

## Judicial transparency furthering public accountability for new judiciaries

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### 1. Introduction: Challenges for new judiciaries

In most present-day Western political systems the authority of governmental institutions is no longer self-evident.<sup>2</sup> This does not only hold true for the legislative-executive branch of government,<sup>3</sup> but also for the judiciary.<sup>4</sup> The role of modern judiciaries – to which I will confine myself in this contribution – has substantially changed over the years; its bearing and weight as a law-maker have increased vis-à-vis the administration and legislature due to the growing complexity of society (and the conflicts resulting therefrom), the internationalization of the law, individualization, informatization and some other ‘-alizations’ to boot.<sup>5</sup> These developments draw on the legitimacy of the judiciary, a state power which is – as we know – in most countries not democratically underpinned.<sup>6</sup> An ever more important role of the judiciary as a law-making, ‘counteractive’ state power is – one may argue – no more than the apt and correct reaction to the actions of the legislature and administration. The legislature increasingly relies on judicial action (e.g. by using open-ended norms), and the administration interacts and intertwines with society in ways that call for remedial action. This is the paradoxical result of the law-making dominance of the legislative-administrative branch of power in most modern societies.

In countering these developments, the judiciary is only fulfilling its proper corrective role in a state governed by the rule of law. On the other hand: a strong reliance on a very powerful judge-lawmaker is – especially in civil law countries – ‘unnatural’ to systems based on the idea of checks and balances between state powers.<sup>7</sup> In states governed by the rule of law, especially

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2 One may argue – to good effect – that this authority has never been self-evident, but in the age of the informed, self-conscious individual, the upsurge of civil society and citizenship, and the dominance of the ‘classe politique’ government, authority in most Western political systems is challenged in new, unprecedented ways, resulting in new demands on government especially as regards the legal protection of the individual, the openness of government and access to government information, accountability and liability, and democratization (to name but a few).

3 Due to the growing symbiosis of the legislative branch of government and the executive/administrative one, it has become increasingly common to look at them as one, undivided department of governmental power. This perception results in the notion of *Duas politica*, or *Duo Politicum*, referring to a bipolar constitutional/political system with the legislative/administrative complex of governmental power on the one hand and the judiciary – counterbalancing power – on the other. See T. Koopmans, *Courts and Political Institutions*, 2003, p. 247.

4 See e.g. the report by the Dutch Scientific Council for Government Policy (Wetenschappelijke Raad voor het Regeringsbeleid), *The Future of the national ‘Rechtsstaat’* (De toekomst van de nationale rechtsstaat), The Hague 2003, Chapter 7, especially p. 185 and p. 186.

5 See J. Soeharno, ‘From Guardian of the Rechtsstaat to Ruler in the Rule of Law: an Inquiry into the Increased Role of the Judiciary’, in Aukje van Hoek *et al.* (eds.), *Multilevel Governance in Enforcement and Adjudication*, 2006, pp. 157-177.

6 Some of the judges in the world do have a popular mandate. In some states of the United States, for instance, judges are elected.

7 Be they inspired by the idea of *Trias Politica* or not.

the ones governed by continental ‘Rechtsstaat’ principles, the centre of gravity of the law and decision-making belongs to the democratically-legitimized legislature and the democratically-accountable administration, not with the judge.

The original legitimization of judicial action lies in the independent role of a judge as an arbiter operating under the rule of law, judging conflicts, supervising and reviewing state actions. No need for democratic legitimization there: popular influence is rather more of a threat within the rationale of this concept. This original pattern, however, no longer accommodates the judiciary in its changed setting and role. Kate Maleson<sup>8</sup> has pointed out that we live in an age of judicial activism, where – for instance – judges and judiciaries have expanded their judicial review into areas hitherto considered the reserve of politics, and where political life itself has become more judicialized. This transformation results in – what Maleson calls – a *new judiciary*. This new judiciary is activist, with new responsibilities in the field of law-making and even policy-making. This is partly the result of a global trend of judicialization due to, for example, the growth of international (human rights) law, partly the result of the need to empower the judiciary vis-à-vis the other government branches, partly the effect of a legislative attitude to rely more and more on the judiciary to decide on controversial issues, in order to develop balanced case law.<sup>9</sup>

New judiciaries like this, partly performing on the political platform, can no longer be totally shielded by judicial independence<sup>10</sup> from public control and public accountability. If we want the rule of law values to be effective in a new setting, new forms of control and accountability<sup>11</sup> for the judiciary may be warranted.<sup>12</sup> Transparency, openness, a more efficient delivery of justice, and new forms of interaction between politics and the judiciary<sup>13</sup> are the modern buzzwords in debates on the accountability and legitimacy of non-elected organizations.<sup>14</sup> But what might be the proper way to hold new judiciaries accountable without compromising or judicial independence?

