EJTN THEMIS SEMI-FINAL D - Judicial Ethics and Professional Conduct

Content Creators v. Judges - How open can a courtroom be in the information age?

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> *"Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial. In the darkness of secrecy, sinister interest and evil in every shape, have full swing.*
>
> *Only in proportion as publicity has place can any of the checks, applicable to judicial injustice, operate. Where there is no publicity there is no justice."*
>
> *Jeremy Bentham*

1. Introduction

In the course of our incipient judicial career, we have seen cases where we felt that the use of modern technology obstructed judicial proceedings. Whether it is via Skype, Facebook or YouTube, judges face constant challenges from new communication methods. They often find it difficult to decide whether to allow the use of such means. Firstly, no direct regulation can be found on the use of modern communication methods, only abstract definitions of courtroom broadcasting and public hearings exist. Secondly, the permission or the prohibition of the use of modern technologies in the courtroom raises ethical questions to judges. Allowing the use of these methods satisfies the public, as they can follow a hearing more efficiently, but opens the proceedings to unfiltered and negative comments on social media, and to encroachment on personal rights. In contrast, the prohibition of broadcasting may protect the interests of the parties or other participants, as well as the dignity of the judicial procedure, but may cause a justified uproar from the general public and may undermine the confidence in courts and the right to a fair trial.

Fair trial is a multifaceted concept. On the one hand, it means that a democratic society expects that court cases are decided in a way that is fair and just. On the other hand, it also implies that procedural justice must be dispensed in all circumstances, usually by the means of holding a public hearing. This latter function has served as a basis for our examination, as the advancement of modern technologies challenge the existing rules regarding public hearings.

The purpose of our paper is to explore this intricate issue, by identifying the obligations of judges in the proceedings, determining whether the right to a fair trial and to a public hearing is an individual right or the right of the society, and proposing methods for judges to respond to the related challenges, with special regard to ethical rules of their professional conduct. We will analyse real-life cases where the use of modern communication methods caused controversy, review relevant international and national legal regulations, and discuss the ethical issues related to modern age publicity.

2. Publicity of hearings

The nature of publicity can be unraveled through historical review, human rights based analysis and a comparative overview of pertinent legal regulations.

2.1. Historical review

Publicity of legal proceedings is not a modern invention, it goes back to ancient times. In the fifth century BC, Athenian trials appeared as such a 'cultural communicative space' that modern courts may only hope to resemble. Hundreds of jurors and spectators attended those trials. Publicity provided the basis of the democracy's operation in several ways. Transparency via publicity established accountability of the jurors who had to make and pronounce decisions in front of the public. Publicity supported truth by detaining litigants for unsubstantiated accusations. Public trials contributed to democratic education and civil consciousness.[1] The role of publicity, however, lost its democratic value in the Middle Ages. In those times, courts mainly delivered theatrical drama and pretence to the spectators.[2] In the absence of sources it is uncertain when publicity returned as a democratic principle of judicial proceedings, but it did so. The right to a public trial in this sense appeared in Pennsylvania's Constitution of 1776, followed by the Sixth Amendment to the US Constitution in 1791. And the principle quickly infiltrated into the European civil law systems as well.[3] While the trial's venue got reduced from a field or marketplace to a courtroom over the centuries, in the last few decades modern technology has expanded those walls again through broadcasting (live streaming, Facebook Live, YouTube, Twitter etc.).

2.2. Whose right is publicity of the hearings?

In order to better understand the challenge of our issue, it must be clarified whether publicity of the hearings is a right of the parties or a right of the public. To find the answer, first we should ask why we allow someone to attend a court hearing. To address this question, we have to look at the principal role of judges and the judicial system as a whole. In our opinion, the main role of the judiciary is the administration of justice. The concept of justice has been interpreted in various

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[1] A. Lanni, "Publicity and the Courts of Classical Athens", (Yale Journal of Law & the Humanities, Vol. 24, 2013), 119-135.

[2] M. Goodich, "Voices from the Bench – The Narratives of Lesser Folk in Medieval Trials", (Palgrave Macmillan US, 2006).

[3] "Civics Library of the Missouri Bar: The right to a public Trial", (https://web.archive.org/web/20070811082603/ http://members.mobar.org/civics/PublicTrial.htm, 3 May 2018).

theories. Conservative scholars like *Locke*[4] and *Nozick*[5] derived justice from the natural rights of every person, mainly from the right to property. Progressive thinkers like *Rawls*[6] advocated that justice could be described as a system of distribution within a society, based on the concepts of social contract and egalitarianism. *Aristotle* in his Nicomachean Ethics revealed that *„[Justice is a] moral disposition which renders men apt to do just things, and which causes them to act justly and to wish what is just; and similarly by Injustice that disposition which makes men act unjustly and wish what is unjust."*[7] In practice, administration of justice usually means a method of dispute resolution between parties, whether in determining if the charges against the accused are justified, or if the plaintiff may be awarded damages. In essence, judicial proceedings boil down to two parties disagreeing in a certain matter, and a judge(s) adjudicating their dispute, mainly through the application of formalised rules of written law or case law. Most judicial proceedings may be defined in the aforementioned triangular operation, characterised by the parties and the judge(s), which leads to our second question.

