PUBLIC HEARINGS IN COURT PROCEEDINGS. THE CONCEPT OF OPEN COURT AND ITS RELATIONSHIP TO SOCIAL MEDIA*

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I. Introduction

Dear colleagues and friends, ladies and gentlemen, it is an extraordinary honour and pleasure for me being at the prestigious Institute of the Academia of Bologna.[1] This paper shall demonstrate the scientific interests of an incoming external member of the prestigious Bologna Institute. They relate to civil procedure, especially to comparative procedural law and to its current developments triggered by European integration, by globalisation and by information technologies. In this regard, it must

* Lecture at the Accademia delle Scienze dell'Istituto di Bologna, 25 November 2017. I would like to thank Felix Koechel, Martina Mantovani, Pietro Ortolani, David Schwarz and Laura Renée Schmidt for their valuable assistance. The usual disclaimer applies.

[1] È un grandissimo piacere e un privilegio per me avere la possibilità di parlarvi oggi. Sono molto grato di essere stato nominato Accademico corrispondente non residente dell'importante Accademia delle Scienze dell'Istituto di Bologna. Questa nomina è non solo un grande onore ma anche un forte incentivo a promuovere il dialogo scientifico e la cooperazione con gli stimati colleghi dell'Università di Bologna.

Signor Presidente, stimati colleghi, Bologna è un posto molto speciale per ogni scienziato perché rappresenta la culla dell'università in Europa e nel mondo. L'Accademia delle Scienze è nota per essere un luogo di aggregazione, di scambio scientifico e di cooperazione interdisciplinare. Essere accolto nella Vostra prestigiosa cerchia mi rende molto felice. Lo considero un momento molto importante nella mia carriera.

Sono convinto che la giurisprudenza, soprattutto quella Italiana, abbia tanto da contribuire al discorso interdisciplinare e internazionale. Più di ogni altra scienza morale la giurisprudenza ha bisogno del confronto con altre discipline, come le scienze politiche, la psicologia e l'economia, per ottenere risultati validi, comunicabili al mondo scientifico e alla società. Vi chiedo perdono, cari colleghi, se non continuerò parlarvi nella vostra bellissima lingua, madrelingua della giurisprudenza occidentale, che purtroppo ancora non so parlare, ma presenterò in inglese.

be recalled that procedural law belongs to the most international and comparative of disciplines within legal science. The development of procedural law in the nation states of the 19th and 20th centuries was supported by international exchange among scientists. These academic exchanges started in the 19th century when the nation states were established.[2] After the catastrophe of World War I, they intensified in the 1920s when the great Italian proceduralists, Chiovenda, Calamandrei and Carnelutti were in close contacts with their fellow colleagues in Europe and Latin America.[3]

After WW II, it was again the Italian Association of Procedural Law which took up the mantle to reanimate international scientific interchange. Here in Bologna, the "Institut international de droit processuel civil" was founded in December 1955 on the initiative of professors Redenti and Carnelutti. The underlying concept was not only to promote scientific interchange but also to endorse the idea of justice and to learn from the misuses of justice systems during the periods of Nazism and fascism.[4] In the 1970s, after a World Congress in Gent, the Institute was transformed into the International Association of Procedural Law; Mauro Cappelletti became its president; he was succeeded by Marcel Storme and our colleague and friend Federico Carpi was the IAPIL president from 2008-2009.[5]

Almost 60 years later, in 2013, the idea of an international Institute of Comparative Procedural Law re-emerged in Luxembourg with the Max Planck Institute for European, International and Regulatory Procedural Law.[6] Since its establishment, the Max Planck Institute has been in close cooperation and partnership with the International Association of Procedural Law and with my colleagues and friends in Italy.[7] Against this background, this is a special moment for me to speak within the Institute of the Academy; in Bologna where not only the first university in the world was founded but also the first "Institut international de droit processuel ».

The topic of this paper – Public Hearings in Court Proceedings – shall demonstrate one of the research fields of the Luxembourg Institute which is comparative procedural law. The topic is not only about an overarching and constitutional principle of procedural law but shall also demonstrate how procedural law is influenced by

[2] B. Hess, *Carl Josef Anton Mittermaier - Zivilprozessrecht in Europa: vom 19. Jahrhundert bis in die Gegenwart*, in C. Baldus, H. Kronke, U. Mager (eds.), *Heidelberger Thesen zu Recht und Gerechtigkeit*, Heidelberg, 2013, p. 143 *et seq.*

[3] F. Carpi, *Mauro Cappelletti et l'histoire de l'Association Internationale de Droit Judicaire*, in M. Storme, F. Carpi (eds.), *In honorem Mauro Cappelletti (1927-2004)*, The Hague, 2005, pp. 37, 38 *et seq.*

[4] F. Carpi, *Mauro Cappelletti...*, cit., p. 37, 39 *et seq.*

[5] M. Storme, *Zu Besuch bei Giganten des Prozessrechts*, in *Festschrift für Peter Gottwald zum 70. Geburtstag*, München, 2015, p. 619 *et seq.*

[6] B. Hess, *Ein neues Max-Planck-Institut für Internationales, Europäisches und Regulatorisches Prozessrecht in Luxemburg*, in *ZEuP*, 2013 (2), p. 229 ff.

