowning what has occurred (Resnik, 2006, p. 537). Transparency and openness of a court's operation can also reinforce its legitimacy. As judges are not directly elected in most countries, their legitimacy is not given to them by the public, but is received indirectly through the appointing or electing bodies. It is therefore of utmost importance that

Court, which raises the problem of a lack of transparency. For more information regarding this subject, see Frost (2013, p. 443).

their legitimacy be enforced in other ways, and transparency and openness are the ideal tools for this.

Legal certainty is another constitutional principle, which supports an argument in favor of openness. From this principle comes the requirement that the decisions should be published and available for analysis. Openness and transparency ensure that courts operate in a predictable and foreseeable manner, which contributes to legal certainty.

Accessibility of court documents and decisions can also be regarded as a realization of freedom of research and freedom of science. More generally, an understanding of the court's operation and case law can also develop citizens' legal knowledge and enhance their awareness in this field. According to Aharon Barak (2006), public confidence in the judge is an essential condition for realizing the judicial role. As Engelmann points out, "[i]ndeed, the judge has neither sword nor purse. All he has is the public's confidence in him" (1977, p. 49). A precondition for this public confidence is openness, in other words, the possibility that the general public can follow the activities of the courts and the judges; the merit of their work does not happen behind closed doors.

Finally, the more transparent the court is, the higher its authority can be.

The most important counter-argument in the debate on openness and transparency of courts is the privacy of the parties involved. The problem of personal data appearing in the case file and decision can be solved by removing this information from publically-available documents.

Privacy can be a legitimate reason to reduce openness by restricting access to the public hearings and trials for both the audience and the media. As this element of the procedure is in "real time", there is no other way to ensure the rights of the persons involved.

In these cases, the best way to guarantee a fair procedure is to discuss the exclusion of the public from the hearing in a public meeting and ensure that all parties can express their opinion on the restriction. The openness of such cases can also be ensured by publishing the minutes or report on the closed hearing without including the personal data.

In addition to personal data, there are other types of data that should be protected (e.g. business secrets, state secrets). In these cases, the same solution can be applied as in the case of personal data.

Among the disadvantages of openness, we can note that public hearings can slow down the procedure, which can violate another element of the right to free trial, namely the right to a speedy trial.

The independence of the judges is another argument against openness. There is a risk that when the deliberation takes place in front of the public, the judges will adjust their behavior in response to public opinion and will shift from respecting the purely legal arguments. However, we are of the opinion that openness has more of a positive impact on judges' attitude than a negative one. Moreover, holding a private deliberation after the public hearing can eliminate these risks.

Lastly, there are arguments that more openness and transparency could negatively affect the courts' authority. As a matter of fact, openness can lift the veil of opacity that frequently covers court activities, and can also publicize negative symptoms (unpreparedness, bias, idleness etc.), but this is more about individual judges than about the whole institution. Moreover, those who accepted a position in public office should be subject to more criticism than an ordinary citizen.

4. Examples of new challenges in the field of transparency and openness of courts

In the following section, I would like to present some examples of the challenges in the field of transparency and openness of courts that were raised in the 21st century. I will mainly focus on the United States' federal judicial system, but in most of the cases, other democratic countries have to face very similar issues.

4.1. Vanishing of the trials

One of the first challenges that the ordinary judicial system has to face is that it is becoming more and more “invisible”.

On one hand, this is a result of the “privatization of the administration of justice”. Various methods of alternative dispute resolution flourish in several democracies. In the United States, the private dispute resolution has a long history, but over the past few decades, the approach of the legislature and courts changed a lot. Nowadays, the law often sends contracting parties to mandatory arbitration programs. Besides the usual explanation of avoiding the cost, length, and risk of litigation, another reason for arbitration programs can be the increasingly public nature of court proceedings, including broad public access to court documents. Parties can choose alternative dispute resolution methods to avoid the public scrutiny (Marder, 2009, p. 444). The problem is that to have an access to the data or content of these procedures is relatively hard if not impossible. On the other hand, there are countries where even if a case is brought to the ordinary court system, the number of the trials is decreasing. The phenomenon is called the vanishing of the trials. Statistics show that as a consequence of a decreasing trend, trials are now held in less than 2% of civil cases in the United States. In criminal procedures, the portion of cases in which there is a trial is around 5%⁶. The main change came in 1993, when Rule 16 (on the Federal Rules of Civil Procedures) was amended to detail more of the work and power of the managerial judge. Judges moved from “resolution by adjudication to resolution by negotiation”. They were also given the power to compel participation in settlement negotiation even when parties are reluctant (Resnik, 2006, pp. 552-553).

