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► **To cite this version:**

Emmanuel Jeuland. Towards a principle of transparency in the justice systems. Transparence de la justice, Cour d'appel de Manaus, Sep 2022, Manaus, Brazil. hal-04746256

HAL Id: hal-04746256

<https://hal.science/hal-04746256v1>

Submitted on 21 Oct 2024

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Towards a principle of transparency in the justice systems? The French example.

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Who wants an opaque justice system? Auguste Conte, the inventor of the word sociology and, moreover, of the adage order and progress, *ordem e progresso* of the Brazilian motto, believed that when we had a true science of society, we could regulate it perfectly without the need for law. In other words, society would become transparent and conflicts could be settled upstream. His positivist scientist approach is now obsolete but the ideal of transparency of society is still there, today we would like at least a transparent justice to exist.

The principle of transparency seems to have taken hold by force of evidence. It emerged in the 1990s¹ probably from the English (and Commonwealth) idea of open justice². Initially, this idea encompassed free access to documents relating to a trial and the publicity of proceedings. In its more universal version, which has spread to South American countries and the whole of Europe, the idea of open justice has come to mean, in no particular order, free access to justice, to information on statistics, to judicial decisions and the reasons behind them, to court budgets, and to the ways in which magistrates are appointed and cases assigned. It is therefore a principle of good administration of justice that reinforces confidence in the justice system. It remains a procedural principle that can be associated with the public nature of proceedings, notably through videoconferencing and deferred broadcasting of hearings, but here again it is more a question of a tool likely to increase confidence in the public service of justice.

However, the filters that should be transparent in order to show justice in all its essence are not, be they screens (videoconferencing,

¹ This information can be gleaned from a search on the Ngram Viewer site in English and French (drawing on all the information harvested by Google).

² J. Spigelman, "Seen to be Done: The Principle of Open Justice - Part II", ([2]000) 74 Australian Law Journal 378, 378; J. J. Bosland and J. Townend, "Open Justice, Transparency and the Media: Representing the Public Interest in the Physical and Virtual Courtroom", Communications Law, vol. 23, no. 4, pp. 183-202, 2018, <https://ssrn.com/abstract=3336948>.

broadcasting of hearings), algorithms (open data), objective criteria (allocation of cases, appointment of judges) or indicators and statistics (determining budgets). The theme of transparency in justice thus seems to be developing in relation to new technologies and judicial communication. Nevertheless, it seems to call for a degree of concealment (e.g. the anonymization of court decisions). As for justice itself, one wonders whether it can be known even in transparency: isn't its allegory blindfolded to express that it must be impartial, but also that it can be blind and generate a shadowy side? Is it not a fantasy to believe that justice can be seen at work in all its truth?

The etymology of transparent is less abstract than it might seem; while it does mean "to see through without hiding anything", the Latin word *parere* originally means to prepare, and comes from an Indo-European root meaning to give birth. We could say that the term "transparent" means to prepare to be accountable. The theme of transparency in justice has emerged in connection with the risks of corruption, the need for access to justice, and is now associated with the digitization of justice.

Transparency is thus a paradoxical concept that may seem entirely positive, but which can turn out to be negative precisely because of its idealism and angelism. For example, the Bordeaux courthouse was designed to be transparent, so that citizens could observe the judges' work through the glass windows. An examining magistrate who had himself been prosecuted in a politico-financial case realized that journalists could observe him while he was being questioned by two other examining magistrates; he wrote a book in which he noted: "the current trend is to build glass courthouses that would be a symbol of transparency and accessibility, but an investigation always needs discretion" .³

Another example, in a new building of the WTO in Geneva, the architect also wanted to let people see through the fence without letting them pass and what we see through it is a new building apparently

³ Ph. Courroye, *Reste la justice*, Michel Lafon, 2018, part one, parag. "liturgie judiciaire".

transparent but letting only few things be seen. One thinks one can pass through but it is too narrow, one sees through but actually sees nothing.

The architecture of the new Palais de Justice in Paris (designed by Renzo Piano), in the form of superimposed glass parallelepipeds, perfectly expresses this abstract symbolism. The cold, transparent and secure nature of the building reflects the rationalization, digitization and managerialization of the justice system. It's not certain that the building de-dramatizes justice and channels the emotions of the parties involved; it may even arouse a certain unease, even for the judges (who have specific elevators according to their floor with codes, all managed by a private partner).