[7] Since 2014, the MPI and the IAPL have organized three Summer Schools for young proceduralists (post-docs) and published the papers as well as the debates, see: L. Cadiet, B. Hess, M. Requejo Isidro (eds.), *Procedural Science at the Crossroads of Different Generations*, Baden-Baden, 2015; L. Cadiet, B. Hess, M. Requejo Isidro (eds.), *Approaches to Procedural Law - The Pluralism of Methods*, Baden-Baden, 2017; a third volume is going to be published in 2019.

technical and social change. These developments entail that existing legal texts and traditions must be interpreted as "living instruments" in order to adapt them to the needs and challenges of our present times.[8]

II. The concept of a public hearing

1. Historical roots

Since antiquity, justice has been rendered in public spaces. First, in the agora in the Greek cities, then in the medieval ages at the king's court in an open session. In the middle ages it took place in the market places and moved later to the so called "Palais de Justice".[9]

Giving justice in front of the public does not mean that all parts of the proceedings are open to the public. Judges' deliberations are usually not disclosed [10] and third parties do not have access to documents presented to the court.[11] However, a hearing does take place in front of the open court and judgments are pronounced before the public audience. As a consequence, the principle of orality applies in a hearing: procedural acts must be spoken aloud by the parties; the lawyers and the court and the judgment must be pronounced orally. Sometimes, the judgment is published and accessible to the public.[12] In the 16th century, the old concept of the public hearing became linked to the idea of a visible and open building which housed the court. Courts became visible institutions in cities.[13] In the 19th century, court buildings were amongst the most prominent public buildings. This can be demonstrated by many impressive court buildings in several capitals, not only in Europe, but throughout the world. A prominent example is the Italian *Corte di Cassazione* in Rome, a building which expresses the ideas of a powerful, but visible and accessible justice. In the German Reich of 1871, the newly created *Reichsgericht* was situated in a large and

[8] C. Chainais, *Open Justice and the Principle of Public Access to Hearings in the Age of Information Technology*, in B. Hess, A. Koprivica (eds.), *Open Justice – the role of courts in a democratic society* (on file with the author; to be published in 2019).

[9] U. Wesel, *Geschichte des Rechts in Europa*, München, 2014, p. 124 *et seq*; P. Oestermann, *Wege zur Rechtsgeschichte: Gerichtsbarkeit und Verfahren*, Stuttgart, 2015, p. 17; M.T. Fögen, *Der Kampf um die Gerichtsöffentlichkeit*, Berlin, 1974; J. Resnik, D.E. Curtis, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms*, New Haven, 2011, p. 18 *et seq.*

[10] Example: sections 192 *et seq.* of the German Act on the Organization of the Judiciary Gerichtsverfassungsgesetz (GVG).

[11] Section 299 (1) of the German Code of Civil Procedure. This provision clearly distinguishes two constellations: According to para (1), the parties' access to the files seems to be unlimited whereas the access of third parties depends on the discretion of the court and requires a legitimate interest (cf. section 299(2) of the German Code of Civil Procedure).

[12] The public hearing is closely connected to the procedural principles of the orality and the immediacy of the proceedings, W. Zimmermann, in *Münchener Kommentar zur ZPO*, 5th ed, München, 2017, Sec. 169 GVG, para 2.

[13] J. Resnik, D.E. Curtis, *Representing Justice*, cit., p. 134 *et seq.*

prestigious building in Leipzig – the *Reichsgericht* building was (after the *Reichstag* itself) the most important public building erected before the First World War.[14]

2. Legal texts

In the course of the 19th century, the principle of public hearing appeared in normative and constitutional texts.[15] A typical example of a legal text is section 169 of the German Courts Constitution Act (Gerichtsverfassungsgesetz, GVG). This provision states:

> The hearing before the adjudicating court, including the pronouncement of judgments and rulings, shall be public.

This provision was part of the Act on the Organization of the Judiciary. Officially, this was not a constitutional instrument, but a formal act of legislation. At first sight, its wording appears as a mere technical provision. The text addresses the public at large (not the parties) which shall have physical access to the courtroom.[16] However, during the German Reich (1871-1918) the function of this statute went much further as it guaranteed the independence of the civil and criminal courts vis à vis the administration and the government.[17] The federal Parliament (Reichstag) had enacted this act and only the Parliament could change it. Functionally, it provided for an institutional guarantee at a quasi-constitutional level.[18]

Today, the principle of a public hearing is found at the constitutional level.[19] One of the most modern provisions, article 47 (2) of the EU Charter of Fundamental Rights reads as follows:

> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.[20]

[14] This ambition was clearly expressed in the contemporary literature, cf. Centralblatt der Bauverwaltung, Nr. 11 A, 18.3.1885, p. 113; Müller, *Das Reichstaggebäude in Leipzig*, 2008, p. 3, 19 *et seq.*

[15] After the French Revolution, the Law of 16 and 24 August 1790 guaranteed the public access (sic!) to court proceedings, C. Chainais, in B. Hess, A. Koprivica (eds.), *Open Justice* (to be published in 2019) – on file with the author.

[16] Section 169 GVG does not confer to the individual a (subjective) right to get a seat in the audience.