Why do we allow persons who are not parties to the case to attend a court hearing? Judges decide cases with the view that the State will enforce their decisions in the future. They are in a position of power while performing their tasks; therefore the parties to a case are in an inferior position compared to them. While in democratic societies power can be gained through the means of election, members of the judiciary are usually selected by different methods, thus democratic control over the courts should be maintained in some form.

It follows that the parties to a court case may require others to be present at their hearing. In order to ensure that legal norms are always upheld during judicial proceedings, it may be important that third persons attend the hearings, providing a powerful civil control over it. Hence we can arrive at the conclusion that the publicity of the hearings is a fundamental right of the parties.
This conclusion becomes even more apparent when reviewing various international human rights instruments. Article 10 of the Universal Declaration of Human Rights prescribes that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. The European Convention on Human Rights contains a similar definition under Article 6 regarding the right to a fair trial, as does the Charter of Fundamental Rights of the European Union under Article 47

[4] J. Locke, "Second Treatise on Government", (Watchmaker Publishing, 2011).

[5] R. Nozick, "Anarchy, State and Utopia", (Basic Books, 1974).

[6] J. Rawls, "A Theory of Justice", (Harvard University Press, 1971).

[7] Aristotle, "Nicomachean Ethics", (Kegan, Trench, Truebner & Co. Ltd., London 1906). A detailed analysis of the concept of justice is beyond the scope of this paper.

regarding the right to an effective remedy and to a fair trial. All these instruments use the word 'everyone', which represents all individuals subject to judicial proceedings.

Overall, two arguments can be found in favour of the access for the public to courts. First, public access ensures democratic control of the administration of justice and legitimises judicial proceedings. Secondly, it informs citizens about the operation of the judicial system, giving them an opportunity to learn about the law that society must adhere to. These two functions are essential democratic social values and are unquestionably intertwined. The publicity of legal information provides citizens with understanding about the justice system, should they ever find themselves in a court of law. Moreover, armed with this knowledge, citizens can openly question the efficacy and legitimacy of the laws to which they now know they are coercively beholden.[8] As Lord *Woolf* from the English Court of Appeal wrote: *"[The open court principle] enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. [...] If secrecy is restricted to those situations where justice would be frustrated if the cloak of anonymity is not provided, this reduces the risk of the sanction of contempt having to be invoked, with the expense and the interference with the administration of justice which this can involve."*[9]

In conclusion, while international human rights treaties and national constitutions consider the right to a public hearing as personal, individual, fundamental right, it is also important to entitle the general public to be present in any judicial proceeding. Public hearing may only be viewed as a fundamental right of the parties to the case, despite the fact that, under most circumstances, press and the general public is admitted to the courtroom. We consider that the public's entitlement to participate in hearings is a significant democratic value, but not a fundamental right of the public. Therefore, in our following discussion, we will not consider the 'open court' principle[10] as a fundamental right, and the tests of democratic necessity, proportionality and the margin of appreciation may only be applied while providing a fair trial for the parties. The exclusion of certain persons from a hearing may indirectly infringe the fundamental rights of the parties, as the publicity principle does not entitle certain external individuals, but the right to a fair trial entitles the parties that some, not individually described spectators may be present at a public hearing. Overall, even though the publicity of trials can only be considered a fundamental right of the parties, judges must

[8] S. Hall-Coates, "Following digital media into the courtroom: Publicity and the open court principle", (Dalhousie Journal of Legal Studies, Vol. 24, 2015), 108.
[9] Ibidem, 106.
[10] Ibidem.

exercise exceptional care when limiting publicity in order to protect the rights of the parties properly.

2.3. Regulation of publicity in European jurisdictions

Whether a hearing is public or not is a core question in the procedural rules of all democratic countries. The fact who's attending the hearing is such a significant influencing factor on the outcome of the whole trial that it must be regulated in each and every code of procedure. It is worth reviewing these rules at European level to set the legal context of our study.

Among the Member States of the European Union there is a consensus that the main rule is open trial and public hearing. In *Belgium* the trial is held in public, unless this is not possible for security reasons. In sexual offence cases (rape, etc.) access to the courtroom may be restricted at a party's request. A mentally disturbed offender may ask that his detention case be heard in private, to which the public prosecutor may object. In *Bulgaria* it is also possible that the whole trial or a part of it be held behind closed doors to protect state secrets, public morals or the identity of protected witnesses. In *Estonia* the court can declare that the trial will be held partially or fully in private to protect family or private life and the administration of justice, including cases where publicity may endanger the security of the court, the parties to the proceedings or witnesses. In *Ireland*, if the accused is a minor or a sexual crime is concerned, the case is heard in private. In *France* a reason for the exception from publicity could be juvenile delinquency or the victim's request in cases of rape, torture and acts of savagery accompanied by sexual assault. In *Cyprus* the Constitution provides that the press and the public may be excluded from all or any part of the trial by a decision of the court in the interest of national security, constitutional or public order, public safety or public morals, or where the interests of juveniles or the protection of the private life of the parties so require. Furthermore, the public may be excluded in special circumstances where the court considers that publicity would prejudice the interests of justice. In *Poland,* generally, the trial is open to the public with a few exceptions, but the judgment is always pronounced in public. *Portuguese* courts may hold in-camera trials in some cases such as those concerning human-trafficking or sex crimes. In *Romania* the interrogation of a minor is done separately from other hearings and is not public. In *Slovenia* the interest of fairness could be a reason for restriction. As a rule, *Slovakian* cases are held in public, but the public can be excluded from a hearing if its presence would be a threat to bank or telecommunication secrecy, public order, identity of an agent or similar reasons. The judgment, however, is always pronounced in public. In Sweden crimes against national security, among others, may place the trial behind closed doors. In other EU countries, i.e. in *the Czech Republic*, *Denmark*, *Finland*, *Germany*, *Greece*, *Italy*, *Latvia*,