In Spanish and Portuguese, the expression seems to refer to the administration of justice: the transparency portals on the Internet in Spain (Portal de la transparencia) or Brazil⁴ (Portal da transparência) provide information on the budget and statistics of the justice system; this is the transparency of a public service. But the idea is also linked to the principle of publicity. Generally speaking, the rise of expression corresponds to the development of a society and economy based on information and attention.

It seems to me that this is due to a combination of two factors: the digitization of the justice system, which gives the impression that we're going to achieve transparency in the justice system, and the idea that transparency in the justice system will restore public confidence in the justice system, and therefore the accountability of judges.

The transparency of justice is a visual concept, but it also contains an element of invisibility. In other words, it's a luminous concept, but it also has a shadowy side. In terms of technology, we always lose on one side what we gain on the other: the expression of the transparency of justice is part of an ideology and a rhetoric, i.e. a way of thinking that

⁴ See also a Brazilian author, D. Mitidiero (coord.), *Accountability e Transparência da Justiça Civil*, Capa comum, 2019, foreword: "The ability of civil justice to respond adequately to demands for justice in a transparent and accountable manner - supporting the individual before other individuals and before the state - is one of the most valuable assets that can be cultivated in the structure of a democratic rule of law" (free translation).

is not questioned. In this case, it's managerial and communication thinking that goes beyond the law. It's a way of thinking that also has an aesthetic side, with transparent justice buildings. Transparency is part of a vast disintermediation movement linked to the development of the Internet. The judge has to become invisible in a way, like the soccer referee who lets the game unfold, who makes himself invisible, who rarely or never whistles for fouls. So there's a shadow over transparency. It is perhaps an attack on the impartial third party who is the very definition of the judge and of justice⁵. The emphasis on transparency is on information and communication, while denying the grey areas.

But this play of light and shadow must be taken into account. There's always something between subject and object: according to Valdovinos, an Australian philosopher of communication, there's always "an irreducible gulf between object and subject - but we also believe that we can, in spite of everything (by technical and rational means), cross it. ... metaphorical force makes transparency an exceptionally powerful rhetorical device that can mobilise and shape the cultural valence of its associated terms (openness as something inherently desirable, and secrecy as something intrinsically negative)"⁶. In this way, the author shows that aesthetics is more than just window-dressing, and that it is necessary in order to become part of a global rhetoric and immerse individuals in a culture. Valdovinos concludes: "We should be careful in using transparency as a device for demystification, since it is much more accurately described as its exact opposite: a promise of access to the real that has become a crucial element in an ongoing fetishisation of the medium. Thus, it becomes imperative that we work towards developing a critique of transparency that takes its ideological dimension seriously". At the same time, a critique of transparency can lead to an undemocratic cult of secrecy.

⁵ Fr. Ost, *L'empire du tiers*, Dalloz, 2021 spec. p. 80.

⁶ J. I. Valdovinos, "Transparency as Ideology, Ideology as Transparency: Towards a Critique of the Meta-aesthetics of Neoliberal Hegemony", *Open Cultural Studies* 2018; 2: 654-667, <https://doi.org/10.1515/culture-2018-0059>.

Transparency presupposes a filter that has become invisible, in order to make visible and knowable what it was hiding. It's a metaphor that suggests that justice can be seen and therefore evaluated, and that trust in justice can be restored. However, at least since Kant, we have known that we only have access to phenomena and not to noumena (the being of things), and that we have numerous biases in our knowledge, due in particular to our emotional reason. Sight-based knowledge can also be easily distorted by the way images are produced (shooting, editing, open data structure). Increasing the amount of information does not always allow us to get closer to the reality of a target object. One of the classic process strategies is to communicate large quantities of information in order to "drown out" the few "pearls" that might be unfavorable. When it comes to transparency, we always hide on one side what is illuminated on the other⁷. Justice is no more transparent to itself than any individual, and the language it employs cannot be totally reduced to clear, precise and unambiguous information⁸. Conversely, a solid relationship of trust - in other words, a legal relationship - implies tension, rigor, otherness, the autonomy of the parties and a neutral third party. It can only be made transparent at the cost of an amputation⁹. Transparency can undermine the third-party function at the heart of law, since it tends to generate dual relationships without intermediaries (each party is transparent to the other, the parties to each other, the judge to the parties). Of course, transparency in the justice system can also be seen as an avatar of the "dictatorship of transparency". This injunction to make the justice system transparent leads us to believe that the reality of the legal system can be known by everyone (open data, broadcasting of hearings, videoconferencing) and that it can be made present for all to see. This illusion risks generating defensive attitudes on the part of the judiciary: new forms of secret proceedings (notably corridor discussions), stereotyped judgements