[17] The German Constitution of 1871 did not protect human rights. Art. 178 of the liberal German Constitution of 1848 (which was never enacted) guaranteed explicitly the public hearing.

[18] W. Schubert, *Die deutsche Gerichtsverfassung (1869–1877)*, Frankfurt am Main, 1981, p. 27, 767-768; However, in Germany, the legal nature of the guarantee of the public hearing is still unsettled today. According to some authors, it is a procedural principle, but does not amount to a constitutional guarantee, cf. S. Arnold, *Zum Grundsatz der Öffentlichkeit im Zivilverfahren*, in R. Geimer, R.A. Schütze, T. Garber (eds.), *Europäische und internationale Dimension des Rechts : Festschrift für Daphne-Ariane Simotta*, Wien, 2012, p. 11 *et seq.*

[19] The present German constitution does not contain an explicit provision granting the right to a public hearing but this right is deduced from the democratic principle, Art. 20 (1), and the rule of law principle, Art. 20 (3) of the German constitution; W. Zimmermann, in *Münchener Kommentar zur ZPO*, 5th ed., cit., Sec. 169 GVG, para 3.

[20] The Charter of Fundamental Rights entered into force according to article 6 (3) of the Lisbon Treaty in 2009. According to its article 51, the Charter applies whenever the organs of the Union are acting or the Member States implement EU-law, ECJ, 26.2.2013, case C-617/10, *Åkerberg Fransson*, EU:C:2013:105.

An even more developed provision is found in article 6 (1) of the European Convention on Human Rights of 1948 which states:

> In the determination of his civil rights and obligations [...], everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. (2) Judgment shall be pronounced publicly but the press and public may be excluded from all or parts of the trial in the interest of morals, public order or national security in a democratic society, where the interest of tribunals or the protection of the private life of party so require, or to the extend strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

These legal texts contain interesting developments: They provide for subjective rights of the parties of the proceedings, which are entitled to a fair and public hearing.[21] Of course, additional objectives back these procedural guarantees: They shall avoid a "hidden justice" given without sufficient independence and impartiality of the Court.[22] The public hearing shall guarantee the independence of the judiciary. A transparent and open process avoids manipulations of and by judges.[23] On the other hand, the constitutional guarantees also provide for a control of the justice system by civil society: Everyone is entitled to go to court and to attend a hearing, unless there are exceptional circumstances.[24] As a result, parties are not permitted to renounce "their right" to a public hearing as this guarantee also entitles the public at large.[25] The best way to evade public scrutiny of private disputes is arbitration.[26]

[21] There is, of course a certain contradiction in the right to the public hearing as the parties might prefer not to litigate their case fully exposed to the public, cf. ECtHR, 16.04.2013, *Fazliyski / Bulgaria*, 40908/05, ECLI: CE: ECHR: 2013: 0416JUD004090805 paras 67-69 concerning the concealment of a decision on national security grounds.

[22] According to the English philosopher Jeremy Bentham, the principle of publicity shall encourage the accountability of judges, assist the manifestation of truth and educate people and, finally, play a therapeutic role for citizens. Cf. J. Resnik, *The Democracy in Courts: Jeremy Bentham, "Publicity" and the Privatization of Proces in the Twenty-first Century*, in *Interdisciplinary Journal of Law and Justice*, 10 (2013), 84 *et seq.*

[23] Cf. ECtHR, 12.7.2001, 33071/96, *Malhous / Czech Republic*, para 55, ECLI: CE: ECHR: 2001: 0712JUD003307196

[24] ECtHR, 8.12.1983, *Pretto and others / Italy*, para 21; ECLI:CE:ECHR:1983:1208J UD000798477.

[25] ECtHR, *Schuler-Zgraggen / Swiss*, 24.06.1993, 14518/89, ECLI: CE: ECHR: 1993: 0624JUD00145188g para 58: "The Court reiterates that the public character of court hearings constitutes a fundamental principle enshrined in paragraph 1 of Article 6. Admittedly, neither the letter nor the spirit of this provision prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to have his case heard in public, but any such waiver must be made in an unequivocal manner and must not run counter to any important public interest" (see, among other authorities, the *Håkansson and Sturesson v. Sweden* judgment of 21 February 1990, Series A no. 171-A, p. 20, para. 66), ECLI: CE: ECHR: 1990: 0221JUD001185585.

[26] Swiss Federal Tribunal, 10.2.2010, DFT 4A_612_2009; ECtHR 24.6.1993, appl. No. 14518/89, *Schuler-Zgraggen v. Switzerland*, CE: ECHR: 1993: 0624JUD001451889.