Luxembourg, *Malta*, *the Netherlands*, *Spain* and *the United Kingdom* the trial is public and the public is excluded only in exceptional circumstances, e.g. in order to protect witnesses, state secrets, personal rights of the victim or where the victim is a child.[11]

2.4. Regulation of publicity in Hungary

Hungarian rules are in line with European trends. Both civil hearings and criminal trials are held in public, with slight differences in the two types of procedure. We elaborate on these rules because they apply to the cases in which we have detected ethical concerns.

In Hungarian civil proceedings the court must adjudicate legal disputes in public hearings and deliver its judgments publicly. However, the court may on its own motion or at a party's reasoned request declare the hearing wholly or partly closed from the public, where this is deemed appropriate for the protection of classified information, business secrets, public morals, minors, witnesses, or the personal rights of the parties. Under certain conditions a 'media content provider' must be allowed to make, in the manner prescribed by the court, audiovisual recordings of public hearings for the purpose of disseminating information to the public. Audiovisual recordings can be made of judges, court clerks, public prosecutors and any other persons involved in the proceedings, without their consent, provided that they are present as public officials. However, recordings can be made of the parties, intervenors, counsels, witnesses and experts only with their express consent. Furthermore, full names of natural persons may be disclosed by the media only with their approval.[12]

In Hungarian criminal proceedings the main rule is also publicity of trials. Criminal procedural law differentiates, however, between limiting the size of the audience and in-camera (i.e. non-public) trials. In the first case the aim is to provide the court's operability. In order to ensure the proper conduct, dignity and security of the trial, or due to lack of space, the judge may limit the number of the spectators. The reasons for in-camera trials serve protection. The court may, *ex officio* or at the motion of the parties, exclude the public from the whole or a part of the trial for ethical reasons as well as for the protections of minors, witnesses, any other participants of the proceedings, or classified data. Regardless of the public's exclusion, the court may permit the presence of official persons performing tasks relating to the administration of justice. When the public has been excluded, a victim without a representative or an accused without a defence counsel may request

[11] "Rights of defendants in criminal proceedings", (European e-Justice Portal, 10 August 2017, https://e-justice.europa.eu), with information provided by the respective Member States.
[12] Sections 231-232 of Act CXXX of 2016 on the Code of Civil Procedure (CP).

that a designated person be present at the trial. If the court excluded the public to protect classified data, no such request may be granted. In the case of an in-camera trial, the court must warn the participants that they are prohibited from disseminating information on the trial, and if necessary also about the consequences of disregarding that prohibition.[13] The court must pronounce the 'operative' (decision) part of the judgment in public even when the public was excluded. The reasoning of the judgment must also be announced publicly, unless protection needs require a different approach. Criminal procedural law is more detailed than the civil one, since it also regulates the disclosure of information to the public in the course of pending criminal proceedings. This is sensible since criminal trials often attract higher publicity than civil cases. According to the code of criminal procedure, others than members of the press may not be provided with information on public court trials. Even the press may be refused for the protection of classified data or administration of justice. Any sound or video recordings may be subject to the permission of the judge(s), and recordings of persons present at the hearing, with the exception of judges, clerks, the prosecutor and the defence counsel, are subject to the consent of the person concerned. The judge may refuse to grant permission or may withdraw the permission at any stage of the proceedings in order to ensure an uninterrupted trial. No information may be disclosed to the press on trials held in camera, unless the audience was excluded because of disturbing the order or regular course of the trial.[14]

3. Controversy in the courtroom practice

After having explored the nature of publicity, we need to delve into some controversial issues relating to the dissemination of information from the courtroom to the public. We will examine here the definition of the press, television broadcasting, and live broadcasts on social media.

3.1. Television courtroom broadcasting

Television courtroom broadcasting (TCB) is a controversial issue. One of the strongest arguments against TCB is that it is influencing the participants of the trial.[15] That however is not proven and usually the person who is at the centre of media attention is the judge. Judges are usually accustomed to this treatment in their professional life, and should not feel uncomfortable or influenced by it. Nevertheless, a lot depends on the circumstances of the broadcasting, such as the types of television cameras, their locations, and also whether there is a camera operator involved.