⁷ J-P. Cavaillé, "La face cachée de l'injonction de transparence", *Les Dossiers du Grihl* [Online], Les dossiers de Jean-Pierre Cavaillé, Secret et mensonge. Essais et comptes rendus, online December 03, 2014, accessed September 02, 2022. URL : <http://journals.openedition.org/dossiersgrihl/6212> : "any action aimed at extending transparency requires and itself produces secret procedures; so that there is no gain in transparency, at any level whatsoever, that does not at the same time produce opacity".

⁸ M. L. Marcos, "Community in tension: a critique of transparency", *Communication et organisation*, 52 | 2017, 113-126, [Online], 52 | 2017, online 01 December 2020, accessed 02 September 2022. URL: <http://journals.openedition.org/communicationorganisation/5715>.

⁹ Ibid.

that are sufficiently contextualized, and boring recorded hearings (by analogy, when our seminars are recorded, we pay attention to what we say and lose spontaneity). Just as new technologies have failed to save time for the judiciary (notably because answering e-mails is becoming increasingly time-consuming, and because lawyers' writings have become longer), contrary to the hopes that had been placed in them, the injunction for transparency in the justice system, the broadcasting of hearings and open data should do nothing to reinforce confidence in the justice system. Linked to the surveillance society, transparency is fundamentally ambiguous. Having considered the luminous aspects of the principle of transparency in the justice system, we shall examine its reverse side, i.e. what it implies in terms of obscurity and mystery.

I.- Luminous aspects of the principle of open justice.

It cannot be said that there is a fundamental principle of procedure based on transparency, but there is a value and an objective that can be translated into a principle of judicial organization. There are various sources of transparency in justice, both internationally and internally.

A.- Transparency of justice at international level.

The theme of transparency in the justice system is associated, on a global level, with the fight against judicial corruption. In 2016, for example, the United Nations Development Programm (UNDP) published a report on transparency and accountability in the judicial system¹⁰. Transparency is essentially targeted by fairly repetitive *soft law* texts that can lead to case law. The International Union of Judges has adopted a Universal Statute of the Judge (Taiwan, November 17, 1999), which refers to transparency in the allocation of cases (Article 3-4), the appointment of judges (Article 5-1) and their promotion (Article 5-2).

The Special Rapporteur on the Independence of Judges and Lawyers¹¹ specifies the objectives for 2030: "The 2030 Agenda focuses on three

¹⁰ A transparent and accountable justice system to deliver justice for all, April 21, 2016.

¹¹ D. García-Sayán, United Nations July 22, 2022 A/77/160.

fundamental axes: ensuring universal access to independent justice, promoting transparent and accountable institutions, and strengthening national capacities to guarantee the achievement of these objectives". The Special Rapporteur stresses that the aim must be "to promote efficient and transparent justice based on the necessary balance between the fundamental rights of judges and prosecutors and the legitimate interests of the State" .¹²

According to the European Court of Human Rights, the transparency of justice is a justification for the principle of publicity and disclosure of documents (July 25, 2000, Tierce v. San Marino¹³): "By the transparency which it (publicity) confers on the administration of justice, it contributes to the attainment of the aim of Article 6 § 1: a fair trial" (confirmed ECtHR, Dec. 13, 2007, Foglia v. Switzerland, no 35865/04, parag.75). In a more recent decision, the ECtHR (Big Brother Watch v. United Kingdom, May 25, 2021, 001-210280, para. 32) approves of the role of an English Investigating Panel (IPT) "(ii) to advance the case for disclosure in the interests of the complainants and of the transparency of justice". The Swiss Federal Court¹⁴ , which is required to apply article 6-1 of the European Convention on Human Rights, expressly refers to this principle of transparency of proceedings close to the principle of publicity¹⁵ : "The Complaints Authority considers that huis clos, as an exception to the principle of transparency of proceedings, is justified only when the case file contains sensitive documents relating to ongoing criminal proceedings" .¹⁶

Instead, the Court of Justice of the European Union has resisted this principle by not granting access to the judicial file in one case, because while there was a public interest, there was a risk in granting access to the documents in a case before it had been fully adjudicated. The European Court of Justice thus refused to extend the transparency of judicial proceedings on the basis of Article 15 TFEU concerning the scope of transparency obligations¹⁷ . This decision is based on the

¹² A/HRC/41/48, paras. 92-112.

