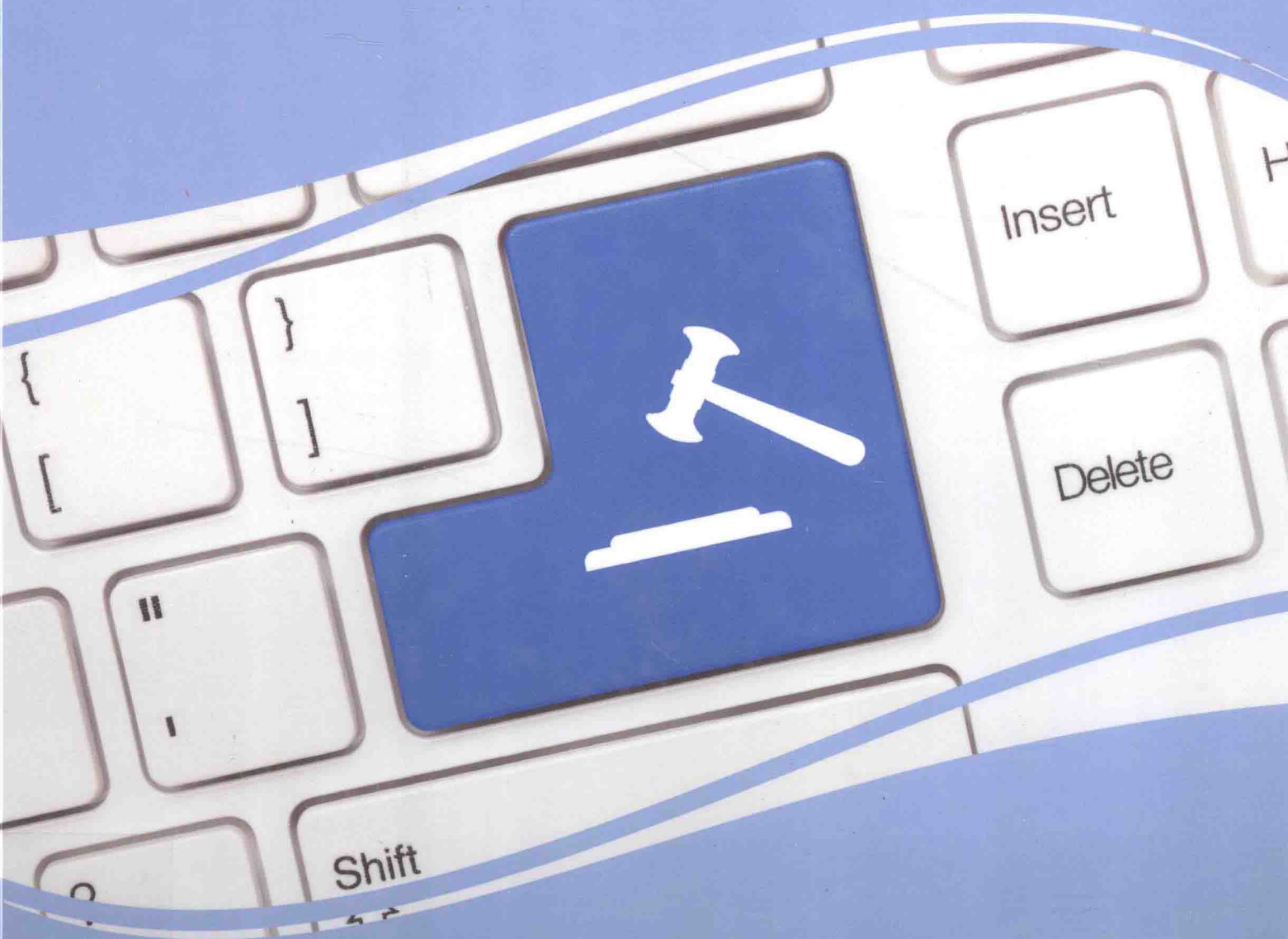


Achieving Open Justice through Citizen Participation and Transparency



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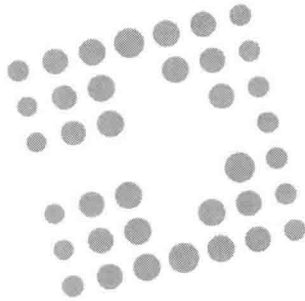
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Preface