[13] Sections 232-237 of Act XIX of 1998 on the Code of Criminal Procedure (CCP).
[14] Sections 74/A-74/B of the CCP.
[15] P. Lambert, "A candid camera", (New Law Journal, 10 December 2010, https://www.newlawjournal.co.uk).

Besides TV cameras there are also other ways to stream the trial, e.g. tweeting, selfies and Facebook Live.[16] With these new types of broadcasting the court has to make up the rules on the spot and implement some changes, issue warnings and admonishments.[17] This raises the question how far the 'open court' principle and the people's right to publicity extends, and where the court should step in to enforce the dignity and fairness of the trial. Examples support those who are against TCB or live-streaming. TCB may serve many purposes, such as education, information, entertainment or cheap programming content, but its main objective is to provide publicity. Courts have to adjust to the fact that the concept of publicity has widened and with modern technology the same right means more to the citizens. The famous *Karen Buckley* case shows the informative side of the TCB. Here the victim was Irish but the trial took place in Scotland. Providing the opportunity for Irish citizens to hear the sentence directly enforced their right to know that the Scottish jurisdiction worked the way the Irish would have.[18]

Compared to the United States where *'Judge Judy'* and similar TV programmes make it entirely ordinary to 'attend' trials even from home (even if it is only a reality show), in Europe many feel that TCB can easily make trials into circus.[19] Unfortunately there is no research to evaluate the educational or informative side of broadcasting compared to the entertaining nature of it.[20]

Although in European countries court broadcasting is not usual, the European Court of Humans Rights (hereinafter: ECHR) broadcasts all of its public hearings on the Court's website.[21] However, the ECHR is not an ordinary court, as its decisions affect more than a few persons. By broadcasting its public hearings the ECHR can step over the boundaries between the countries.

3.2. Definition of the press

For the purposes of our paper it is necessary to discuss the definition of the press. According to the Cambridge Dictionary, *press* means "*newspapers and magazines, and those parts of television and radio that broadcast news, or reporters and photographers who work for them*''. Thus, the term

[16] 2010/13/EU Directive (Audiovisual Media Services Directive) also differentiates between traditional TV broadcast and on-demand services available on the Internet, regarding both as audiovisual media services.
[17] This happened e.g. in the famous South African *Pistorius* case in 2014.
[18] P. Lambert, "These are some of the negative effects that broadcasting in court can have", (The Journal, http://jrnl.ie/2316380).
[19] N. Morris, "Courtroom cameras 'risk turning trials into circus", (Independent, 28 March 2012).
[20] P. Lambert, "Column: Is television courtroom broadcasting a good idea?" (The Journal, http://jrnl.ie/881671).
[21] "Calendar of hearings", (https://www.echr.coe.int).

press can cover both the ways of disseminating news and people who work on the dissemination of news.

In Hungary, the codes of civil and criminal procedures do not use the term 'press' but have introduced the term '*media content provider*'.[22] According to Act CIV of 2010 on Freedom of the Press and on the Basic Rules Relating to Media Content, a media content provider is defined as "*media provider or any media content provider"*, where media content includes all audiovisual media services and content offered by the press.

The above definition does not help much in delimiting the exact group of people who must be entitled to make sound and audiovisual recordings at a hearing. What is the situation with those who want to make recordings in the courtroom but are not members of the press? After all, they may have a blog followed by hundreds or thousands of people. How can we differentiate between the press and a blogger? The situation of bloggers is practically unregulated, because it is not clear if they can be considered 'media content providers'.

Hungarian civil procedural law provides that a media content provider must be allowed to make, *in the manner prescribed by the court*, audiovisual recordings of public hearings, for the purpose of reporting to the public. The judge's responsibility for maintaining order in the courtroom includes the protection of personality rights of the parties and other persons involved in the proceedings, including counsels, witnesses and experts.[23] This means that everyone in the courtroom, whether a pressperson or not, is bound to observe the rules set by the judge and respect the personality rights of the aforementioned persons.

The situation outlined above may seem clear and simple. If someone enters the courtroom with a huge camera and several microphones, the judge is probably able to control who is being filmed during the hearing. When a violation of the rules is detected, necessary measures can be taken. It is more problematic, however, when someone does not appear at a hearing with big cameras, but with a tiny little smartphone or with a simple laptop. We will analyse this situation in the next section.

3.3. Live broadcasts on social media

Live broadcast or streaming media means sending video or audio content in compressed form via the Internet and in order for it to be played immediately, rather than saving it to a hard drive. With

[22] Section 232 (1)-(2) of the CP and Section 601 (6) of the CCP.
[23] Section 232 (1) and (5) of the CP.

streaming media, users do not have to download a file to play it. Since the content is sent in a continuous stream of data it can be played as it arrives. Users can pause, rewind or fast-forward, just as they could do with a downloaded file, unless the content is being streamed live.