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8 K. Maleson, *The New Judiciary; the effects of expansionism and activism*, 1999.

9 *Ibid.*, pp. 8-35.

10 If indeed the judiciary was ever totally detached from this form of accountability.

11 The concept of accountability is – in our day and age – commonly defined as: the process by which an ‘organisation’ (my addition WV) holds itself openly responsible for what it believes, what it does and what it does not do in a way which shows it involving all concerned parties and actively responding to what it learns. See H. Seim, *By What Authority? The Legitimacy and Accountability of Non-governmental Organisations*, paper delivered at The International Council on Human Rights Policy International Meeting on Global Trends and Human Rights — Before and after September 11, Geneva, January 10-12, 2002. To be found at: <http://www.jha.ac/articles/a082.htm> (last consulted on 17 April 2007).

12 See G.Y. Ng, *Quality of Judicial Organisation and Checks and Balances*, 2007, p. 17.

13 A remarkable trend in Europe is the mushrooming of so-called Councils for the Judiciary. These councils come in different types and sizes, under different labels and have different responsibilities and competences. Notwithstanding all of their differences, Councils for the Judiciary (used here as the umbrella term to refer to them) in Europe do share a lot of common features. Generally they function as independent intermediates between the government and the judiciary in order to ensure and guarantee the independence of the judiciary in some way or in some respect. For purposes of classification a Council for the Judiciary could be defined as an institution which: a. is a self-governing judicial organisation, b. functions independently from the government and parliament, c. acts as an intermediate institution (a ‘buffer’) between the legislative-executive branch of government and the judiciary, and d. does not administer justice as such, but typically performs ‘meta-judicial’ tasks such as disciplinary action, career decisions by judges, the recruitment and professional training of judges, coordination between courts, general policies, courts’ service-related activities (budget, housing, automation, finances and accounting, etc.), etc. as regards judges and courts. These Councils for the Judiciary are booming throughout Europe. A recent survey by the Consultative Council of European Judges (CCJE) shows that 27 Countries out of 38 do have a Council for the Judiciary in place. Most of them have been established very recently. See the 3rd European Conference of Judges, dedicated to the theme: Which Council for Justice? Rome (Italy), 26-27 March 2007. [http://www.coe.int/t/dg1/legalcooperation/judicialprofessions/ccje/meetings/Conferences/Conseils/default\\_en.asp](http://www.coe.int/t/dg1/legalcooperation/judicialprofessions/ccje/meetings/Conferences/Conseils/default_en.asp) (last consulted on 18 April 2007). See also W. Voermans, ‘Councils for the Judiciary in Europe: trends and models’, in F.R. Segado (ed.), *The Spanish constitution in the European Constitutional context*, 2003, pp. 2133-2144, and W. Voermans & P. Albers, *Councils for the Judiciary in EU Countries*, European Commission for the Efficiency of Justice (CEPEJ), Council of Europe, Strasbourg 2003.

14 See Seim, *supra* note 11.

### ***Hard and soft accountability***

As a first on the road to answering this question Gar Yein Ng, in her recent Utrecht PhD thesis makes – inspired by Malleon – a very helpful distinction between more ‘traditional’ forms of hard accountability, and more modern ‘soft accountability’. Hard accountability for the judiciary entails that judges can only be scrutinized and held answerable indirectly for their professional functioning *e.g.* via the mechanisms of an appeal system, by way of the power of the purse for judicial organisations, through recruitment, appointment, promotion, permanent education, disciplinary action and so on. Hard accountability methods are traditionally very aloof in order not to compromise judicial independence. These methods of accountability evidently provide legitimacy<sup>15</sup> to judicial authority. Soft accountability, on the other hand, is not indirect, but deals with the openness and representation of the judiciary in a more direct way. This type of accountability demands procedural transparency, representation and sensitivity as regards different interests and needs of a changing social environment – as Ng puts it.<sup>16</sup> This, to her mind, is a two-way process whereby courts need to open up to the public, to enter into a dialogue and at the same time to be more sensitive to values and the needs of the community (social accountability – as she calls it). Soft accountability is by no means a new concept for the judiciary but the increase of soft accountability instruments like the introduction of Users’ Charters, more open complaints processes, and a more open attitude as regards access to information, according to Malleon, are indicative for a trend in which soft accountability instruments are used to answer a growing public pressure for greater social accountability as regards the judiciary.

### ***Focus of this contribution***

In this contribution I will not come up with grand schemes and theoretically sound solutions or ways to arrange a proper – soft – accountability for the new judiciary. I will limit myself to discussing and analysing the efforts of some judiciaries in Europe and the US to open up and work more transparently. I will especially focus on the comparison and analysis of the way in which judiciaries in different countries tackle the demand for information about cases, case-related or court-related issues. From their policies on information provision we may read how different courts deal with the demand for social accountability. At the end of this contribution I will attempt to give a preliminary answer to the question whether these information-provision policies, as methods of soft accountability, contribute to the legitimacy of the judiciary.