Finally, the constitutional guarantees do not provide for unlimited rights. They provide for principles to be balanced against other constitutional principles in need of protection.[27] In this respect, the wording of article 6 (2) of the European Convention on Human Rights is explicit: This paragraph requires that the fundamental guarantee must be balanced against other competing rights and interests, especially the protection of the privacy of the parties (and of witnesses) and the protection of trade secrets and juveniles.[28] However, the fundamental guarantees do not provide for an open-ended balancing process: they clearly state that an open and public hearing is the rule and that the limitations are exceptional and must serve a distinctive objective. Finally, any limitation of the principle of the public hearing must be proportional.[29]

III. Modern developments

1. Looking at courts: institutional authority vs. the provision of services

Throughout the 20th century, courts acted according to the paradigm of the 19th century. The publicity of the hearing was understood in a way that the opening of the door of the courtroom to the public[30] was sufficient for guaranteeing the publicity of the proceedings.[31] However, full transparency of civil processes was never assured: civil proceedings especially are not easy to understand for someone coming from outside to visit the court.[32] As the hearing is usually (comprehensively) prepared by a written phase of the proceedings, transparent oral pleadings (with a full explanation of the case) do not usually take place any longer. In some jurisdictions, as in Germany, lawyers and the court largely refer to the files in the hearing and do not repeat or read the motion contained in the files.[33] As a result, the publicity of the

[27] R. Alexy, *Theorie der Grundrechte*, 7th ed., 2015, p. 78 *et. seq.*; ECtHR, 24.4.2001, *B.u.P / United Kingdom*, 36337/97; ECtHR, 14.10.2000, *Riepan / Austria*, 35115/97, para 34; CE: ECHR: 2001: 0424JUD003633797 (*B. u. P / United Kingdom*); CE: ECHR: 2000: 1114JUD003511597 (*Rieport Austria*)

[28] The pertinent guarantees under the ECHR are article 8 (protection of family life) and article 10 (protection of the freedom of expression).

[29] Cf. ECtHR, 24.4.2001, *B.u.P / United Kingdom*, 36337/97, CE: ECHR: 2001: 0424JUD003633797 paras 35-41; EctHR, 26.09.1995, *Dinnet / France*, 18160/91, ECLI: CE: ECHR: 1995: 0926JUD001816091, para 34; K. Gaede, in *Münchener Kommentar zur Strafprozessordnung*, 1st ed. 2018, article 6 ECHR, para 124.

[30] One should be aware that the practical application of the principle is much more basic: some of the average visitors are only interested in getting a warm seat in winter; or to sleep peacefully in a non-surveilled corner. Other visitors come in to be "entertained" by the proceedings.

[31] Until the 1990s, this traditional concept was not fundamentally challenged by the legal doctrine.

[32] A critic of this unsatisfactory situation was prominently forwarded by N. Luhmann, *Legitimation durch Verfahren*, 3. Aufl., Berlin, 1978, p. 124 *et seq.*

[33] Zimmermann, in *Münchner Kommentar zur ZPO*, cit., section 169 GVG, para 1.

hearing has lost much of its practical importance.[34] However, the situation is different in systems where the principle of orality and the idea of pleading still dominates the unfolding of the hearing as in England[35] or in France.[36] Yet, it has been reported that the situation is changing in these jurisdictions, too.

2. Technical developments and the publicity of the hearing

In today's world, this situation is changing considerably: In the social media age, every public institution is considered a public service and, therefore, is "evaluated" online with regard to the "comfort" of its "clients".[37] Courts are not shielded from this general development. The opening of the physical courtroom may no longer sufficiently meet the expectation of the society regarding the guarantee of a public hearing Furthermore, the concept of publicity has changed because physical attendance (by the public) can be replaced by virtual attendance: video recording is easily done and uploaded. Still, we do not entirely know what "virtual attendance" really means.[38]

In Germany, the impact of technical developments on court proceedings was first discussed in the 1960s when (public) television asked for important hearings to be broadcast. Conservative as they (usually) are, courts were extremely reluctant to provide the media with access to the courtroom. However, one must be aware that the presence of cameras in the courtroom would have altered the unfolding of proceedings at this time. Cameras were big and intrusive devices. In 1964, the German provision on the public hearing (section 169 GVG) was complemented by the following sentence:

"Audio and television or radio recordings as well as audio and film recordings intended for public presentation or for publication of their content shall be inadmissible."

As a result, German law provides for a comprehensive ban on any radio and television recording. Parliament feared undue influence from the media on parties, witnesses and the unfolding of the proceedings.[39] Even today, the reporting of court proceedings by German broadcast is reduced to the filming of the courtroom before the opening of the hearing. Only the moment when the judge or judges enter the

[34] It is fair to say that the court may always change the situation by inviting parties and lawyers to discuss the case more exhaustively.

[35] A. Zuckermann, *Civil Procedure Principles of Practice*, 3rd ed., London, 2013, p. 124 para 3.124, who notes that the Woolfe reforms have changed the importance of the hearing.

[36] S. Guinchard, C. Chainais, F. Ferrand, *Procédure civile*, 34th ed., 2018, paras 724-726.

[37] A. Garapon, J. Lassègue, *Justice digitale. Révolution graphique et rupture anthropologique*, Paris, 2018, p. 269 *et seq.* B. Limperg, *Justiz und Öffentlichkeit - § 169 GVG im Wandel der Zeiten*, in C. Hertel, S. Lorenz, C. Stresemann (eds.), *Simplex Sigillum Veri: Festschrift für Wolfgang Krüger zum 70. Geburtstag*, München, 2017, p. 397 *et seq.*

[38] See infra at 3.