As an advantage, streaming media makes it possible for users to take benefit from interactive applications like video search and personalized playlists. Live broadcast allows content distributors to monitor what visitors are watching and how long they are watching it. It provides an efficient use of bandwidth because only the part of the file being transferred is the part being watched. Streaming media has also the benefit of providing the content creator with more control over his intellectual property because the video file is not stored on the viewer's computer. Once the video data has been played, it is discarded by the media player.[24]

Nowadays there are numerous possibilities of broadcasting the events of our lives via social media. We have Facebook, Instagram, Snapchat, Twitter and Skype, just to name the most popular ones. The outstanding expansion of social media is well illustrated by the fact that social media platforms have become an important tool even for political communication. In the past, broadcasting live videos used to be a complex technical pursuit, requiring television cameras, trucks and satellites. Today, the ubiquity of smartphones and social media has made 'going live' as simple as tapping an app. The result is a new world of live video, documenting society's good, bad and ugly, that challenges how we think about visual information made public in an eyewitness – even journalistic – fashion.

Live-streamed video muddies the intersection of social media and journalism. Facebook has more than a billion daily active users, with 66 percent of them getting news from the site. Live-streaming videos in social media compel us to reconsider what we think about the news (speed, spread and defining influence) in how they may affect to public life.[25]

It is indisputable that technology has become one of the defining characteristics of the Fourth Industrial Revolution. Yet, despite the pervasive integration of technology into various social institutions, the courtroom has remained relatively immune from technology's noisy demands for recognition. The segregation between the courtroom and digital technology is nonetheless collapsing, as trial spectators increasingly arrive in court expecting that they will be able to use their digital devices there to disseminate information about the trial in real-time via social media such as Facebook Live or Twitter and other live blogging and broadcasting platforms. Moreover, despite

[24] M. Rouse, "What is streaming media?", (WhatIs.com, April 2009, https://whatis.techtarget.com).
[25] S. Lewis, N. Smiths Damen, "What Facebook Live means for journalism" , (The Conversation, 8 February 2017).

the judicial system's wariness of digital media technologies, their integration into the courtroom is strongly supported on the basis of the 'open court' principle that holds that court proceedings must be open to the public and that publicity must be unconstrained.[26]

3.4. Social media – the new level of journalism?

According to some views social media use within the courtroom merely acts as the 21st century equivalent of the reporter's pen and paper, and thus does not represent a radical break from past journalistic practices. However, in our opinion these new platforms create wholly new and challenging courtroom narratives, characterized by the immediacy, interactivity, abundance, and permanence of the information disseminated through them.[27] In other words, we reject the view which states that social media only means a new form of journalism. Furthermore, the ethical aspects of this issue are not negligible, as they may shape the professional conduct of judges, since it does matter how they handle these situations in the courtroom.

In deciding whether to integrate digital media use within the courtroom, the justice system must determine which of the democratic values that underpin the 'open court' principle ought to be given decisive weight in modern society.[28]

Based on the above, one of the most important questions of our study is whether the judge is able and/or obliged to detect and circumscribe the use of social media and electronic devices in the courtroom, taking into account various ethical and fundamental rights issues. Another important question is whether the judge must consider the persons entering the courtroom with a smartphone or a laptop to be members of the press.

4. Ethical concerns

The ethical concerns relating to the use of modern electronic communication devices in the courtroom can be best illustrated through real cases. Therefore, in the following section we will analyse cases concerning four popular social media platforms, i.e. Facebook, Skype, Twitter and YouTube. We either experienced these cases personally or learned about them from the World Wide Web.

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[26] S. Hall-Coates, "Following digital media into the courtroom: Publicity and the open court principle", (Dalhousie Journal of Legal Studies, Vol. 24, 2015), 102.
[27] Ibidem, 103.
[28] Ibidem, 104.

4.1. Facebook Live

The first noteworthy case relates to a famous criminal proceeding which was brought against two activists in 2017 for having dumped the Palace of the President of the Republic with paint as an expression of their political protest.[29] They are well known in the Hungarian social media, nearly 30,000 people follow their Facebook page which has a critical tone against the current political situation. Alongside the members of the press, a huge audience attended their trial, which was recorded by one of the spectators with a smartphone, and the video was streamed via *Facebook Live* through this political-public profile, and was eventually viewed by 424,000 people, and 10,000 comments were added.[30]

The main concern raised by this case is that anybody could follow the live broadcast freely, including witnesses who are not entitled to be present at the hearing before giving their testimony. This raises serious doubts concerning the fair trial principle, because in this case, modern technology has contributed to breaking down a fundamental procedural rule, not to mention that the personal data of the participants in the lawsuit were also displayed on the video.