¹³ Applications no. 24954/94, 24971/94 and 24972/94, para. 92.

¹⁴ Federal Supreme Court, Court of Criminal Law, Decision of December 8, 2021, 6B 1080/2021, para. 1.2.

¹⁵ Switzerland, Federal Court, 2nd Court of Public Law, Decision of October 5, 2021, 2C 327/2021, para. 2.2.

¹⁶ <https://www.ubi.admin.ch/fr/documentation/publications> [last accessed September 28, 2021]

¹⁷ September 21, 2010, Sweden and API v. Commission, C-514-07.

principles of equality of arms and the proper administration of justice, since proceedings may be disrupted by such disclosures.

There are also *soft law* texts in Europe, such as the Resolution on Transparency and Access to Justice (European Network of Councils for the Judiciary, Bucharest 2009), which states: "An open and transparent justice system is one in which: Everyone, regardless of background or ability, has access to justice or to an alternative dispute resolution system, affordably and in accessible locations, so that all proceedings can be easily brought against any person, public or private, physical or moral". Here we have all the ingredients for a transparent justice system, including its relationship with the rule of law.

The European Charter on the Statute for Judges (Consultative Council of European Judges CCJE Strasbourg, July 8 - 10, 1998, par. 6.2), the Magna Carta of Judges (Strasbourg, November 17, 2010 (CCJE), par. 14) and the Venice Commission (March 16, 2010, par. 13) stress the importance of transparency in the calculation of magistrates' remuneration, the budgets of each court and the allocation of cases to each judge (natural judge principle).

However, according to the ECtHR, if systemic teleological interpretation is not sufficient to resolve a difficulty, recourse to external texts is possible, even if they are not binding¹⁸. Non-normative references to transparency from the Council of Europe could therefore take the form of an ECtHR ruling.

B.- Transparency of the internal justice system.

The televised broadcast of hearings undeniably increases the number of people likely to attend a trial. Admittedly, the principle of publicity rather implies that the public should be present at the time of the hearing. This prevents justice from becoming secretive and potentially arbitrary. But even when the proceedings are deferred, broadcasting

¹⁸ECtHR, Jan 9, 2013, *Volkov v. Ukraine n°21722/11* then ECHR, Sept 25, 2018, *Denisov v. Ukraine n° 76639/11* concerning the European Charter on the Statute for Judges and the Venice Commission.

removes the secrecy. The French Law for Confidence in the Judiciary no. 2021-1729 of December 22, 2021 provides that hearings may be filmed for "a reason of public interest of an educational, informative, cultural or scientific nature". The images may only be broadcast after the cases have been definitively judged, and without prejudice to "security, respect for the privacy of the persons recorded, or respect for the presumption of innocence". The advantage is to raise public awareness of the trial and preserve the meaning of the principle of publicity. There are also disadvantages, such as that of disrupting the course of justice by creating strong pressure on judges and creating a form of media lynching. More generally, it's the purpose of recording that's in question: is it to uphold the principle of publicity (but is it in danger?), the principle of impartiality (media pressure can just as easily undermine this principle), to raise the profile of justice, to improve its image? Or is it a matter of turning trials into a spectacle? We mustn't forget that technique is never neutral in law, and that it's a question of adding a new person to the trial or extending the audience to people who don't usually attend a trial.

The French Decree no. 2022-462 of March 31, 2022 specifies that the agreement of the parties is required in all cases, even when the case has not been tried in open court. The decree also sets out the rules and deadlines for prior authorization by the first president of the court of appeal. The latter is competent to authorize an editorial project, which must be sufficiently developed. He must obtain the opinion of the public prosecutor's office, and has forty-five days from the date of transmission of the registration application to give his decision (his silence is equivalent to refusal). If it does not authorize broadcasting, an appeal may be lodged with the Court of cassation within eight days. In reality, the system is still one of prohibition of broadcasting, except in the case of derogation and authorization. Neither the decree nor the law specifies the viewing angles (which may or may not give an impression of guilt). The retransmission of trials is a guarantee of transparency, provided that it is not instrumentalized, as is sometimes the case in the United States, for example.