These phenomena demand new answers. According to Yale professors, Judith Resnik and Dennis Kurtis, adjudication is proto-democratic, as courts are able to limit the government. Democracy, of course, changed the adjudication process by making it public, independent and fair, but it also creates a new challenge. Legislators reacted to the increase in the number of rights-holders not only by creating more judgeship and courts but also by “privatizing” some procedures. However, “[t]he movement away from public adjudication is a problem for democracies because adjudication has important contributions to make to democracy” (Resnik, 2010, p. 26).

4.2. Cameras in courtrooms

The most important trials in history were public, as we saw in the introduction. But today, openness means much more than the personal presence of the audience. The media plays an intermediary role and its representatives are usually present in the courtrooms, enabling the wider public to have access to information on the courts' operation.

There is a global tendency to allow cameras into the courtrooms. The Supreme Court of Canada first allowed a camera in its court in 1981 and started webcasting the video streams of the court hearings live on the court's website in 2009. The U.K. Supreme Court has allowed its hearings to be broadcast since its opening, in October 2009. In Brazil, all judicial and administrative meetings of the Supreme Court have been broadcasted live on television since

⁶ Detailed numbers can be found in Galanter (2004, pp. 459–570).

2002 (Youm, 1990). However, there are still exceptions. Oral arguments held by the United States Supreme Court are public: theoretically anyone can enter the courtroom and proceedings are followed by a grand media attention. However, cameras are not allowed into the courtroom. Journalists can only take notes on paper, and the court allows for official drawers to make sketches of the arguments. As electronic devices are prohibited in the courtroom, there is no possibility to broadcast the hearing online, for example on Twitter. Journalists can only do this from the main pressroom a floor below (Strickler, 2014, p. 66).

In 2012, the U.S. Senate Judiciary Committee approved legislation to require the Supreme Court to televise their oral arguments, but this was opposed by several justices and never got the support of both houses of Congress at the same time (Miller, 2015, p. 168). Currently, none of the Supreme Court justices in office support the idea of cameras in courtroom⁷. Even the justices who might have had a positive opinion on this question during their confirmation hearings changed their opinion after their inauguration (p. 168). The most extreme opinion came from retired Justice David Souter who said that cameras would only enter the courtroom over his dead body⁸. Consequently, there is currently no probability of introducing a broadcast of the oral arguments⁹ in the Supreme Court in the near future. However, there are some positive steps in the United States. Previously, the Supreme Court was harshly criticized because of its practice, as it decided on a case-by-case basis in which cases it would make the audio recording public (Lithwick, 2006). The Supreme Court now publishes the audio recording of the oral arguments at the end of every week⁹. In addition, transcripts of the public hearings are available on the Court's website on the day of the oral argument¹⁰.

At a lower level, the Federal Judicial Center conducted a pilot project in fourteen federal courts from 2011 until 2015. They installed cameras in the courtrooms and the video recordings were made available on the website of the Administrative Office of U.S. Courts¹¹. The Judicial Conference, the main administrative body of the judiciary, dealt with the report on the pilot project on March 15, 2016, and agreed not to recommend any changes to the Conference policy. According to it,

[a] judge may authorize broadcasting, televising, recording, or taking photographs in the courtroom and in adjacent areas during investitive, naturalization, or other ceremonial proceedings. A judge may authorize such activities in the courtroom or adjacent areas during other proceedings, or recesses between such other proceedings, only: 1) for the presentation of evidence; 2) for the perpetuation of the record of the proceedings; 3) for security purposes; 4) for other purposes of judicial administration; 5) for the photographing, recording, or broadcasting of appellate arguments; or 6) in accordance with pilot programs approved by the Judicial Conference. When broadcasting, televising, recording, or photographing in the courtroom or adjacent areas is permitted, a judge should ensure that it is done in a manner that will: 1) be consistent with the rights of the parties, 2) not unduly distract participants in the proceeding, and 3) not otherwise interfere with the administration of justice.¹²

⁷ The C-Span, a channel specialized for the transmission of programs on the constitutional organs gathered in a separate YouTube channel the current and former Supreme Court justices' statements on this question. https://www.youtube.com/view_play_list?p=4CBB5711EF7BD211.

⁸ The other famous story is that Justice Ruth Bader Ginsburg once fell asleep during an oral argument (Strickler, 2014, p. 67).