## **2. Opening up: Information provision by the courts**

The openness of proceedings, especially public hearings, rulings and verdicts, traditionally constitutes an important part of the right to a fair trial. Transparent proceedings serve a variety of goals, one of them the possibility to exercise some form of control over the judiciary. Nowadays, however, the need for public information is not satisfied by mere open trials. Judicial activities have accessed the centre stage of the public debate, televised mass media serve as intermediaries to inform the public, and we live in an information age where information is exchanged with lightning speed. This affects both the way courts provide information and the level of public expectation. Information provision by the courts is very topical, so much so that

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15 Seim defines legitimacy as ‘the particular status with which an organisation is imbued and perceived at any given time that enables it to operate with the general consent of peoples, governments, companies and non-state groups around the world’. According to Seim legitimacy is *derived* from morality and law and *generated* (or reaffirmed) by veracity, tangible support and more intangible goodwill. See Seim, *supra* note 11.

16 Ng, *supra* note 12, p. 17.

the Council of Europe dedicated a Recommendation to it – as regards criminal proceedings, in 2003.<sup>17</sup>

In a research project in 2005 Philip Langbroek and I looked into the way courts in eight different EU Countries (Denmark, England & Wales, Germany, France, Italy, the Netherlands, Portugal, Romania) and the USA deal with information provision.<sup>18</sup> We mainly focussed on two major areas of tension regarding information provision by courts. The first was the tension between the need for transparent proceedings, trials and judicial publicity on the one hand (the right to a public hearing) and the right to privacy of persons involved in trials on the other. Second, the possible tension between primary passive information provision (open-doors at court sessions, admission of the press, etc.), and – secondary – active information provision (pre-trial publicity, information about parties and documents, press judges, press releases, information, the publication of – administrative – court information, etc.). In the next subsections the findings of our research are summarized.

***a. Information provision on request: The right to a public hearing & publicity versus privacy and security***

In all of the countries involved in the 2005 project court sessions are open to the public as a general rule. The right to a public hearing goes back several centuries and is – as a requirement of the rule of law – embedded in the constitutional and legal systems of most modern liberal democracies, as a common heritage and hence common fundamental constitutional principle. In the USA the right to a public hearing – stemming from fair-trial origins – is coupled with the right of the public to attend criminal proceedings – the public’s right to know.

In article 6, paragraph 1, of the European Charter on Human Rights – a treaty to which most of the countries involved in the project are party – the right to a public hearing forms part of the more general right to a fair trial.<sup>19</sup> Most countries have enshrined the right to a public hearing in the Constitution in order to emphasise its fundamental character, as it were. France, Germany and the UK (for obvious reasons) do not have constitutional provisions in place. The constitutional guarantee for a public hearing in the USA is an indirect one: by requiring a jury in criminal trials in section 3 of article 3 of the US Constitution an element of publicity is introduced into criminal hearings.

Constitutional provisions on the right to a public hearing come in different forms and shapes. Some constitutions distinguish between hearings and rulings or judgements. For example, the Dutch Constitution provides that trials are to be held in public and judgements are to be pronounced in public (art. 121 Dutch Constitution). The distinction does have some implications: the right to the public pronouncement of judgements cannot be limited in the same way and to the same extent as the right to a public trial. Most countries involved in this research do not explicitly distinguish between the trial and judgement. Some constitutions provide for public court hearings (implicitly excluding the judgement or rulings. *E.g.* article 206 Portuguese

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17 Committee of Ministers, Council of Europe 10 July 2003, 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.

18 P.M. Langbroek & W.J.M. Voermans (eds. and research directors), *Provision of information by courts and court administrations: a comparative inventory of eight European Countries and in the USA*, A research project commissioned by the Dutch Council for the Judiciary, Utrecht/Leiden 2005. The different chapters (country reports) of the report were authored by: V. Lehmann-Nielsen (Denmark), C. Menzies (UK), H. Pauliat (France), R. Pamp (Germany), D. Cavallini (Italy), W. Voermans & A. Brenninkmeijer (the Netherlands), C. Gomes & P. Fernando (Portugal), I. Vasiiu (Romania) and A. Skove (USA).