On January 2009, President Obama signed the Memorandum on Transparency and Open Government that declares the new Administration's commitment to creating an unprecedented level of openness in government and establishing a system linking three principles: transparency, public participation and collaboration. Since then, public administrations around the world have embarked on open government initiatives and have worked to redefine their relationship with citizens and with each other. The benefits attributed to open government are many. They include the claims that open government leads to more effective decision making and services, safeguards against corruption, enables public scrutiny, and promotes citizens' trust in government, included better achievements of effectiveness, efficiency or accountability.

Although many open government initiatives have been implemented around the world, most of them have been related to the executive and legislative powers and institutions. However, open government does not seem to apply to the judiciary for, maybe, this has always been a "closed" field. As a result, there is a need to know what openness in justice is, to explore its implementation, and to understand what it can do to improve government, society and democracy.

As in the case of open government, in the judiciary, openness has been originally linked to transparency, that is, the right to know, the right to public scrutiny (Reinhardt, 1995). In particular, the starting point has been said to be the open justice principle, a constitutional principle to be found not in a written text but in the common law. The principle states that judicial procedures should be open to the public, including contents and information of judicial records and public hearings. According to Neuberger of Abbotsbury (2013), in this context, openness is a justice fundamental right.

Authors such as Reinhardt (1995), Jiménez-Gómez (2013) and Rodrick (2007) state that the open justice principle enhances the integrity, accountability, and performance of those who are involved in the administration of justice. *For example, it is supposed that openness makes judges more accountable for the manner in which they exercise the judicial power that is vested in them; secret courts are regarded as having a propensity to spawn corruption. Witnesses are thought to be more likely to tell the truth if they have to testify orally in open court. For their part, the public, having observed responsible and truthful behaviour on the part of the judges and witnesses, will have increased confidence in the operation of the courts and a greater understanding of society's laws and legal system. Any perceived shortcomings in the behaviour of particular individuals or in the substance of the law or its application in a particular case can be publicly scrutinised and, perhaps, corrected* (Rodrick, 2007: 172).

Dyson (2013) confirms that the open justice principle allows for a better understanding of the activities that are carried out but, also, for an increasing trust in judicial independence. However, the author goes a little further and also recognizes the important role that technology plays in judicial openness. Specifically, the author refers to televising courts or using social media, tools that support the opening of processes but that are not exempt of challenges (such as sensationalism or the effects of real time diffusion). The potential of ICT is also assessed by Jiménez-Gómez (2013) and Gamero (2012).

Despite its origins, openness in the judiciary has expanded beyond transparency and, therefore, beyond the common law open justice principle (Stefan & Alemanno, 2014). Jiménez-Gómez (2014) has widely referred to the application and adaptation of the open government dimensions to the judiciary: transparency and accountability but collaboration and participation, as well. He calls this new open government-inspired philosophy open judiciary. Jiménez-Gómez (2014) also refers to the significant role innovation and ICT play in open judiciary. Finally, as Williams III (2007) does, he maintains that this shift is aligned with the structural and unprecedented changes in the judiciary that several countries have undertaken and that focus on meeting today's social demands, such as accountability, effectiveness, protection rights, democratic participation, and trust.