Another Hungarian case also raised concerns about the use of *Facebook Live* in the courtroom. In early 2018 in a hearing of a lawsuit between two municipalities before a district court in Hungary two journalists reported at the beginning that they wanted to make audiovisual recordings. In addition, the respondent's representative O.M. indicated that he also wanted to make recordings via *Facebook Live* broadcast. When asked by the judge, the plaintiff's representatives did not give their consent to appear in these recordings. Subsequently, the judge allowed the shooting but prohibited to make recordings of the plaintiff's representatives. The judge noted in the minutes of the hearing that the cameras of the press and the mobile phone of O.M. were set up. A few days later, one of the plaintiff's legal representatives requested the court to impose a fine on O.M., as she had discovered that in the live streaming on Facebook, recorded by O.M., she was visible and recognizable, even though she had not given consent to be filmed. Indeed, in the video in question, despite the court's order, the plaintiff's representative appeared several times for several minutes, and all her statements made during the hearing were broadcast live on the World Wide Web. The three-and-a-half-hour long recording is still available at any time by anyone on O.M.'s Facebook profile.[31] Upon the submitted request, the court imposed the fine[32], highlighting that the addressees of the

[29] One of the writers followed the hearing live on Facebook.

[30] Video recording of the case: https://www.facebook.com/slejmpolitika/videos/1803060343355201/ (4 May 2018).

[31] Video recording of the case: https://www.facebook.com/mihalyzoltan.orosz/videos/716838021857461/ (4 May 2018)

[32] This was not the most severe punishment for using live broadcast on social media; in 2017 in Cardiff a man who streamed a court trial live on Facebook from his mobile was sentenced to 28 days of imprisonment.

right to publicity of the hearing were the litigants who had a legal interest in adjudicating the dispute under public scrutiny and in a fair trial.[33]

What could the judges have done to avoid the above situations? In the first case such a big audience was present that it would have been really difficult for the judge to notice that someone broadcast the hearing in a hidden way. It was not that difficult to detect the broadcasting in the second case, as O.M. rotated his smartphone constantly during the hearing. However, during the several hour-long hearings, should the judge have been constantly monitoring whether the persons making recordings violated the personality rights of the other participants of the procedure? Or should the judge have warned them at the beginning not to use their mobile phone during the hearing?

We suppose that, in both cases, the situation was unexpected and unusual for the acting judges. It is likely that they were not fully aware of the exact nature of *Facebook Live*. As judges are not always up-to-date in the world of the newest technologies, training would be needed to prepare them for such situations and offer them knowledge of modern media platforms. If they are unable to recognize the pitfalls of the situations outlined above, they can easily enter into distractions that could be avoided by preparation.

4.2. Skype

A few months ago at a Hungarian Regional Court there was a hearing in a civil dispute with the presence of the judge and the legal representatives of the parties.[34] In the middle of the hearing, when the plaintiff's lawyer showed a document on his laptop, the representative of the other party noticed that the *Skype* was on and asked if the plaintiff's lawyer was actually using it. He answered yes, as his client was listening into the hearing from home. The judge responded that the minutes must indicate the persons being present at the hearing so the representative should have mentioned at the beginning that his client was 'present' via Internet. She prohibited the continuation of the 'broadcast' as Hungarian law did not allow the presence at court via *Skype* or other electronic devices. Those who are heard via electronic communication network must appear in designated premises and be present throughout the whole hearing. Identification of those persons must be made

(https://www.thesun.co.uk/news/2931426/man-jailed-after-streaming-a-court-case-live-on-facebook-from-his-mobile/, 3 May 2018)

[33] One of the writers of this paper drafted the fine order. In connection with this, see also decision no. 873/B/2008 of the Hungarian Constitutional Court.

[34] One of the writers of the paper was present at the hearing.

by the presiding judge.[35] Attending a hearing via electronic devices other than official electronic communication networks is not allowed by law in Hungarian courtrooms.

What ethical issues are raised by this case, where not the presence of the public but the presence of a party through electronic devices was denied by the judge? Firstly, why is a party not allowed to attend the hearing from home or any other places? Secondly, would it be advantageous to conduct a hearing via *Skype*? What are the dangers of listening into a hearing from the distance? Should the judge have prohibited the use of laptops?

As for attendance from a distance, with the rapid development of modern technology it could seem natural for a party not to bother with physically showing up in a hearing, but rather to follow it from the distance through an electronic communication device. Still, the courts cannot authorise this 'presence' from a distance, since being present at a hearing via *Skype* or other similar ways is not in line with the rules of procedure. According to these rules, witnesses are not allowed to be present at a hearing before giving their testimony. However, when a party follows a hearing via *Skype* the judge cannot be sure if future witnesses are also watching it or not.
A Skype-hearing would also be disadvantageous, as an interview conducted through *Skype* could be arbitrary terminated any time by disrupting the connection. The judge cannot do anything if a person wants to escape from answering a question by cutting off.
As for laptops, it is possible to prohibit their use in the courtroom and we have seen judges doing so. However, completely rejecting the use of electronic devices is not a feasible solution, as courts must keep pace with the achievements of modernity and find the right balance.