19 Article 6 stipulates that ‘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. (...)’

Constitution). Other countries – like Romania – have a sort of umbrella protection: all court proceedings (including trials and judgements, verdicts or rulings) are open to the public, except for cases provided by law.<sup>20</sup> Much along the same lines, under the German Judicature Act in ordinary court proceedings all oral arguments – including the pronouncement of judgement and other decisions – are public. The Danish Constitution is interesting because it does not directly grant a right to a public hearing to its citizens, but calls upon the authorities to conduct public and oral court proceedings to the ‘widest possible’ extent.<sup>21</sup>

#### *Limits on the right to a public hearing*

In none of countries involved in the 2005 project, however, was the right to a public hearing absolute. Different limits were set to the publicity of court sessions. The extent of the limitations varies according to the sort of proceedings involved. Most countries have legislation enabling closed-door court sessions. The legislation varied in different respects, but we were able to distinguish different strands of characteristic features. The legal regimes varied as regards the limits set to different sorts of proceedings, the authority to order closed-door court sessions (and the grounds), group differentiation as regards (limited) admittance to proceedings (*e.g.* a different regime for the press – audio and video recording, photographing, television or radio broadcasting) and the existence of a dedicated set of press rules.

#### Differentiation according to the sort of proceedings

The research showed that most countries have different regimes for limiting access to criminal proceedings, on the one hand, and civil proceedings on the other. As a rule more restrictions to publicity in criminal proceedings are possible. In criminal proceedings the age of the suspect does seem to play a role in many countries. In almost all of the countries involved minors need to be tried behind closed doors and they are not admitted to court proceedings.<sup>22</sup> State secrets can also play a role in the decision to close the doors and in some countries criminal proceedings dealing with sex crimes can – at the request of the victimised party – be conducted behind closed doors (France). In civil matters the focus in public/non-public questions is more on the legal interests of the parties involved, be it business secrets or privacy-related interests. Sometimes parts of the proceedings (for instance, preliminary hearings in Italy) or especially sensitive proceedings (juvenile court proceedings) are exempted from the obligation of a public hearing. In the USA different family-related proceedings (adoption, guardianship, termination of parental rights, etc.) are also, historically, held behind closed doors. In England and Wales cases involving children are – as we noted – mostly dealt with behind closed doors.

#### The ordering authority

There is some variation here: sometimes the presiding judge decides (*e.g.* in civil matters in the Netherlands, in criminal matters in France), sometimes the court as such (see for instance Denmark). Even when the court has to decide it will often amount to the same thing: the president will have to decide or at least take the initiative. Sometimes the doors can only be closed at the request of the parties or the public prosecutor and *ex officio* (*e.g.* Portugal); in some countries the relevant legislation does not mention a preliminary request (but does not rule it out

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20 See article 127 Romanian Constitution.

21 See section 65 of the Danish Constitution.

22 In the USA there is a trend to allow the public to attend juvenile court proceedings, according to the report by D.M. Rubio & F. Cheesman, *Minnesota Supreme Court State Court Administrator's Office, Key Findings from the Evaluation of Open Hearings and Court Records in Juvenile Protection Matters*, Denver, Co. 2001.

either). Under Danish law the phenomenon of the double-closed-doors exists. This means that the decision to close the doors itself is made in a closed-door session.<sup>23</sup>

#### Grounds for closed-door sessions

We encountered basically five sorts of grounds for closed-doors court proceedings in this project. These sorts of grounds run parallel to the interest protected. The first group of grounds is aimed at the interest of an orderly trial (peace and order in the courtroom, equality of arms, fair trial without undue influence from the public<sup>24</sup>), the second group tries to protect public morals (ethics, etc.), the third state-related interests (*e.g.* state secrets, but also the interest of an uninhibited investigation and effective prosecution) and the fourth the interest of the parties involved (*e.g.* privacy, business secrets) and – in some courts – the interest of public health and safety (*e.g.* Italy). In family courts and juvenile criminal proceedings age – both of the involved party and the public – is in most countries a separate motive for closed-door sessions. The grounds for closing the doors in any given country are all variations to the themes of the first five groups of closed-door motives.

#### Group differentiation

From the research it is evident that where the general public are allowed to attend court proceedings, the press are admitted too. Most countries, however, have rules and restrictions on intrusive methods of press reporting. We found two sorts of reporting restrictions: restrictions as to the reporting method, and restrictions pertaining to the reported content.

#### Restrictions on reporting methods

In almost all of the countries involved in the 2005 research, restrictions apply to press reporting methods of court proceedings. The more intrusive and direct the reporting method (*i.e.* live broadcasted television) the stricter the limitations put thereon.