OPEN JUDICIARY: VISION AND VOICE

In the academic literature, openness has been approached from two different perspectives: (Meijer et al., 2012): transparency and participation. The literature on transparency revolves around terms such as freedom of information, Internet, active dissemination of information, access to documents and usability of websites (Curtin & Mendes, 2011). The core question tackled by these works is: what is being made visible/transparent? Literature discusses, among other issues, the nature and scope of transparency, the usefulness of information, and the timing of the release of documents. The premise underlying these studies is that transparency yields to accountability. At the same time, a more accountable government is a more legitimate one (Sandoval-Almazán, 2011). At the same time, the literature on participation literature stresses terms such as interactive policy-making, consultations, dialogue and stakeholder involvement. The central question for participation is: whose voice is heard? Empirical and theoretical analyses focus on inequalities in access to participation meetings.

Curtin and Mendes (2011) refer to these components of openness as vision and voice. Citizens need information to see what is going on inside government and participation to voice their opinions about this. We find this distinction extremely useful for an in-depth approach to open judiciary.

Open Judiciary and Transparency (Vision)

As we have already presented, judiciary openness is highly related to transparency and, in its roots, to the common law open justice principle. Transparency means, in this context, openness to public scrutiny and, therefore, it is linked to the right of information, active dissemination of information, and access to documents or web usability (Rodrick, 2007).

Several authors have addressed transparency in the judiciary from different perspectives. For example, Devanesan and Aresty (2013) affirm that transparency is a key element for Online Dispute Resolution (ODR) models while Ruggieri (2010) states that it should be inherent in mediation processes. Meanwhile, Conley et al. (2012) refer to both the right to access hearings and the right to access judicial documentation for inspection and copy. What's more, the authors declare that courts should review the rules that allow for the creation and access to documents, introducing online tools that will actively promote transparency. This statement shows the relevant role ICT play in transparency initiatives, as is the case when talking about open government.

Two additional authors, Stefan and Alemanno (2014), state that transparency in this field is more than just accessing documents or being present at hearings. They actually refer to further goals, such as legitimacy, accountability, and good governance. For them, transparency is just a means to achieve these ultimate objectives. Along the same lines as Conley et al. (2012), Stefan and Alemanno (2014) also recognize the contribution of ICT and media not only in allowing access to the information but, also, in helping understand it.

However, being transparent is not easy (Bannister & Connolly, 2011). In addition to the challenges of technology (for example, those related to the characteristics of social media such as immediacy, ubiquity and speed), transparency initiatives are also associated to privacy and security issues, distortion of information, and sensationalism (Gorham, 2012; Winn, 2004; McLachlin, 2003; Cameron, 1986). The case of the Court of Justice of the European Union (CJEU), which has been not able to keep a balance between the pervasive rhetoric of transparency and the implementation of real transparency initiatives (Stefan & Alemanno, 2014), clearly shows these difficulties. Despite the slow evolution towards greater transparency, the lack of defined transparency and openness standards as well as the absence of a detailed regulatory framework in this regard hinder openness efforts.

Open Judiciary and Participation (Voice)

In terms of open government, Gascó (2014) differentiates between collaboration and participation. The author refers to a collaborative government as one that involves citizens and other external and internal actors in the design, delivery, and evaluation of public services whereas she states that a participative government is one that promotes citizen engagement in political processes and, particularly, in the design of public policies. Although both definitions focus on different elements (public services, on one hand, public policy/political processes, on the other), both clearly bring up the issue of engagement, involvement, and cooperation. In sum, they both raise the subject of voice, which is easier to apply when addressing open judiciary.

According to Meijer et al. (2012), the link between vision and voice may seem self-evident but is rarely explored in the literature:

Sometimes, in research into government transparency the question is raised whether information is actually used to strengthen participation, but generally this does not feature prominently in the debate. Likewise, some of the research into participation does pay attention to the question whether citizens have been informed properly and can have access to the information they need to participate but, again, this is the exception rather than the rule (p. 11-12).