A study carried out in Holland shows¹⁹ that the broadcasting of hearings does not particularly attract those who are already familiar with the justice system, and does not necessarily boost the confidence of those who are unfamiliar with it, as they see flesh-and-blood people with their faults and qualities. On the other hand, a segment of the population with some knowledge of the justice system learns even more about it through the broadcasting of hearings. Their confidence in the justice system is thus reinforced.

The French Law no. 2016-1321 of October 7, 2016 for a Digital Republic provided for all judicial and administrative court decisions to be made available to the public. The open data of court decisions is supposed to increase the transparency of justice²⁰. For P. Deumier, "the usefulness of releasing the names of judges therefore comes down entirely to the pledge thus given to the transparency of justice".²¹

In a way, the doctrine of precedent is gaining ground in France, since many more cases are known and can be imposed on other judges thanks to new technologies, which should enable so-called predictive justice to take off.

A conference by the Secretary General of the Conference of Ministers of Justice in the European Union, also links transparency and videoconferencing²²: "Since the early 2000s, the Council of Europe has been helping member states to make effective use of information technologies in their judicial systems" ... improving "hearings by videoconferencing, online dispute resolution, or the use of open data". Some see videoconferencing hearings as equivalent to face-to-face

¹⁹ S. Grimmelikhuijsen and A. Klijn, "The Effects of Judicial Transparency on Public Trust: Evidence from a Field Experiment," *Public Administration* Vol. 93, No. 4, 2015 (995-1011) © 2015 John Wiley & Sons Ltd. Downloaded from <https://onlinelibrary.wiley.com/doi/10.1111/padm.12149>.

²⁰ D. Lovato, *Rev. Lamy Droit de l'immatériel*, 1^{er} nov. 2021, 186: "The aim of *open data* on court decisions is to promote access to the law and reinforce the transparency of the justice system through this massive online publication. The use of these tools will profoundly alter the work of judges, justice officials and even researchers".

²¹ "L'*open data* des magistrats: une petite histoire législative", *RTD Civ.* 2019. 72.

²² Conference of Ministers of Justice: "Digital Technology and Artificial Intelligence - New Challenges for Justice in Europe" Gödöllő, Oct. 5, 2021.

hearings, offering access to justice for certain remote parties (in overseas territories, for example), witnesses or technicians²³. Videoconferencing would thus contribute to the transparency of justice. The publication of all decisions in open data undoubtedly makes the justice system more transparent, since it makes it easier to understand the judicial activity that lies at the heart of the justice system's mission.

The publication of information on court budgets, statistics and indicators certainly helps to improve understanding of the public justice service. The improvement of the magistrate appointment circuit through what is known in France as "transparency" (magistrate promotion procedure) has long been a step in this direction, even if recurrent criticisms have been voiced, particularly concerning promotions for members of the public prosecutor's office (since the opinion of the Superior Council for the Judiciary is not necessarily followed by the ministry).

The jurisprudence of the ECtHR makes judicial transparency a corollary of the principles of publicity and access to judicial documents. It is not certain, however, that we can speak of a principle of transparency as in the case of public service, as it has not yet acquired normative force. Nevertheless, all the elements are in place to achieve it. It does, however, call for a certain opacity.

II - The shadows of the principle of transparency in the justice system.

It seems that even metaphorical light mechanically generates shadow. The technical tool of communication promises transparency but does not entirely escape shadow (B), while metaphorical transparency implies certain occultations (A).

A.- Abstract occultations.

²³ Report by L. Licoppe and Ch. Dumoulin, *Les comparutions par visioconférence : la confrontation de deux mondes - Prison et tribunal*, Gip Justice 2009-2013, chap. 6 the authors quote "innovators" who claim that videoconferencing is "transparent".

Time-shifted broadcasting of hearings has its dark side, since the parties may be blurred; the shots may emphasize the hands of a defendant and leave other aspects of the defendant in the shade²⁴. A sort of trailer, music and the organization of the set create a scenarization that creates a certain representation of justice, rather than access to the equivalent of what a citizen could experience by going to court.

Nor is videoconferencing the equivalent of a face-to-face hearing, and technology cannot be said to be "transparent" in this respect²⁵. It must remain a duly justified exception, as it undermines the rights of the defense in that, by being at a distance, a party cannot defend himself or herself in the same way: emotions do not circulate as well, silences do not have the same meaning, non-verbal language cannot be easily perceived and eyes cannot meet. A decision by the French authority (défenseur des droits, no. 2020-011 July 9, 2020) links videoconferencing and transparency and points out that the use of videoconferencing constitutes a restriction on the right to a fair trial, that it must remain the exception and be surrounded by guarantees: "The publicity of proceedings protects litigants against secret justice that escapes public scrutiny and is a means of preserving confidence in justice through the transparency of its operation, in particular by allowing the presence of relatives".