[39] Arnold, *Liber amicorum Bajons*, 2012, p. 11, 16 *et seq.*

courtroom can be filmed when the court permits it. A journalist usually reports on the hearing as a kind of "untechnical witness" being filmed in front of the court building and telling television viewers orally what he or she observed in the hearing. This rather strange situation is reinforced by the legal ban on taking photos during the hearing.[40] Consequently, the situation within the courtroom is portrayed by drawings which are also shown in the daily news on television.[41] In legal literature, authors justified this practice by distinguishing between the "internal" and the "enlarged" publicity of the hearing.[42] Section 169 GVG was understood in a way that only the physical presence within the courtroom was guaranteed, but not the direct reporting by the media.[43]

In 2001, the legal situation was challenged before the Constitutional Court. At this time, several former members of the last government of the German Democratic Republic[44] and leaders of the former communist party faced criminal proceedings for having consented to the shooting and killing of persons trying to leave the former GDR.[45] The accusation was that the members of the former government formally adopted the order for the use of weapons against the fugitives. This was an important criminal process which raised much public attention. A (private) news broadcasting channel (NTV) challenged the comprehensive ban of section 169 GVG.[46] It argued that the public interest in that criminal case was so overwhelming that broadcasting should be permitted under the strict supervision of the Court. Finally, the German Constitutional Court rejected the constitutional complaint by a bare majority of four votes to three. The Court held that the unfolding of the hearing should not be impeded by the presence of television and other media.[47] However, three judges strongly dissented stating that the comprehensive ban was no longer compatible with the information needs of the modern society.[48]

[40] K. Schreiber, in B. Wieczorek, R.A. Schütze, § 169 *ZPO Großkommentar*, vol. 13, 4th ed., 2018, para 39 *et seq.* See also BVerfG, 17.8.2017, 1 BvR 1741/17, NJW 2017, 3288, where the Constitutional Court upheld an order of a Court of Appeal in criminal proceedings which restricted the taking of photos and the filming of accused in the courtroom before the opening and after the closure of the audience.

[41] The present situation appears to be paradoxical. In criminal proceedings, the accused are filmed before the Court enters the audience. These are painful moments and – sometimes – the accused try to hide behind the files and the folders. One might wonder whether this practice corresponds to the presumption of innocence.

[42] Cf. O.R. Kissel, H. Mayer, § 169 *GVG Kommentar*, 9th ed., 2018, para 60; R. Stürner, *Gerichtsöffentlichkeit und Medienöffentlichkeit in der Informationsgesellschaft: Das Bundesverfassungsgericht zwischen Liberalität und Zensur*, in *JuristenZeitung*, 2001, p. 699 *et seq.*

[43] *Ibidem.*

[44] The so-called former "Politbüro" of the former communist party.

[45] All in all, almost 327 persons had been killed at the inner German border and 139 persons at the Berlin Wall.

[46] BVerfG, 1.1.1996, BVerfGE 93, 373.

[47] BVerfG, 24.1.2001, BVerfGE 103, 44.

[48] BVerfG, 24.1.2001, BVerfGE 103, 44, 72.

3. Social media and the courts

At present, the situation within the courtroom has changed because of the possibility of using mobile phones and tablets to directly send short messages via social media like twitter and by using blogs. Usually, the courts are not aware that the unfolding of proceedings are being reported "online" and "real time" to the outside world. In some jurisdictions, there is a comprehensive ban of using mobile phones in the courtroom – they must be handed over to court clerks when entering the court building.[49] However, in many countries, the use of mobile phones within the court building is permitted and, occasionally, reporting from the courtroom takes place, especially during important proceedings with social or economic impacts.

As of today, the German lawmaker has not regulated the use of mobile phones and tablets within the courtroom. There is no doubt that the court by exercising its "authority for maintaining order in the courtroom"[50] may forbid their use when they impede the unfolding of proceedings[51] or – even worse – when witnesses are influenced by short messages coming from the court room.[52] On the other hand, the use of laptops and tablets by the parties and their lawyers has become a widespread practice as parties use these devices for the preparation of statements and the taking of notes. Therefore, a general ban of the use of any laptop or tablet in the courtroom would not be proportionate although the court may forbid their use by the audience when necessary. Yet, during the hearing section 169 (2) GVG forbids any recording and transmission out of the courtroom – this comprehensive ban also applies to the use of mobile phones and tablets for the sending of messages out of the courtroom.[53]

IV. Different tendencies

1. Germany: the 2017 reform of the public hearing

During recent years, the public debate in Germany has criticised the legal regime of section 169 GVG as outdated and inadequate.[54] Public hearings in criminal proceedings were largely discussed by the Deutschen Juristentag in 2016, one of the most influential forum in Germany for public debates of legal developments. A doctrinal

[49] This is the situation in the U.S. Federal Court of Appeal for the 2nd Circuit in New York.

[50] So-called "Sitzungspolizei", cf. Section 176 GVG, BVerfG, NJW 2014, 3013. The presiding judge may regulate the access of the press by an ordinance but must strictly respect the right of the press to report the proceedings and protect the personality rights of the parties and witnesses. Therefore, the decision of the presiding judge must be comprehensively reasoned.

[51] BVerfG, 3.12.2008, NJW 2009, 353.

[52] *Beck'sche Online-Kommentare*, Walther, § 176 GVG (2018), paras 12 and 13.

[53] *Beck'sche Online-Kommentare*, Walther, § 169 GVG (2018), para 16.