Most countries – except for Denmark<sup>25</sup> and the UK<sup>26</sup> – do not have legislation or policies that limit the dissemination of written reports of court sessions. A rule like that would, of course, soon risk running counter to the principle of freedom of expression. More intrusive reporting methods (making sketches, still photography, audio or videotaping, live broadcasting be it by radio or television) are, however, in most countries subject to restrictions. In some countries these restrictions are based upon statutory provisions. Section 41 of the UK Criminal Justice Act (CJA 1925) prohibits the taking of photographs in or around courtrooms and section 9, paragraph 2, of the UK Contempt of Court Act 1981 makes sound recordings of court sessions without permission punishable as contempt of court. France, too, has statutory restrictions on court reporting. Law n° 85-639 of July 11th 1985 (as amended in 1990) forbids the recording or photographing and subsequent publication or live broadcasting of court proceedings. Recordings of proceedings with some historic value – for instance the *Klaus Barbie* trial – are exempted; they can be published if enough time has elapsed after the final verdict.<sup>27</sup> In Italy the Criminal Code

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23 Section 29c of the Danish Administration of Justice Act.

24 *E.g.* in Denmark the presiding judge can refuse certain persons access to the court hearing on the ground that it may unduly influence witnesses.

25 Under section 30 of the Danish Administration of Justice Act the presiding judge can prohibit a – public – written report of the sitting.

26 In Family Court proceedings it is not allowed to publish certain information (names and addresses, a concise statement of the allegations, the defence and counter-allegations, etc.) unless the presiding judge directs otherwise. See also *Broadcasting Courts Consultation Paper* CP 28/04, p. 33. Section 31 of the Danish Administration of Justice Act contains similar restrictions.

27 They can be published after 20 years when the Minister of Justice agrees. After 50 years publication is free. The 1990 amendment provoked a debate in France.

and its annexed statutory instruments do allow for the recording of court proceedings provided that the court permits this, and the parties, witnesses, etc. approve. Romania has special legislation in place including special dispositions concerning the access of mass-media to information of public interest.<sup>28</sup> Some provisions of this act relate to the reporting and subsequent dissemination of information from court proceedings. In the US different States have different regimes, some of them enshrined in legislation. According to the US report all state courts have either permanent or experimental rules regarding cameras in court. Different recording methods are subject to different restrictions in different states, all giving as much rein to the press as possible in view of the other interests involved.

Other countries have more lenient regimes. In most countries involved in the research the admission of the recording<sup>29</sup> and radio or television broadcasting press to the actual proceedings is a matter for the court's discretion. This discretion is in most cases a sequel to the authority of courts or judges in these countries to direct an orderly court trial.

The regimes we found vary in detail. Intrusive press reporting may, judging from the country reports, generally be refused on two grounds: interference with the orderly course of the proceedings, and risk of undue defamation or damage to privacy interests of (one of) the parties or others involved (witnesses, experts, etc.). Express court authorisations for reporting and broadcasting of court proceedings is – as our research shows – always necessary. In some countries (*e.g.* Italy, Portugal and states in the USA) the court can only permit recording and broadcasting of publication after the parties, witnesses, experts, etc. concerned have consented. In Italy party consent may be overruled by the court. If an overriding social interest exists in the publicity of the proceedings the permission to record and publish may be granted without the consent of the party, witness, expert, etc.

The more intrusive the reporting method, the less the courts will be inclined to authorise its use. For instance, artist's renderings are almost always allowed in the US, while televised live broadcasting is almost never allowed.<sup>30</sup> In most countries permission for the recording and broadcasting must be requested in advance (in the Netherlands 12 hours before the proceedings begin), and – in some countries – may be revoked during the proceedings (*e.g.* Romania).<sup>31</sup> The permission itself may be conditional: reporting and publication or broadcasting can be permitted under certain conditions, like recording only up to the point of the start of the actual proceedings, agreed camera positions, non-identifiable recording, etc. (*e.g.* the Netherlands). Romania also has a system of press accreditation that coincides with the permission system. In some countries reporting and recording restrictions do not only apply to the courtroom, but also to the court buildings and personnel (*e.g.* Germany)

In Germany a specific media regime applies for the proceedings of the Federal Constitutional Court. This system differs somewhat from the discretionary system which the ordinary courts use. Federal Constitutional Court sessions can be registered freely within the court up until the moment the Court has stated the presence of the parties and during the pronouncement of the court's decision.

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28 Law n° 544/2001.

29 Including taking photographs.

30 The trial of Michael Jackson in the US introduced a novelty. The court session was re-enacted a day after the trial by actors, thus bringing a semi-live report from the court's proceedings. Under the first amendment it is quite difficult to oppose this kind of indirect reporting.

31 In Germany the court's discretion in this respect is limited by the constitutional rights of the freedom of the press and the freedom to broadcast. These rights, the German reporter claims, can force judges to allow (live) TV and radio recordings, at the beginning of the trial, during intervals or after the oral arguments.