⁹ See: http://www.supremecourt.gov/oral_arguments/argument_audio.aspx.

¹⁰ See: http://www.supremecourt.gov/oral_arguments/argument_transcript.aspx.

¹¹ See: <http://www.uscourts.gov/about-federal-courts/cameras-courts>.

¹² See: <http://www.uscourts.gov/about-federal-courts/cameras-courts/history-cameras-courts#a1>.

Accordingly, the federal judicial system did not become more open or transparent, and the question of allowing further openness remains open for the future in the United States.

4.3. Privacy of parties or other participants

Access to the court records is, on the one hand, a precondition of the right to fair trial of the parties of a case. On the other hand, it is also necessary for the media to be able to exercise the freedom of press and freedom of speech. For the general public, this is the basis on which they may form their opinion on the courts' activities.

The decisions of the courts are usually public in all democratic countries; however, there are differences in the level of the openness. In common law systems, for example, it is traditionally not only the decisions, but also the case files, which are made public.

Originally, this meant that someone who wanted to look at these documents had to go the registry of the court personally or send someone for a copy. This is a type of openness, but it is usually called practical obscurity: only the most interested members of the public would take the initiative to go to the courthouse and examine these documents (Marder, 2009, p. 444).

Nowadays, the internet makes it possible to reach these documents while far away from the courthouse. The general question is whether the level of openness on the internet should be the same as the level in the courthouse. In our opinion, there is no reason to argue for a different level.

In the United States, the Public Access to Court Electronic Records (PACER) system was developed in 1988 to provide access to the court records. It is supplemented by the Case Management/Electronic Case Files system. Virtually every docket entry, opinion, and case file document is filed electronically in a federal appellate, district, and bankruptcy court and, as a result, is available to the public over PACER world-wide in real time (Sellers, 2014, p. 1027). This can be considered a great step toward ensuring transparency and openness. However, this broad openness can cause also problems. The first is the problem of the personal data of the parties and other participants in the procedure. An entirely open case file can allow access to an enormous amount of personal data. The procedural rules list the data that an electronic or paper filing with the court should not contain. According to the Federal Rules of Civil Procedure, Rule 5.2.(a), it can include only the last four digits of the social-security number and taxpayer-identification number; the year of the individual's birth; the minor's initials; and the last four digits of the financial-account number¹³. However, the name of the parties or other participants of the case is always public (except in the case of minors).

A very particular problem arose when the site *Who's a Rat* (www.whosarat.com) was created. After paying quite a low membership fee, anyone can browse the data of police informants with names, photos and court documents about their plea of guilty.

Most legal experts agreed that *Who's a Rat* is protected by the First Amendment. As a reaction, the Justice Department has begun urging the federal courts to make fundamental changes in public access to electronic court files by removing all plea agreements from them whether involving cooperating witnesses or not. But this practice is against the openness of justice (Liptak, 2007). Most of the federal courts refused to categorically exclude the posting of such information and continued to examine on a case-by-case basis the necessity of sealing (Westley, 2010).

¹³ Federal Rules of Criminal Procedure, Rule 49.1.(a) establishes that in the criminal procedure, only the city and state of the home address can be included.

4.4. Changes in the structure of the media

It is a general tendency in the traditional and electronic press that the number of reporters covering the courts and court procedures is decreasing. This can also cause a decrease in competence, as they are sometimes not specialists as their predecessors were. Additionally, the demand for news is more pressing, leading to higher speeds in publishing which can also bring about mistakes. Perhaps the most painful mistake in the history of covering the US Supreme Court was when CNN started to report on the Obamacare Case before reading the whole judgment, announcing the opposite result to what had been decided by the Court (Fung, 2012).

Another tendency is that new forms of media play an increasingly important role in covering the courts: anyone can become a “journalist” via blogs and social media (Sellers, 2014, p. 1022). Some examples are admirable, for example, *SCOTUSblog* (Supreme Court of the United States Blog, www.scotusblog.com) became one of the most important sources for academics and the general public to get informed about the US Supreme Court’s work. But, of course, there is no guarantee that other blogs will reach this high quality.

The courts should react to these tendencies in the structure of the media. On the one hand, they have to make a decision about how they handle new forms of media. The U.S. Supreme Court gave a restrictive answer to this problem: blog representatives cannot get credentials at the Supreme Court because according to the Supreme Court’s guidelines, applicants for regular press credentials must operate or be employed by a media organization, and their primary professional work must be for the media organization through which they are seeking the press pass¹⁴.