Interestingly enough, this has also been the case in the justice field although a few authors have addressed the links between transparency and participation and, furthermore, they have connected both dimensions to trust and legitimacy. Abrahamson (2002), for example, reports the lack of trust in judicial institutions. He links information activities (particularly related to achieving a closer relationship between lawyers and judges and citizens, to increasing the communication with the executive and legislative powers, and to getting input from non-legal professionals, such as volunteers) with public participation. Stepniak (2006), as other authors do, declares that the open justice principle is not only about public scrutiny but about true participation. García (1998) adds that citizens' participation in courts helps these citizens understand the role of courts, increasing trust in what they do and the decisions they

made. Similarly, the National Association for Court Management (2001) links openness, hearings and collaboration to increasing citizens' trust in justice. Rottman (1998) speaks on the same lines and states that citizen engagement boosts citizens' trust in the judiciary.

Participation has been approached from several points of view. One of the most popular perspectives has to do with the concept of participatory justice (Stephens, 1986), a model according to which the common people become participants in those matters which are of importance to them instead of just onlookers (that is, they become the producers of solutions and not mere consumers). Participatory justice implies the use of alternative dispute resolution mechanisms, such as mediation, conciliation and arbitration, which focus on prevention and cooperation instead of on confrontation. In sum, participatory justice is an approach that engages everyone affected by conflict in finding a satisfactory resolution (Law Commission of Canada, 2003).

Participatory justice has highly benefitted from ICT (Vilalta, 2010) and other more recent ideas such as crowdsourcing. Martic (2014), for example, acknowledges this fact and proposes a conceptual model of Crowdsourced Online Dispute Resolution (CODR) that relies on multiple anonymous participants and that guarantees a higher level of confidentiality, secrecy and privacy preservation along with leveraging the so-called "wisdom of the crowds".

A different set of initiatives has had to do with voluntarism. Terry III (2000) mentions courts in Wisconsin (United States), which take advantage of the participation of citizens in several programs (ADR, prison, legal services, etc.). Similarly, Barendrecht & Nispen (2008) refer to micro-justice services addressed to poor people, some of which are altruistically delivered by volunteers. According to Brown (2007) and the Justice Management Institute (2010), volunteers add value in terms of costs (saving time) but, also, in terms of boosting innovation.

Committees and commissions are another way of participation, particularly related to stakeholders' engagement in judicial initiatives (Lenaola, 2011). For instance, the Committee on State Justice Initiatives of the American Bar Association (ABA) (2003) has, since 1995, supported the role of commissions as collaborative entities that bring together courts, the Bar, civil legal aid providers, and other stakeholders in an effort to remove barriers to civil justice for low-income and disadvantaged people. ABA actually hosts several groups (committees, commissions, centers,...) that rely on collaboration among different stakeholders and that address a wide variety of topics.

Involvement of stakeholders is actually promoted in many countries, such as the United States, the United Kingdom, Canada, and South Africa. This active engagement has given rise to the concept of community court defined as neighbourhood-focused problem-solving court that applies a problem-solving approach to local crime and safety concerns (Wolf, 2007). Community courts can take many forms, but all strive to create new relationships, both within the justice system and with outside stakeholders such as residents, merchants, churches and schools. Community courts emphasize collaboration, crime prevention, and improved outcomes, including lower recidivism and safer communities. Ultimately, community courts attempt to harness the power of the justice system to address local problems. They strive to engage stakeholders in new ways in an effort to bolster public trust in justice (Casey & Rottman, 2005; Berman & Anderson, 1997; Mackenzie, 1994).

An evolution of this collaborative approach is the case of the Center for Court Innovation, described by Goldstein (1997) as a judicial incubator aimed at developing and evaluating new approaches to administering justice. The Center was indeed founded as a public-private partnership between the New York State Unified Court System and the Fund for the City of New York to assist judges in devising strategies and technologies for improving the judicial system.