As for open data on court rulings, it could be said that too much clarity can lead to obscurity, just as when you try to look straight at the sun, you end up with black spots. A report by the Mission d'étude et de préfiguration sur l'ouverture au public des décisions de justice²⁶ highlighted the formidable technical (pseudonymization) and legal difficulties involved in respecting the privacy of the parties, the RGPD²⁷

²⁴ Justice in France The Ministry of Justice and France Télévisions signed an agreement in March 2022 to broadcast trials as part of a documentary series, "Justice in France" (starting Oct. 19, 2022).

²⁵ Licoppe and Dumoulin report, op. cit.

²⁶ *L'open data des décisions de justice*, report by the mission d'étude et de préfiguration sur l'ouverture au public des décisions de justice submitted to the Minister of Justice on Jan. 9, 2018, chaired by L. Cadiet; L. CADIET, "L'open data des décisions de justice suit son cours : une loi peut en cacher une autre", *Procédures* 2018, repères, no. 7; S. Gaudemet, "Anonyme mais pas trop", *Defrénois*, May 29, 2019, p. 1.

²⁷ General Data Protection Regulation (GDPR, EU 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data).

, the security of members of the judiciary, the commercial use of decisions, the dissenting opinions, etc. The reluctance of certain magistrates²⁸ and above all the French Ministry of Justice²⁹ to such dissemination may explain the slowness of the process independently of the technical achievement³⁰. Articles L.10 of the Code of Administrative Justice and L. 111-13 of the Code of Judicial Organization stipulate that "the surnames and first names of natural persons mentioned in the judgment, when they are parties or third parties, are concealed before being made available to the public. When its disclosure is likely to affect the security or privacy of these persons or their entourage, any element enabling the identification of the parties, third parties, judges and members of the judicial staff is also concealed". The notion of concealment or concealment was therefore created as a result of the quest for transparency in the justice system.

Decree no. 2020-797 of June 29, 2020 on the public availability of judicial and administrative court rulings adds restrictions, since it allows the president of the court, the judge, the clerk or the public prosecutor to conceal any other identifying information concerning the parties and third parties or the judges and clerks³¹. The decree also left it to another decree to set the timetable for making all administrative and judicial judgments available. The Ouvre-Boîte association had to bring an action to the Conseil d'État to force the administration to issue this decree within three months³². A new report was submitted to the First President of the Cour de cassation on June 14, 2022, on the dissemination of decision data and case law. In particular, it is suggested that decisions of jurisprudential interest be selected for the Judilibre website³³. A report suggests a pre-selection based on decisions that could have a normative effect. Facts can be just as interesting, however, as the distinction between fact and law is not

²⁸ J.-H. Stahl, "Open data" et jurisprudence", *Dr. adm. nov.* 2016. Benchmark 10.

²⁹ Th. Perroud, "L'open data des décisions de justice", *D.* 2021, Entretien 344.

³⁰ J. Jourdan-Marques, "Délivrance des décisions de justice et vie privée : quand " ceinture et bretelles " rime avec danger", *Dalloz actualité* March 30, 2018.

³¹ V. Rivollier, "L'open data des décisions de justice : pas tout, pas tout de suite", *D.* 2020, points de vue, 1626; D. Berthault, entretien, *JCP G* 2021, 1004.

³² CE, January 21, 2021, Ouvre-Boîte, n°429956, *JCP G* 2021, 162 obs. Erstein.

³³ S. Jobert, "L'open data et la jurisprudence. Quelle jurisprudence à l'ère des données judiciaires ouvertes?", *Procédures Focus*, n°17; L. Cadiet and C. Chainais, "Open data des décisions judiciaires: quelles perspectives pour la jurisprudence?", *D.* 2022, 1696.

always clear. It should be added that judicial reasoning is not purely formal either, and that access to decisions does not guarantee an understanding of solutions and developments in case law. Judges don't just mechanically apply legal rules to the facts, they interpret the facts and the rules in order to strike a new balance in the relationship between the parties .³⁴

Nor is there any question of total transparency in judicial management. Statistics are not always reliable: court clerks don't always have the time to compile them, choices have to be made in the way they are compiled (e.g. should one case be counted per sibling in educational assistance cases, or per child?), and court presidents may make choices in the presentation of their statistics to obtain or avoid budget losses. It is sometimes difficult to know the budget of a particular court, as justice budgets are managed on a trans-regional level³⁵. Indicators alone are not enough to monitor court activity and make satisfactory interpretations (e.g., the appeal rate can be a good or bad sign of the quality and originality of first-instance decisions).