On the other hand, if the media is no longer able to report on the courts, the courts should take steps to communicate more effectively with the media and the public at large. According to Canon 3A(6) of the Code of Conduct for United States Judges, judges must avoid public comment “on the merits of a matter pending or impending in any court”. However, Canon 3 states that “[t]he prohibition on public comment on the merits does not extend to public statements made in the course of the judge’s official duties, to explanations of court procedures, or to scholarly presentations made for purposes of legal education”. So even if the judges cannot comment their cases in process, there is a need for a more activist approach concerning communication. David A. Sellers, the Public Affairs Officer at the Administrative Office of the U.S. Courts proposes four solutions to this end: increasing the numbers of the Public Information Officers (PIO), easier access to court records, the development of court internet sites, and a more active use of videos and social media (Sellers, 2015, 1024-1034).

Court PIOs perform a wide variety of duties: they manage the court’s website, develop educational outreach programs and events, conduct courthouse tours, produce annual reports, etc. (p. 1026.). In the United States, they have their own organization to exchange experiences and best practices, the CCPIO: Conference of Court Public Information Officers (<http://ccpio.org/>). While state courts in the United States very often employ a public information officer, it is still the exception at federal level. Absent a PIO, the district executive, clerk of court or division manager has contact with the press. They often designate a member of the clerk’s staff, or some other court employee, as a contact person for the news media¹⁵. In all of these cases, the officials exercise this task beside their other competences, so necessarily with less expertise, time and means.

The court can communicate with the media and the general public via its internet site and social media very effectively. While nowadays almost every court has an informative

¹⁴ See: “Requirements and Procedures for Issuing Supreme Court Press Credentials”. http://www.supremecourt.gov/publicinfo/press/Media_Credential_Requirements_And_Procedures_February_2015_v2.pdf.

¹⁵ See: “A Journalist’s Guide to the Federal Courts” (2011). <http://www.uscourts.gov/file/journalistguide2011pdf>

website, especially the higher level courts, the use of social media is still very low. Even if they have a Facebook or Twitter account, they do not use it very often¹⁶. However, for example, the common Facebook page of the D.C. Court of Appeals and the Superior Court of the District of Columbia regularly publishes news concerning the operation of the courts¹⁷. In the US judicial system, the bankruptcy courts are the primary users of Twitter, typically tweeting announcements of case filings, announcement of estate sales and court openings and closing¹⁸. The Federal Judicial Center, the education and research agency of the judiciary, has also a YouTube channel (<https://www.youtube.com/user/uscourts>) where they upload videos on public hearings, information about the operation of courts, and advertisements to increase the popularity of the judiciary.

5. Conclusion

Transparency and openness of the courts is not a settled issue. Over the past few centuries, and especially in the last few decades, this field has changed enormously. An intensive development has occurred, moving from the former situation, where one's physical presence at the courthouse was the only way to learn about the court's operation and decisions, towards a new dimension of openness, which includes the possibility of a "virtual presence". The scope of interested persons is also wider, as is the scope of the concerned procedures. Today, transparency and openness of courts has a much broader meaning than just a public trial. The principle of procedural transparency covers the whole process and almost all of the activities of the courts. In addition, the institutional-organizational form provides a transparency that is broader than the openness of the single procedures. There is a long list of fundamental rights and constitutional principles that can be raised in favor of transparency and openness, but of course, there are also arguments against. A careful design by the legislation and judiciary should ensure the balance of these rights and principles. Even if open justice was traditionally a basic concept in the constitutional democracies, in recent decades, new challenges have arisen, making a reconsideration of the answers also necessary.

These challenges place the responsibility on the legislators: they must adopt a regulation that can achieve the best balance between the fundamental rights and constitutional principles for and against transparency. Perhaps the courts' responsibility is even higher: they must draft appropriate internal regulations to ensure the technical conditions for openness, and must also conduct effective communication and public outreach work. The judges are in the focus; their practice and attitude is a crucial element in this field. Finally, there is also a demand on the media: it should be able and willing to inform the general public about the operation of the courts. However, the first task is assigned to the scholars: they must analyze the changes and provide possible solutions that can be used in practice. This paper also aimed to encourage them to take this step.

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¹⁶ Only a dozen or so federal courts use social media, but half of the pages had not had any activity since they were created (Sellers, 2014, p. 1033).

¹⁷ See: www.facebook.com/DCCts.

¹⁸ Sellers (2014, p. 1033). See for example https://twitter.com/WAWB_News.

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