In countries where press recording and publication/broadcasting are subject to the court's discretion only the Netherlands – judging from the country reports – has explicit policy rules pertaining to all the courts (Courts' Press Directive 2003). Judging from the reports these Dutch policy rules are unique: in other courts the rules on press admission and reporting methods are laid down in legislation or they are the product of jurisprudence derived from case-based law.

#### Restrictions pertaining to the reported content

Some countries have – and we were a bit puzzled by that – imposed restrictions on the content of reports: the names and addresses of the parties involved in family or criminal court proceedings cannot be published. Denmark and the UK have rules that go even further down that road: section 1071 of the Danish Administration of Justice Act provides that reports on court proceedings shall be objective and loyal. According to Danish Law a reporter is, for instance, not allowed to report in a one-sided manner, to use harsh or contemptuous speech or to report on actions or behaviour of parties or suspects that are not relevant to the case.

#### Access to documents and the obtaining of copies or transcripts by persons other than the parties to the litigation

Verdicts, judgments and rulings are – as the research shows – as a general rule public and can be obtained by the parties to the litigation themselves or others. Access to documents or information from ongoing proceedings is generally much more restricted. The principle of publicity or openness of judgements results from special information law dealing with access-to-court documents (*e.g.* Section 5 of the UK Civil Procedure Rules or the Code of Civil Procedure in Portugal) or from the result of the general access to information legislation (Romania).

In general, restrictions on the access of non-parties (including a former suspect) do exist in most countries. Sometimes the restrictions are generic – privacy-sensitive cases (family law) in Denmark for instance<sup>32</sup> and in France – in other countries judges or courts decide whether a non-party (or a party for that matter) will have access to the Courts' files (including the judgements) (*e.g.* UK). In some countries, applicant non-parties need to show a reasonable interest (Portugal and France). Although we will not enter into detail on the way copies of judgements can be obtained both by parties and non-parties in this summary, it is interesting to note that only the French and Dutch reports mention the manipulation of the copy (*e.g.* striking out the names of the parties) as a standard practice. In systems where judges decide on applications for court information they can however impose restrictions (see, once again, the UK). Electronic access has stepped up the discussion on access to court information in some countries (notably the US). Should all court documents be accessible online or should there be filters and gatekeepers? As a result of this discussion Guidelines like the CCJ/COSCA<sup>33</sup> *Guidelines for Public Access to Court Records* have been drawn up in the US to serve as an example/best practice for the Courts.

#### Specific press rules?

Most countries do not have specific press rules as a point of departure; the press are treated much like the general public or interested parties. Only the Netherlands and Denmark do seem to have a specific policy on how the press should be handled by the courts (*e.g.* the Courts Press Directive 2003). In the USA, the special position of the press in court proceedings is recognized in

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32 Rulings or judgments in matrimonial cases, custody, paternity, adoption cases etc. are not accessible to persons who were not involved in the proceedings.

33 Conference of Chief Justices and the Conference of State Court Administrators.

jurisprudence, but the openness of courts to the press does not exceed the openness of the courts to the general public.

However, some countries seem to have special provisions in their access of information or data protection legislation regarding press and mass media (Romania's Law no<sup>o</sup> 544/2001 concerning free access to government information and Italy's Personal data protection Code), while probably many more countries provide for special facilities for the press/media than can be seen from the reports.

### ***b. Spontaneous information provision***

In all countries involved in the 2005 project, the principle of open access to government (including the administration and the judiciary) information was adhered to. The right entails that government information is to be made available and accessible to the general public and to the press or 'the media'. What this means for information held by courts' administrations is not always entirely clear, since the distinction between what is 'administrative judicial action' (subject to open access under information law) and 'judicial action' itself (not subject to the general regime of open access) is not always apparent. Most countries feel that a difference does exist between proper administration and adjudication, and that this distinction has consequences (or needs to have consequences) as regards the obligations of access to information held by judicial organisations. Almost all of the countries involved in the research, however, seemed to struggle with this distinction. A key term here is the definition of 'public authority'. In most countries courts are not considered to be a 'public authority', as they are evidently not part of the executive branch of government. On this ground courts are often exempted from general access to information legislation. Sometimes specific and dedicated access to information regimes for the judiciary exist in order to fill the gap.

### *Access to information legislation*

In most countries the relevant law on access to government information is enshrined in acts of parliament with a general scope, like the Administrative Procedures Act in Italy<sup>34</sup> or in separate, specially dedicated acts, like the Freedom of Information Acts in the UK and the USA, the Free Access to Information Act of Romania,<sup>35</sup> the Danish Act on Public Administrations' Openness to the Public, the Portuguese Act on Access of Citizens to Administrative Documents,<sup>36</sup> the French Act on Free Access to Administrative Information,<sup>37</sup> and the Dutch Act on Access to Administrative Information (Wet openbaarheid van bestuur, 'Wob' for short).<sup>38</sup> The German case is the exception here. In Germany the principle of free access to government information is neither enshrined in the Constitution, nor in federal law. Four of the German 'Länder', however, do have freedom of information legislation in place. In most countries, this information is available to everybody, but in Italy one has to show a specified interest in the information requested.