[54] Cf. B. Hess, *Die Justiz muss sich öffnen*, in *Frankfurter Allgemeine Zeitung*, 14.4.2016, p.6.

opinion prepared the deliberations.[55] It proposed a comprehensive regulation (although restricted to criminal proceedings). Yet, the large majority of the participants (mostly judges and public prosecutors) rejected most of the proposals.[56]

However, this was not the end of the public debate.[57] Within the so-called Conference of the Ministers of Justice (*Justizministerkonferenz*) a working party prepared a reform which would permit the broadcasting of the pronouncement of judgments rendered by the supreme courts in civil, criminal, administrative, social and fiscal matters.[58] This proposal borrowed from the practice within the Federal Constitutional Court.[59] After a heated debate,[60] section 169 (3) GVG was changed as follows[61]:

> (3) Audio and television-radio recording, as well as audio and television recording with a view to publicly broadcast or to publish the contents of the pronouncement of judgements of the Supreme Federal Courts may, exceptionally, be allowed by the presiding judge. The presiding judge must weigh the conflicting interests at stake.[62]

Eventually, the German lawmaker enacted limited changes to the legal situation which only permit the filming (and broadcasting) of the pronouncement of judgments of the Federal Supreme Courts. One might doubt whether these changes will be sufficient to implement the clear objective of the lawmaker to increase the visibility of the judiciary.[63]

[55] K. Altenhain, *Öffentlichkeit im Strafverfahren, Gutachten für den 71. Juristentag*, München, 2016, C 1 *et seq.*

[56] *Beschlüsse des 71. Deutschen Juristentags, Abteilung für Strafsachen*, p. 20 *et seq.*, https://www.djt.de/fileadmin/downloads/71/Beschluesse_gesamt.pdf

[57] In particular the President of the Bundesgerichtshof, Limperg, criticized the proposals, cf. B. Limperg, R. Gerhardt, *Gründe gegen Fernsehübertragungen aus dem Gerichtssaal*, in Zeitschrift für Rechtspolitik, 2016, p. 124 *et seq.*; B. Limperg, *Justiz und Öffentlichkeit - § 169 GVG im Wandel der Zeiten*, cit., p. 397 *et seq.*

[58] The (former) federal minister of justice, *Maaß*, made the following statement during the debate: "German courts give their judgment in the name of the people. Therefore, they cannot avoid that the people want to see them when rendering their judgments."

[59] Section 17a of the Law on the Federal Constitutional Court. According to the president of the Federal Constitutional Court, this provision helped to increase the visibility of the court and the acceptance of its jurisprudence, Voßkuhle in *Festheft für Karl-Dieter Möller zum 65. Geburtstag*, München, 2010, p. 10.

[60] Cf. H. Alwart, *Die Justiz ist kein Zirkus*, in *Frankfurter Allgemeine Zeitung*, 14.4.2016, p. 6.

[61] Law on the Expansion of the Publicity of Judicial Proceedings through Media (2017); Gesetz zur Erweiterung der Medienöffentlichkeit in Gerichtsverfahren und zur Verbesserung der Kommunikationshilfen für Menschen mit Sprach- und Hörbehinderungen (EMöGG) of October 8th, 2017, Bundesgesetzblatt 2017 I 3546; the changes entered into force on April 19th, 2018.

[62] In addition, the wording of paragraph 1 of section 169 GVG was expanded in order to permit the transmission of the hearing to a special "media room" within the court if the number of places in the courtroom should be insufficient. However, the law does not provide for any subjective right of the media to have access to this media room. Furthermore, there is no obligation of the courts to establish a media room in the court building. It remains to be seen how the Federal Constitutional Court will interpret these provisions.

[63] Bundestags-Drucksache 18/10144, p.18 *et seq.*

As a result, the possibility of broadcasting the judiciary's practice is largely limited: Only the Supreme Federal Courts may "exceptionally" permit the filming of the pronouncement of their decisions – they have large discretionary powers to do so.[64] In the legal doctrine, some authors described this marginal change as a "dam break".[65] The first commentaries on the new provisions urge for a cautious application of section 169 (3) GVG.[66] However, the Federal Courts might consider formulating a shorter version of the decision to be presented for the cameras (similar to a press release).[67] The German example demonstrates a great reluctance of the courts and the lawmaker regarding the conceptual definition of the "public hearing". Obviously, the comprehensive concept of an "open court" has not yet reached the public and constitutional debate.

2. *Italy: Un giorno in pretura – television in the courtroom*

The legal situation in Italy is different: article 147 of the introductory law to the Code of Criminal Procedure permits the recording and the broadcasting of proceedings.[68] Since the 1980s, RAI (the Italian public television channel) has been showing a very popular TV programme called "Un giorno in pretura" which records and broadcasts criminal proceedings. The basic idea is to help civil society to get a basic idea of how justice works. However, hearings are often only partially shown[69], often including the questioning of witnesses. Sometimes, faces of the persons are obscured for privacy reasons. Other segments of the programme show a summary of the court proceedings, excerpts of the documentations and include background music.[70] However, this practice applies to criminal, not to civil proceedings.[71] There is an ongoing debate about the role of media and the role of the courts. Recently, the first president of the *Corte di*

[64] B. Limperg, *Justiz und Öffentlichkeit - § 169 GVG im Wandel der Zeiten*, cit., p. 397, 405, correctly refers to the limits of the discretion set by the freedom of the press (and other media).

