

Notes on the Question of the Judicial Branch of Government and the Right to Information in Spain

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Abstract

Mariana Cendejas has conducted an in-depth investigation into the question of transparency and access to judicial information in Spain. She explains fundamental concepts such as the “principle of disclosure” and “transparency” in the Spanish Constitution and offers a legislative, jurisprudential, and international analysis on the current state of the corresponding set of rules on the interpretation and application of statute law in the different Spanish legal categories. The theoretical analysis on the relationship between the right to access information and the principle of judicial disclosure, as well as the study concerning the principle of disclosure of court rulings, are particularly useful for academic purposes, given that the sources are ideal, the methodology correct, and the conclusions true.

Resumen

Mariana Cendejas realiza una investigación profusa sobre la transparencia y el acceso a la información judicial en España; explica conceptos fundamentales como “principio de publicidad” y “transparencia” en la Constitución Española, asimismo elabora un análisis legislativo, jurisprudencial e internacional sobre el estado que guarda esta normatividad en las distintas jurisdicciones del caso español. El análisis teórico sobre la relación entre el derecho de acceso a la información y el principio de publicidad judicial, así como el estudio relativo al principio de publicidad de las sentencias, resulta particularmente útil para propósitos académicos: las fuentes son idóneas, la metodología correcta y las conclusiones veritativas.

1. Introduction

The growing importance of information in our society is not confined to the private sphere, but has a major impact on the public domain. The establishment of appropriate and increasingly more intense informational relations between the citizens and the branches of government represents a reality that no one can any longer deny. In this sense, we see a trend to increase government transparency in all the spheres of the public administration.

The demand for transparency is more than a simple passing fad. Indeed, it represents one of the ways in which what has become known as the “ideology of communication” is expressed. This “ideology of communication” is present in contemporary societies and is the basis of expressions such as “information society” or “information culture”.¹ The judicial branch of government clearly is not exempt from this dynamic.

In the current makeup of the rule of law, the function fulfilled by judges implies a double presumption: on the one hand, that the judiciary should impartially, promptly, and honestly deal with the cases placed under its jurisdiction, based on the normative framework that governs its activity on both secondary as well as substantive issues and it should favor legal certainty for those being governed. On the other hand, that the sentence handed down in the concrete case will have an immediate or medium-term impact, positively or negatively, on the entire community. Firmness in dispensing justice and the appearance in society in general

¹ Arena, Gregorio, “La trasparenza amministrativa ed il diritto di accesso ai documenti amministrativi”, *L’accesso ai documenti amministrativi*, Bologna, Italy, il Mulino, 1991, pp. 15-25. Quoted by Galán Galán, Alfredo, “La comunicación pública”, *Comunicación Pública. La información administrativa al ciudadano*, Spain, Marcial Pons, 2000, p. 25.

that justice has been carried out promptly, impartially, and expeditiously, places a priority on the supremacy of the system of law and the certainty that through court rulings issued in this fashion, the democratic rule of law will be strengthened.²

2. The principle of judicial disclosure in its constitutional dimension

The constitutional dimension of the principle of judicial disclosure requires that the diverse interests that converge on the issue and that lead to problematic situations arising should be taken into account. On the one hand, there is the interest of the state in a free and independent administration of justice; on the other hand, the individual's interest that his or her personal rights be respected, such the right to intimacy, honor, and privacy, as well as citizens' interest in receiving information on important developments that occur within society in order to be able to form an opinion and express it freely.³

The different motivations and argumentation behind the principle of disclosure of judicial branch decisions is expressed depending on the point of view from which it is contemplated. From the perspective of the person on trial, it is linked with the guarantee function of the proceedings, in the interest in assuring a fair trial carried out by an independent and impartial tribunal with all the corresponding legal guarantees. Procedural disclosure contributes to this interest

² González Alcántara, Juan Luis, "Transparencia y acceso a la información judicial", *Reforma Judicial*, Revista Mexicana de Justicia, no. 2, July-December 2003, Instituto de Investigaciones Jurídicas, UNAM, p. 69.

³ López Ortega, "La dimensión constitucional del principio de publicidad de la justicia", *Revista del Poder Judicial*, no. especial XVII, Justicia, información y opinión pública. Encuentro Jueces-Periodistas, 1999, Consejo General del Poder Judicial, Madrid, pp. 43-44.

since the trial is held in the public view. In this sense, disclosure translates into a greater guarantee that the court decision will be adopted based only on juridical criteria.

From the point of view of the population in general, disclosure of judicial system activities and decisions represents an essential guarantee of the functioning of the judicial branch of government in a democratic society at the same time that that it strengthens public confidence in justice and encourages responsibility in the institutions in charge of administering it. The demand for disclosure is imposed as a guarantee of control over the operation of the judicial system that is expressed in the broadest submission of court decisions to public criticism. Procedural disclosure is the best instrument of popular monitoring of the performance of the judiciary, since in the final analysis, “the people are the judge of the judges”.⁴

Finally, from the state’s perspective, disclosure represents a major contribution to general prevention of crimes and offenses, since it is an ideal tool for transmitting to society the institutional messages on social values recognized in the law and in the validity of penal norms.