4.3. Twitter

In a case related the use of *Twitter*, Julian Assange was residing in the United Kingdom when Swedish authorities issued an European Arrest Warrant in order to prosecute him for sex crimes. During the extradition procedure while a witness was still giving evidence, a leading UK journalist Joshua Rozenberg tweeted that *"Bjorn Hurtig, lawyer for Julian #Assange, is complaining about past leaks from Swedish prosecutors. He clearly has no sense of irony."* In a response a fellow user posted that *"It's not terribly difficult to argue that individual persons should be allowed privacy protections & that govs should not"*. Rozenberg responded with *"Didn't individuals have their privacy breached by #WikiLeaks? Don't people working for governments retain a right to*

[35] Section 624 of the CP.

privacy?" These exchanges of tweets took place within 18 minutes while the hearing was still going on.[36]

Ethical concerns arise here also. If members of the jury or judges could view these tweets during a proceeding, would this have an influence on their opinion about the case? What could a judge do to prevent these interferences in a hearing? Would a comment given by a leading journalist have an effect on public opinion, and could it undermine the confidence in the judicial system?

Through the use of *Twitter* it is possible to influence members of the jury, as tweets often contain prejudicial material or comment which would not be admissible in court. While in most European jurisdictions professional judges sit instead of a jury, and they are presumed not to be influenced by this flow of information, the inherent trust in the judicial system may be challenged by microblogging activities in the form of manipulative comments. The power of first impressions is an important factor, and once a tweet has hit thousands of users, it becomes very difficult to change the initial views of people affected by it. Tweeting is one of the fastest ways of sharing news in our times, which may pose a huge challenge to judges in the near future.

4.4. YouTube

Our last two cases are related to *YouTube,* a popular video sharing website where registered users can upload and share videos,[37] including homemade broadcasts of court hearings.
In the first case, in the early fall of 2016 an outdoor bombing in downtown Budapest shook Hungarian citizens and international media. The following court trial received enormous attention. In Hungary, members of the press are entitled to broadcast a trial upon authorisation by the judge. On the day of the public hearing[38], a large number of agents from the leading national televisions and newspapers were present and, in addition, a similarly sizable bunch of spectators, bloggers and *YouTube* personalities. The presiding judge gave permission to all members of the press to film the hearing, on the condition that the order and dignity of the trial not be impeded. However, the representatives of social media were neither specifically declined nor granted permission, although they also filmed and recorded the hearing, to later publish it on *YouTube*, supplemented by their comments to inform their numerous viewers about the 'abuses and injustices' which they encountered.

[36] J. Rozenberg, "The Twitter era of court reporting is here, despite the risk of prejudice", (The Guardian, 9 February 2011).
[37] "What is YouTube?" , (https://www.techopedia.com/definition/5219/youtube, 2 May 2018).
[38] One of the writers of the paper was present at the hearing.

In the second case an infamous *YouTube* user, who gained recognition by fighting crime on the streets in his own ways, was accused of assaulting and injuring a supposed thief. During his own trial, he was granted permission by the judge to record and film the hearings[39] so he made a seven-part *YouTube* series where he provided in-depth analysis of the 'frauds committed by law enforcement'. In these series the testimony of the expert witness and other witnesses as well as judicial documents were commented on in detail, with the conclusion that the whole proceeding was nothing more than a 'show trial'.

The above cases pose the following ethical dilemmas. Is it the judge's responsability to decide who can be considered an agent of the press and who is a simple blogger? How can a judge make a difference between these categories? Would a comment given in *YouTube* videos have an effect on public opinion and could it undermine the necessary confidence in the judicial system?

The outlined cases show that through the use of *YouTube* and other similar media platforms the presentation of a trial can lead to a distortion of reality, and is capable of manipulating the viewers with regard to its content. The inherent trust in the fair conduct of trials is a very important factor in the legitimacy of the judicial system, and manipulated contents aim to damage this confidence. While everyone has the right to express their own opinion and criticise judicial proceedings, presenting them in such malicious ways does not fall within the scope of freedom of speech.

The difference between the two cases lies in the fact that in the first case the creator of the manipulated content was a blogger who was not party to the case, while in the second case the accused himself recorded the proceedings with the authorisation of the judge. Although permission can be deemed to be 'granted' in both instances, the difference between the role of the persons in these cases calls for a diversified approach on the part of the judges. Regarding the first case, is it the judge's task to decide who can be considered an agent of the press and who is a simple blogger? In some countries recording of public hearings can only be performed by authorised press members who have shown their documentation. In Hungary and in many other jurisdictions, however, the non-existence of a 'press ID' makes it difficult for judges to tell presspersons from bloggers. As for the second case, it is commonly accepted within the concept of a fair trial that parties to a case have the right to make their own notes on the case to facilitate the exercise of their rights. However, this does not mean that the entire trial can be recorded and later commented on and broadcasted to the public. Information in the press may be biased, but it is still a more regulated field than for example *YouTube*, although both reach a similar number of viewers. As such, we believe that judges should

[39] One of the writers of the paper was present.

attempt to diminish these incidents by strictly prohibiting non-journalists the filming and recording of public hearings. Lawmakers should enact legal provisions penalising these activities in order to preserve confidence in the judicial system.

5. Conclusions

As it can be seen from our analysis, allowance of publicity is a convoluted ethical issue. In a modern democracy the greatest possible amount of publicity is generally expected and viewed as an ethical principle. Publicity of court proceedings, however, cannot be unrestricted.

The choice of authorising publicity in courtrooms has multiple sides: the interests and fundamental rights of the parties to the case, the witnesses, the families of the victims of a crime, and the general public. The difficulty for a judge to make an ethically acceptable decision inevitably arises when several of these often opposing interests appear.