Despite the success of worldwide initiatives, participation in the judiciary has a long way to go. Rottman et al. (2002) show that collaboration in the justice field will grow more in the future. The authors refer to the specific case of the United States although we believe the situation is replicable to other parts of the world. Rottman et al. (2002) start showing there is high social dissatisfaction with American courts. The gap between courts and citizens seem to grow wider because courts are not meeting the community's needs. The maladjustments of traditional legal procedures embedded in real life circumstances hinder addressing the society's current problems. Only by opening up and involving citizens and communities in their operation, courts will be able to understand and, therefore, really meet citizens' demands. In doing so, trust in justice and its ability to solve current societal challenges will also increase (National Center for State Courts, 1996).

ABOUT THIS BOOK

Aim of the Book

Despite previous developments regarding openness in the judiciary, the lack of specific literature on the topic, combining vision and voice and therefore adopting the philosophy of open government, shows that this is still an unexplored field. What's more, although numerous initiatives aimed at openness have been undertaken, generally speaking, judicial institutions have followed different directions and interpretations when it has come to implement them. As a result, nowadays, it can be said that the development of open judiciary is unequal and heterogeneous. There is confusion about the concept itself (open judiciary versus open justice), about its implementation process, and about its real impact.

In this context, the aim of this book is to shed light on the concept of openness in the judiciary and to identify and analyze worldwide initiatives that focus on opening the judicial organizations by making them more transparent and collaborative/participative. Our ultimate goal is to show that an open government is not enough. There is a need to talk about an open state and, therefore, to make sure, openness is guaranteed in the three state's branches. No other publication has approached open government from the state perspective emphasizing the need to also have an open justice/open judiciary¹.

In particular, the book aims:

- To provide comprehensive knowledge of recent major developments of open judiciary/open justice around the world.
- To analyze the importance of open judiciary/open justice efforts for the judiciary and the society, as well as for the modernization of the courts and of the justice field generally speaking.
- To provide insightful analysis about those factors that are critical when designing, implementing and evaluating open judiciary/open justice.
- To assess the role of information and communication technologies, and specifically of web 2.0 tools, regarding the acceleration of the opening processes.
- To discuss how contextual factors affect open judiciary/open justice's success or failure.
- To propose strategies to move forward and to address future challenges in an international context.

Organization of the Book

This collective work is structured in four sections and twelve chapters. Section 1 opens the book with general reflections on the concept of open judiciary. Carlos E. Jiménez-Gómez's chapter gives an overview of open judiciary initiatives worldwide, focusing on some of the most successful in order to identify drivers of adoption, critical success factors, and preliminary results. The author's research is embedded in a broader study on the state of the art of open judiciary (Chapter 1).

Nial Raaen's text focuses on one of the dimensions of open judiciary: transparency. The author states that open access to accurate and reliable records is essential to participation in the judicial process. He, therefore, links vision and voice and approaches the former as a condition to achieve the latter. In particular, Raaen discusses the application of the recently adopted records management principles published by the U.S. Conference of State Court Administrators to set up a framework and a list of performance measures that ensure that court records remain open, accessible, and trustworthy in the digital age (Chapter 2).

Finally, Jesús Cano, Luis Pomed, Carlos E. Jiménez-Gómez, and Roberto Hernández address the specific contribution of information and communication technologies to openness in the judiciary. The authors connect the concept of electronic justice (e-justice) to that of open judiciary/open justice. In doing so, they develop an e-justice tool aimed at achieving more open judicial organizations (Chapter 3).

Section 2 is devoted to open judiciary initiatives in Asia. In particular, Mei Gechlik, Di Dai, and Jordan Corrente Beck present the case of China while Yumiko Kita refers to the case of Japan. The former examine the application of open government principles to the reform of the court system in China and identify the key factors to promote judicial openness in a closed society (Chapter 4). The latter describes and analyzes the Japanese citizen judge system, in place since 2001, a judicial model that randomly selects citizens to hear and discuss evidence, to reach a guilty/non-guilty verdict, and to deliver their judgments in cooperation with professional judges. The author's analytical framework is related to democracy and open justice (Chapter 5).