[65] Statement of H. Alwart during the hearing at the Bundestag, on March 29, 2017: "The immature law exposes the cause of the justice system to trivial needs. It does not correspond to the depth dimension of its object. Instead of considering how modern legal culture can be better anchored within the citizens' horizon than before, primitive amusement and sensationalism are encouraged ..."

[66] *Beck'sche Online-Kommentare*, Walther, § 169 GVG (2018), paras 27 and 28.

[67] B. Limperg, *Justiz und Öffentlichkeit - § 169 GVG im Wandel der Zeiten*, cit., p. 397, 406 *et seq.*

[68] Pursuant to article 147 of the Implementation Rules to the Code of Criminal Procedure, the judge may, with the consent of all parties, authorize in full or in part photographic, phonographic, audiovisual taping and/or radio or television broadcasting of the criminal trial, provided that this does not disrupt the smooth and regular running of the hearing. The court may authorize the taping without the consent of the parties when a relevant public interest in knowledge of a trial exists.

[69] Sometimes, the filmmakers give short background information in order to aid understanding of the proceedings.

[70] A very prominent case in this respect were the criminal proceedings against Erich Priebke who was responsible for the murdering of Italian civilians (taken as hostages) by German Wehrmacht and SS during the Second World War.

[71] The hearings of the Constitutional Court are streamed by the Court itself on its Web channel. It is not live-streaming though. The videos are uploaded a few days after the hearing has taken place, cf. http://www.cortecostituzionale.it/jsp/consulta/giurisprudenza/home_udienze.do.

Cassazione mentioned a conflict between expected justice and "applied justice" and the problem of an anticipation of the trial by an over dominant media presence.

3. International courts and tribunals

At the international level, interesting developments are taking place regarding the transparency of court proceedings. More and more, international courts provide the possibility on their websites to follow hearings online. This practice originated in proceedings before constitutional courts where the public interest in following the debate in the hearing has been widely recognized.[72] At the international level, this practice started with the International Criminal Court for the Former Yugoslavia,[73] and was taken up later by the International Court of Justice. The European Court of Human Rights also provides for the video screening of some of its (important) hearings.[74] Usually, video screening takes place under the control of the Court. Sometimes the video is displayed a few hours after the end of the hearing but it remains available on the webpage of the respective international court. Especially in international criminal law, this way of opening the courtroom to a "virtual audience" has proven to be important. In the case of the trial against the war crimes in Former Yugoslavia, the affected civil societies in Serbia, Croatia and Bosnia were able to immediately follow the proceedings. At the same time, the transmissions demonstrated that the proceedings were conducted fairly.

However, this practice also has a flipside. In 2017, one of the accused before the international tribunal for the Former Yugoslavia, Mr. Slobodan Praljak, committed suicide by taking poison in the courtroom while the judgment was delivered.[75] As the hearing was being covered by live video screening, viewers saw this event the instant it was occurring.[76] This distressing situation could have been avoided if the Court had instituted a delay between the filming of the hearing and its broadcasting.[77]

The new practice of showing – at least parts – of court proceedings has also been accepted in international investment arbitration. In 2013, UNCITRAL enacted specific rules on transparency in international investment arbitration.[78] According to

[72] For the German Constitutional Court cf. Klein, in T. Maunz, B. Schmidt-Bleibtreu, F. Klein, H. Bethge (eds), § 17a *BVerfGG Loseblatt-Kommentar*, (last updated June 2018), para 3 *et seq.*

[73] This court acted under the mandate of the United Nation from 1993-2017. Its website still documents the activity of the Court, including the videos of the public hearings, http://www.icty.org.

[74] In the practice of the ECtHR, only 25-30 cases out of around 70,000 proceedings are shown online; communication of A. Nußberger at the Open Justice Conference of the MPI Luxembourg, February 1 and 2, 2018.

[75] United Nations International Criminal Tribunal for the former Yugoslavia, Prlić et al. (IT-04-74), see also the official website, available at <http://www.icty.org/case/prlic/04> last accessed 7 November 2018.

[76] The moment he started struggling, the transmission was stopped (and the hearing was interrupted, too).

[77] The independent expert who investigated the suicide recommended a 30 minutes interval between the pronouncement of the sentences and the broadcasting.

[78] UNCITRAL, 2013 Rules on Transparency in International Investment Arbitration, cf. B. Hess, *Recueil des Cours 388* (2018), para 177.

article 6, courts and tribunals are encouraged to provide for video transmissions so as to improve the legitimacy of investment arbitration. International arbitration institutions such as the Permanent Court of Arbitration and ICSID provide for audio visual media facilities and open up the possibility to follow hearings (at least partially) via livestream.[79] Although this is not a general practice, it applies more and more often to prominent cases of overwhelming public interest. As a consequence, the expectation of the public regarding the transparency of court proceedings has changed: at least before constitutional and international courts, there is a growing expectation that court proceedings in landmark cases can also be followed via social media.[80]

4. The situation in the United States: fading courts and social media

In the U.S., public debate also addresses the visibility of courts but from another angle: federal courts, and federal post offices are often located in the same building as both the courts and the postal services are under federal administration.[81] Yet, the importance of the post offices has decreased considerably due to the development of electronic communications. As a result, post offices have been used less and many have been closed.[82]