Permitting the use of the aforementioned telecommunication devices may displease the parties to the case as well as the families of the victims. The unfiltered 'live' publication of the courtroom events may cause severe psychological pain to these individuals, adding to the existing traumatising experience that a courtroom proceeding may cause. Another, even greater negative effect of the allowance of the use of these devices is the possible erosion of the dignity of the judicial system. In the preceding sections we have examined cases where this threat became a real issue. Broadcasting the hearing in Facebook Live, uploading it to YouTube or sending tweets about it opens the procedure to uncontrollable comments. We believe that in a democratic society dignity of the judicial system is a cornerstone of justice and damaging this legitimacy can be destructive to the society as a whole.

Therefore, our most important conclusion is that publicity of judicial proceedings is a fundamental right of the parties to a case but cannot be considered a fundamental right of every person who wants to attend a public hearing or record the events of a trial.

Furthermore, we also find that there is a substantive (qualitative) difference between the two types of courtroom publicity, i.e. physical presence and presence via electronic devices. In a physically open courtroom the judge can control the participants, since the number of persons present is limited. On the other hand, in an 'electronically' open courtroom the judge has literally no opportunity to know how large the audience is or how many users can follow the events. In addition, as 'Internet remembers', audience cannot be restricted in time or space. Since publicity of

judicial proceedings is not a fundamental right of the public judges do not have to unconditionally grant it.

On the basis of our findings, we believe that it is indispensable to propose solutions to the concerns outlined above. There are various tools to prevent and remedy the problems generated by modern technology but it is not sure that all of them can be applied in practice. What is certain is that no limitless toleration of all forms of publicity must be accepted. In our view, the following solutions may be considered:

1. The first and at the same time the most radical option is the *complete ban* on the use of electronic devices in the courtroom. Prohibiting the use of these devices, however, would be obviously displeasing to the general public. As previously discussed, the 'open court' principle not only ensures the fairness of the trial by keeping the judge under control, but also informs society about the operation of the judicial system. A complete prohibition of publicity through electronic devices would be unacceptable, as the control of the judicial system is a core value of democratic societies and being an important aspect of the fair trial principle it is also a fundamental right of the parties. The press cannot be required to abstain from applying modern audiovisual recording devices. On the other hand, parties may also object to a ban on the use of electronic devices in the courtroom, claiming that they need to use them in order to have access to digitalized case files and legal databases.

2. A second possible solution is the *blocking of courtrooms*, i.e. not providing access to the Internet from there. No signal could go in or out, thus preventing the live broadcast of and comments on the proceedings. It is an alternative solution, and also a radical one, since the public of our days constantly using Internet and most probably would not be sufficiently flexible to adopt this method. Moreover, in a blocked courtroom the parties would also encounter difficulties in having access to online contents (e.g. online legal databases) needed during the hearing; such access, however, could be provided by the court via cable. By all means, the implementation of the blocking may not be feasible, having regard to the related costs and technical difficulties.

3. We also have a less radical, yet effective option to handle these situations. Under this option, the judge may *warn and inform* those who are present at the hearing in a general manner about the rules on the use of electronic devices with the following or similar wording:
"*The court hereby warns those present that recording, broadcasting, streaming or using any other methods of online commentary on any platforms is strictly prohibited, unless such a*

conduct is authorised by court. Those who act contrary to the warning must bear the legal consequences determined by law, such as...”

Application of the above warning could be the ‘golden mean’ between complete ban and total permission and could effectively address the situation. We believe that at present this would be the right and the most feasible solution.
In case the participants act contrary to the warning they must bear the consequences. These legal consequences must be gradual. At first the judge would only warn the person who violates the rule to stop using the electronic device. In case the person does not obey the judge may fine him up to the amount stipulated by the law. If this also fails, the judge could order the confinement of the rule-breaking person for as long a period as it is proportionate to the seriousness of the breach. The application of this eventual strict sanction would not be unique, as we have seen it being used e.g. in the United Kingdom for such behaviours.

When deciding on the authorisation of the use of data exchange devices in the courtroom, judges must be aware of the nature of the device in question and the aim of its use, and must strike a fair balance between conflicting rights and interests. They should draw guidance from Horace: 'ne quid nimis'. All things must be in moderation, so that the judiciary may serve justice in a way satisfying to society and the parties.

As a closing remark, we would emphasise the importance of judicial training and a precise regulation. It is indispensable for judges to be able to recognise relevant situations in the courtroom and be prepared to apply adequate warnings and legal consequences. This capacity could be improved by training where judges could learn about new communication tools and methods in order to be able to deal with situations generated by the use of modern technology in the courtroom. Furthermore, as it can be seen how lack of clear rules leads to anomalies in practice, the legislator should regulate the use of electronic devices in the courtroom more precisely. The most important is to clearly determine who is member of the press and who is not, what their rights are and what they can and cannot do within this framework.

We believe that by proper regulation, training and consciousness it can be duly determined how open a courtroom can be in our information age.