Section 3 includes five chapters on European initiatives. The first one, by Rui Pedro Lourenço, Paula Fernando, and Conceição Gomes, present the evolution from e-justice to open justice in Portugal. The authors look into open justice initiatives and compared them with successful development in the fields of e-government and open government (CHAPTER 6). A more specific experience is described in Mortaza S. Bargh, Sunil Choenni, and Ronald F. Meijer's text, who explain the Dutch approach for integrating the data sets of the judiciary systems in The Netherlands and for opening the data integration outcomes to the public and/or to specific groups. The authors identify some challenges in using the term open data and coin the concept of semi-open data as one that encompasses data dissemination solutions aimed at transparency, compliance, collaboration, innovation, and decision-making support, among other, but do not comply with all open data requirements (Chapter 7).

Mila Gascó-Hernández also focuses on a specific initiative, related to collaboration among stakeholders (the Department of the Interior and the Department of Justice of the Autonomous Government of Catalonia, in Spain). In particular, the author introduces the concept of interoperability in the justice field and links it to the collaboration dimension of openness (Chapter 8). Of extreme interest is the case of openlaws.eu, analyzed by Thomas J. Lampoltshammer, Andres Guadamuz, Clemens Wass, and Thomas Heistracher in their chapter. Openlaws.eu is a European project aimed at initiating a platform and at developing a vision for big open legal data: an open framework for legislation, case law, and legal literature from across. According to the authors, the project contributes to better access to legal informa-

tion and, ultimately, to better governance, both of which build the foundation for open justice in the long run (Chapter 9). Last, Inmaculada Barral-Viñals addresses participation in the judiciary. In her chapter, Barral-Viñals adopts the participatory justice approach and, explicitly, analyzes a specific kind of justice in which participatory access is not necessarily guaranteed: consumer conflicts. The author claims that greater emphasis on collaboration and participation is needed in judicial openness (Chapter 10).

The closing section of the book, section 4, is devoted to experiences in Latin America. The first text, by Rodrigo Sandoval-Almazán, explores the use of technology in open judiciary. In particular, the author assesses the judiciary portals in 25 Latin American countries using a four-component model: information, interaction, integration, and participation. His findings show that the information component is the strongest one, a result which is aligned with the idea that the common law open justice principle is still the prevailing one in the field and that more research is needed to link it with a broader concept of open judiciary that also stresses citizens and stakeholders' collaboration and participation (Chapter 11).

The final chapter, authored by Sandra Elena and François van Schalkwyk, presents a study on the openness of judicial data in seven countries in the region aimed at analyzing enabling country and judicial contexts for open data and at assessing whether judicial data publication meets open data standards of accessibility, sustainability, re-usability, and non-discrimination. Its authors conclude that the seven countries have, to some extent, open judicial data but that this information does not meet the specific requirements of open data (Chapter 12).

In sum, the book presents a collection of chapters that is not comprehensive but that tackles different issues related to open judiciary/open justice that may be of interest for both researchers and practitioners. It shows the state of open judiciary initiatives in some parts of the world and it draws insightful ideas regarding their implementation, but it also presents some interesting conceptual perspectives on transparency and participation, on vision and voice, in achieving greater openness in the judiciary. More could be said about open judiciary/open justice. *Achieving Open Justice through Citizen Participation and Transparency* is only a first approach to the field. We hope that the authors' contributions encourage the reader to keep strengthening the study and practice of open judiciary around the world.

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ENDNOTE

- ¹ We have previously shown that open justice refers to the open justice principle (and, therefore, is mainly related to public scrutiny) while open judiciary combines both transparency and participation. However, this distinction is not always clearly stated in the literature. As a result, we have decided to use both terms indistinctively throughout the book. However, our perspective is broad. We understand open justice/open judiciary as the framework that links vision and voice within the judiciary.

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This book is dedicated to Marcos, Carla, and Hawa.

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