In the legal doctrine, there are authors expressing the same concern with regard to the federal courts. The situation is, of course, different as case law has not decreased considerably – although more and more cases go to ADR (including arbitration) and only 2-3% of all civil cases are heard and decided by a jury (as foreseen as the normal procedure by the US Constitution and the F.R.C.P.).[83] However, there is a growing awareness that courts must communicate activity via the internet and social media.[84] Consequently, the open court principle is understood in a way that electronic files should be accessible to everybody online – if parties want to avoid this constellation, they must apply for a protective order of the court (R. 32.3 F.R.C.P). Furthermore, the broadcasting of hearings has become a wide spread practice – and the negative impacts became largely visible in the (in-)famous O. J. Simpson trial.

[79] Example: the oral hearings of the case Vattenfall versus Germany, ICSID – case number ARB12/12, cf. B. Hess, *Recueil des Cours 388* (2018), para 177.

[80] Recently, the ECtHR held that article 6 ECHR was infringed because the Court of Arbitration for Sports had not held a public audience in cases regarding the sanctions of doping offenses. ECtHR, 2.10.2018, *Mutu and Pechstein v. Switzerland*, appl. nos 40575/10 and 67474/10, paras 170 *et seq.* This judgment will certainly impact on the debate about the confidentiality of arbitration proceedings.

[81] *Resnik*, Courts: In and Out of Sight, Site and Cites, 53 Vill.L.Rev. 771, 788 (2008); J. Resnik, D.E. Curtis, *Representing Justice*, cit., p. 134, 136 et seq.

[82] S.C. Walsh, *Nearly 4,000 post offices might close*, available at >https://www.nytimes.com/2011/07/27/us/27postal.html< last accessed 7 November 2018.

[83] M. Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, in 1 *Journal Empirical Legal Studies* 459 (2004); J. Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 *Villanova Law Review* 771 (2008).

[84] H. Genn, *Judging Civil Justice*, Cambridge, 2008, p. 27 *et seq.*

V. Conclusion: redefining the role of courts in democratic societies

Addressing the concept of the public hearing today is not only about access to the courtroom or visibility of courts in the cities. Societal and technological changes imply that we have to rely much more on digital exchanges than on physical access to the courtroom. Times (and societies) have changed and courts must adapt themselves to the changed circumstances.[85]

In this respect, the concept of the (modern) public hearing is only one part of the more comprehensive concept of an "open court" where the court presents itself on a webpage which provides basic information about its accessibility, the schedule, the composition of the panels and the basic rules to be applied.[86] This information is still provided at the front desk of the court, but there is a more general expectation to be able to access this information online – insofar as courts operate as part of the public services in general. At present, the internet presence of many courts is not comprehensively regulated. There are many open issues, such as the competence to establish and maintain the webpages: does it lie with the ministries of justice or with the president of the court? Furthermore, modern courts (especially, but not only the supreme courts) are expected to have a press officer whose task is to inform the public about the activities of the court in a proper way. In this respect, the growing competition among courts within the European Judicial Area (and worldwide) seeking to attract important cases adds an incentive to the courts to promote their activities in a professional way and to inform the public about their services accordingly.

Finally, the current political crisis of the judiciary in several EU Member States shows that courts must be aware that they have to inform the public in a professional way. More and more populist parties and governments attack the independence of the judiciary. In this environment, it is important that courts cultivate an opportunity to inform about their activities via social media used by the modern society for its information. In this regard, the sentence of the House of Lords that: "justice should not only be done, but should manifestly and undoubtedly be seen to be done".[87] is still valid. However, the old saying deserves a modern understanding and a corresponding implementation. Legal texts must be interpreted as living instruments.

[85] C. Chainais, *Open Justice and the Principle of Public Access to Hearings in the Age of Information Technology*, cit. (on file with the author; to be published in 2019)

[86] On the webpages of German courts, one often finds the distribution list (Geschäftsverteilungsplan) of the respective court. Yet, the organization of these webpages is very much heterogeneous; often, the ministries of justice of the federal states determine the design and, sometimes, even for the content. In this respect, there is much to be said for more professional expertise within the court – not only at the federal level but also within the appellate courts, cf. B. Limperg, *Justiz und Öffentlichkeit - § 169 GVG im Wandel der Zeiten*, cit., p. 397, 407 *et seq.*

[87] *R v. Sussex Justices, ex parte McCarthy* [1924 1 KB 256].

SEMINARIO PERMANENTE DI STORIA DELL'ANALISI ECONOMICA

(17 APRILE E 31 MAGGIO 2018)

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Bononia University Press
Via Ugo Foscolo 7, 40123 Bologna
tel. (+39) 051 232 882
fax (+39) 051 221 019

www.buponline.com
e-mail: info@buponline.com

ISSN: 2283-740X
ISBN: 978-88-6923-414-9

Impaginazione: Sara Celia

Prima edizione: aprile 2019

RENDICONTI DEGLI ANNI 2017-2018

a cura di Giuseppe de Vergottini e Stefano Canestrari

TOMO VIII

NUOVA SERIE

Bononia University Press