Common exceptions to the right of access to government information are non-disclosure in view of the interest of the safety of the state, national security, public security, the interest of justice (criminal investigations), commercial interests of firms, internal company secrets (in

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34 General Law on Administrative Proceedings, 7 August 1990, no. 241.

35 Law n<sup>o</sup> 544/2001.

36 Law n<sup>o</sup> 65/93 of August 26.

37 Loi (Law) 78-753 du 17 juillet (July) 1978, modifiée (modified) 12 avril 2000.

38 Wet van (Law of) 31 oktober 1991.

relation to safeguarding honest competition) and the interest of privacy of persons (also in relation to personal health and safety).

#### *Applicability to the courts*

In Italy and Germany there exists a general regime on access to information held by the courts' administration. No real distinction is made between adjudication and administration; there is only a difference of regime as regards the publicity of public hearings and public rulings, verdicts and judgements, on the one hand, and other court actions on the other.

In Denmark the general courts' administration on a national level falls within the scope of the Act on Public Administrations' Openness to the Public. Adjudication in a narrow sense does not. What rules of accessibility and publicity apply to the administrative documents of the different courts depends on the interpretation of the Act on Public Administrations' Openness to the Public.

In the UK the Freedom of Information Act (FOIA) distinguishes between administration and adjudication. The courts themselves are exempted from FOIA obligations, but not the courts' services (*i.e.* the English word for court administration). Although the FIOA is generally applicable to the court's service, it does make several exceptions for information held by the services: information constituting a part of another document and documents made by the court or by court staff themselves are exempted. The same holds true for documents deposited at the court and documents concerning the preparation of an investigation.<sup>39</sup> In the USA, the FOIA does not apply to judicial administration at the court level. Openness, however, is a legal tradition and the courts are also subject thereto, based on state regulations, court rules and case law. In France the Free Access to Administrative Information does not apply to adjudication as such, but it does apply to information held by the courts' administration in general. Information requests are not directly handled by the courts themselves but by the central national courts' administration, thus providing for a uniformed regime and national co-ordination. In the Netherlands the courts are totally exempted from the right to access information: the Wob is not applicable at all to the courts and the courts' administrations.

Summing up: the USA and the Netherlands are the only countries where courts as well as court administrations fall totally outside the scope of the freedom of access to information legislation.

#### *Duty to publish verdicts*

Article 6, paragraph 1, of the European Convention on Human Rights provides for a specific element of access to government information: it stipulates that – in principle – judgments (verdicts, rulings, etc.) are pronounced publicly.

The second sentence of the 1st paragraph of article 6 reads:

‘(...) Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest 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 the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.’

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39 FOIA, Section 32.

Although many exceptions are possible, and publicity may be provided both orally or in written form,<sup>40</sup> the object of this publicity provision, according to the European Court of Human Rights (ECHR), is ‘to ensure scrutiny of the judiciary by the public with a view to safeguarding a right to a fair trial.’<sup>41</sup> Article 6 does not entail an absolute duty to publish judgments, nor does it provide an absolute right to obtain all of the information held in a court’s judgment. In the *Sutter* case the ECHR held that it is sufficient that: ‘anyone who can establish an interest may *consult or obtain a copy of the full text of judgments* of the Military Court of Cassation; besides, its most important judgments, like that in the *Sutter* case, are subsequently published in an official collection. Its jurisprudence is therefore to a certain extent open to public scrutiny’.<sup>42</sup> Although the Court thinks that it is important that judgments are subsequently published in official collections, it does not result from article 6 that courts are always obliged to publish judgements – unabbreviated – in official, publicly available collections. In some cases there may even exist an obligation under article 8 (privacy) ECHR not to publish (parts of) a judgment.<sup>43</sup> To all intents and purposes article 6 ECHR presents itself as the minimum standard.<sup>44</sup> Member States are free, and indeed are sometimes under national (constitutional) law obliged, to go further along this road.<sup>45</sup>

#### *Duty to publish general information on Courts’ functioning*

Many modern courts are not only obliged by law to hand over certain information if so requested, sometimes they (need to) publish information spontaneously, *i.e.* without a preceding individual request. In most countries involved in our research annual reports are published by the court services. In most cases the annual reports are required by Acts on Judicial Organisation and the like, and not the result of provisions in FOIA legislation. In some countries annual reports need to be provided at an aggregated, national level, in other cases, like in the Netherlands and Italy, individual courts are also obliged to produce annual reports. The research revealed that active openness is not always the result of a legal obligation. Courts in different countries tend to ‘open up’ on their own accord. In France, for instance, court schedules are public, as are lists of court staff and judges and their working addresses. In the USA the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) have given some guidelines as regards spontaneous information provision. These guidelines state that information in bulk which is not accessible to the public can be made accessible to academics, journalists and policymakers. These groups then have free access if they give an indication as to their interest in the materials. In the Netherlands, much on the same footing, court schedules are made available to the general public as are the names of the judges at the court, and other information. Decisions on the spontaneous publication of court information are generally left to the discretion of the court management. In most countries this is either the president or the management board of the court (the Netherlands, Denmark).