We might ask whether a certain ideology of transparency that is often at the root of communication is compatible with the presumption of innocence and the secrecy of investigations. Is the influential force of communication towards the public concerning the truth of the facts compatible with the objectivity of principle of judicial information?

B.- The opacity of the technical tool.

Predictive justice, like predictive medicine, aims to determine in advance the chances of success of a legal action. In France, there are several legaltechs (start-ups specializing in the law) in this field, and legal publishers offer tools for this purpose. It's not a question of divination, but of analyzing case law, which will continue to develop with open data on court decisions, the refinement of algorithms (in particular, the use of natural language to enable an ordinary litigant to ask a question) and artificial intelligence. According to the proposed

³⁴ C. Zénati, *La jurisprudence*, Dalloz, 1991, p.150.

³⁵ Program operating budget.

European regulation of April 21, 2021 (2021/0106 (COD)): 'Certain AI systems intended for use in the administration of justice and democratic processes should be classified as high risk, given their potentially significant impact on democracy, the rule of law, individual freedoms and the right to an effective remedy and access to an impartial tribunal. In particular, to address the risks of bias, error and opacity, AI systems designed to help judicial authorities research and interpret facts and law, and apply the law to a concrete set of facts, should be classified as high risk.' The reliability of predictions cannot be total, since a reversal of jurisprudence is always possible. Predictive justice also assumes that the facts of a case can be transformed into data that can be used for a predictive calculation. The CEPEJ has drafted a report on the risks of AI in the field of justice, set up a 2022-2025 action plan and proposed an ethical charter comprising five principles: respect for fundamental rights (right of access to the judge, right to a fair trial, equality of arms and adversarial process); non-discrimination between individuals or groups of individuals; quality and safety of AI; transparency, neutrality and intellectual integrity and control by the user.

According to the charter, "a balance must be struck between the intellectual property of certain processing methods and the requirements of transparency (access to the design process), neutrality (absence of bias), loyalty and intellectual integrity (putting the interests of justice first), because of the legal effects or impacts these methods may have on individuals". The transparency referred to here is that of the algorithm used, but this is counterbalanced by intellectual property rights. There are also ethical charters drawn up by the players themselves, to enable a degree of self-regulation (e.g. the Hippocratic Oath for *Data Scientists*), or by regulators (those of the national data protection commissions). They all aim to ensure the transparency and intelligibility of AI systems. This flexible law, set by the players themselves, does not really create an algorithmic public order³⁶, but it does prevent players from being confronted with state rights and

³⁶Expression of J-B. RACINE, "La résolution amiable des différends en ligne ou la figure de l'algorithme médiateur", *D.* 2018, 1700.

justice³⁷ . The CEPEJ's ethical principles are undoubtedly superficial from a procedural point of view, and rely on a transparency that it is not possible to fully achieve. Even programmers use languages. There's always a black box, because nobody can have a complete view (in the form of 0s and 1s) of what actually happens with an algorithm. To avoid any drift, we need to make it clear that algorithms should never replace the judge's decision, any more than an expert opinion should replace the judge.

In short, transparency means concealment. Transparency of justice is an element of discourse linked to judicial administration that can have a procedural impact. It's a visual concept that leads to justice in image: we see it through a screen that isn't so transparent, but which can improve remote access for witnesses or parties. There is a concrete notion of transparency (the windows of courthouses, the cubicles of criminal courtrooms and screens) and an abstract notion. We might ask what the screen is in the metaphor of the transparency of justice. Justice is both blind and blinding. It is, in principle, a black box, because it is not always easy to understand: it is intended to be rational, but it also presupposes an element of intuition and emotion. The transparency of justice reflects a form of idealism that covers up its opacity and enigma. In this way, we try to get closer to the essence of justice, a quasi-philosophical concept, without always measuring the shadow we create.

³⁷A. Bensamoun and G. Loiseau, "L'intelligence artificielle à la mode éthique", *D.* 2017, 1371.