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40 ECHR 8 December 1983, Series A., vol. 71 (*Pretto and others v. Italy*).

41 ECHR 8 December 1983, Series A., no. 71 (*Pretto and others v. Italy*), paragraph 27.

42 ECHR 22 February 1984, Series A., no. 74 (*Sutter v. Switzerland*), paragraph 34.

43 ECHR 25 February 1997, No. 9/1996/627/811 Z. v. *Finland*, especially paragraph 112. See for further reference the Dutch report of the VMC-studiecommissie (VMC study committee), ‘Toegang tot rechtelijke uitspraken’ (Access to judgments), 2006 *Mediaforum* 4.

44 See M.F.J.M. de Werd, ‘De openbare uitspraak’ (The public judgment), 2001 *Nederlands Juristenblad*, pp. 67-74.

45 Although the ECHR deems it desirable that judgments are made available in official collections, there is no obligation to do so. Different regimes exist in different countries. Some countries have elaborate public collections of court judgments, most of them commercially exploited. Other countries, like the Netherlands, have come up with nationwide databases that are publicly accessible, and free of charge. The comparative research reported on here did not extend to these – sometimes copyright-dependent – issues.

### 3. Preliminary conclusion

A great deal can be learnt from this overview of the existing regimes on information provision by courts. Different countries have found different ways in which to deal with the challenges of the information age for their judiciaries. Solutions like these are often very country-specific and cannot be readily exported to another setting. But can anything else be concluded from this overview? I think it can. First of all, that courts and judiciaries in Europe, but also in the US, are using information strategies as a means to open up to the public, *i.e.* to further the transparency of the courts' functioning and thereby increasing public accountability and responsiveness (social accountability). They do so in the wake of legislation obliging them to provide information and to have public hearings. The research shows that courts are actively pushing the envelope when it comes down to their information obligations. In most countries the right to a public hearing and the right of access to information is enshrined in legislation, but courts go beyond these minimum standards and try to come up with solutions for new media, specific press rules, and ways to provide information to the general public that respect public and private interest as well. Courts do not seem to be reluctant when it concerns the provision of information, waiting for legislation that forces them to hand over information, but rather actively trying, in an inviting way, to provide as much information and transparency as is possible.

But does it hit home? Do information provision policies of the courts enhance the legitimacy of new judiciaries? One might be tempted to say: 'of course, it evidently does'. However, the legitimacy question is difficult to answer. It cannot be answered right away. In order to provide an answer we need a measuring-rod. A working definition of legitimacy, as Seim uses, may provide one. He defines legitimacy as: 'the particular status with which an organisation is imbued and perceived at any given time that enables it to operate with the general consent of peoples, governments, companies and non-state groups around the world'. Although the idea of peoples, companies and non-state groups around the world is somewhat off the mark if we translate it to judiciaries, it is a useful definition if we trade in these subjects for the 'general consent of the relevant actors involved in its functioning (parties, public, government, organisations, etc.)'.<sup>46</sup> Seim states that there are basically two elements in the concept of legitimacy: it is *derived* from morality and law and *generated* (or reaffirmed) by veracity, tangible support and more intangible goodwill.<sup>47</sup>

In this light it is difficult to assess the way in which (as well as the extent to which) information policies contribute to legitimacy; one would need empirical data in order to draw conclusions here. However, what we may conclude in a preliminary fashion is that the authority of the judiciary is firmly rooted in law as well as in morality in modern states. Transparency obligations (public hearings, public verdicts, etc.) and the law on the provision of information are enshrined in legislation, and the transparency of a court's functioning is commonly perceived as a very valuable common good. So much so that courts themselves feel the need to actively advance information provision and come up with policies as regards transparency and openness. Furthermore, transparency and active information provision seem to be very effective ways to introduce forms of social accountability<sup>48</sup> without compromising judicial independence. A good panacea to gain both tangible support and goodwill for judiciaries, one might argue.

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<sup>46</sup> Seim, *supra* note 11.

<sup>47</sup> Seim, *supra* note 11.

<sup>48</sup> See Malleon, *supra* note 8, pp. 41-42.