3. Constitutional basis of disclosure of judicial decisions and activities

Spain does not have a specific law on transparency and access to information that encompasses all branches of government. Nor does the Spanish Constitution contain any mandate on transparency and/or access to information on the part of citizens to data held by all the branches of government. However, the Constitution does indeed anticipate

⁴ Couture, *Fundamentos de Derecho procesal civil*, Buenos Aires, Depalma, 1962, pp. 192-193.

citizen access to administrative files and records.⁵ The Spanish constitution contains various stipulations in regards to the duty of the state, in general, to disclosure information, and the judicial branch of government, in particular, that are of interest for our study, which is focused on the judicial field.

First of all, we will begin by referring to article 20.1, which stipulates that:

Article 20.1. The following rights are recognized and protected:

- a) the right to freely express and disseminate thoughts, ideas and opinions by word, in writing or by any other means of communication;
- b) the right to literary, artistic, scientific and technical production and creation;
- c) the right to academic freedom;
- d) the right to freely communicate or receive accurate information by any means of dissemination whatsoever. The law shall regulate the right to invoke personal conscience and professional secrecy in the exercise of these freedoms.

This section recognizes and protects what is today known as the right to information in its broadest sense, which encom-

⁵ Article 105.b) The law regulates the access of citizens to administrative files and records, except as they may concern the security and defense of the state, the investigation of crimes and the privacy of individuals.

⁶ The right to information encompasses:

a) the right to receive information, which includes the power to access records, files, and public documents; and, the decision of what media outlet to read, listen to, or contemplate.

b) the right to inform, which includes the rights of free speech and press; and, to establish information-oriented companies and associations.

c) the right to be informed, which includes the ability to receive objective and opportune information, which should be complete, that is, the right to find out about all the news; and, the right to information that is of a universal character, in other words, which is for all individuals without any exceptions.

Vid. Carpizo and villanueva "El derecho a la información. Propuestas de algunos elementos para su regulación en México", in Valadés and Gutiérrez Rivas (co-ordinators), *Derechos humanos. Memoria del IV Congreso Nacional de Derecho*

passes several aspects. Together with freedom of expression, it recognizes the right to receive and to communicate information and, in turn, the right to access news sources and freedom of criticism. Under this conception of the right to information, a collective perspective has been incorporated based on the interest that society as a whole be well informed and thus be able to participate in public affairs and form a free opinion.

The relevance of the recognition of the right to receive information in the field of our study is clear. In relation to its importance, the Spanish Constitutional Court has ruled that:

...the freedoms stipulated in article 20 ...are not only each citizen's fundamental rights, but signify the recognition and the guarantee of a fundamental political institution, which is free public opinion, indissolubly bound with the political pluralism that is a fundamental value and a requirement for the functioning of the democratic state.⁸

...in order for the citizen to be able to freely form his or her opinions and responsibly participate in public affairs, he or she must also be thoroughly informed so he or she can ponder different and even counterposed opinions... Information ...involves the recognition and the guarantee of a fundamental political institution, which is public opinion, indissolubly bound with political pluralism.

Constitucional III, Mexico City, Instituto de Investigaciones Jurídicas, UNAM, 2001, p. 72.

⁷ The right to information is a concept that, in its constant evolution, has become a circle that encompasses three other rights: freedom of thought, freedom of speech, and, freedom of the press, this being the broad sense of this human right. *Vid.* Carpizo, "Constitución e información", Carbonell and Valadés (coordinators), *Constitucionalismo Iberoamericano del Siglo XXI*, Instituto de Investigaciones Jurídicas, UNAM, Mexico City, 2000, p. 34.

⁸ STC 12/1982.

⁹ STC 159/1986, adopted December 12, FJ6.

And, in relation to the importance of the right to receiving truthful information, the Court has declared that it is:

an essential instrument of knowledge of the affairs that take on an importance in collective life and that, for this same reason, is a precondition for the participation of all in the good functioning of the system of democratic relationships promoted by the Constitution, as well as the effective exercise of other rights and freedoms.¹⁰

On the relationship between freedom of speech and of information, the Constitutional Court, concluded that:

“This Court has declared that while the former (freedom of speech) ‘...deals with thoughts, ideas, and opinions, a broad concept with which beliefs and value judgments should also be included...’, the right to information “... on the other hand, deals with facts” (STC 6/1988, adopted on January 21, F.5); that is, what is transmitted. “In one case, we are dealing with an idea, and in the other, with news or data” (STC 223/1992, adopted on December 14, F.1).

The previous conclusion is of capital importance, because each category involves different legal criteria in their relation to other rights, which, depending on the circumstances, can enter into contradiction with each other. First of all, while freedom of speech as such is specifically subject to recognition and generic protection in the article 20.1 a) of the Spanish Constitution, the right to information recognized and protected by paragraph d) of the same section does not encompass all information, but only «truthful information». On other occasions, the Spanish Constitutional Court has made the same point albeit with different formulations (STC 223/1992, adopted December 14, F.2), namely, that freedom of information has an intrinsic constitutional limit in that the data involved must be truthful.¹¹

¹⁰ STC 168/1986, adopted on December 22, FJ2.

¹¹ STC 47/2002, adopted on February 25, FJ3.

In second place, article 24.2 stipulates that "...everyone is entitled... to a public trial...". The principle of disclosure is one of the guarantees of due process, which enjoys the maximum level of jurisdictional protection.

In third place, the Constitution stipulates in article 120.1 that "judicial proceedings shall be public, with the exception of those provided for in procedural laws", and in its third paragraph states that "sentences (...) shall always be delivered in a public hearing".

In fourth place, article 9.2 imposes the obligation on the state to facilitate the participation of all individuals in public affairs. The importance of this article resides in the demand for state action to favor the effective exercise of freedom, an indispensable condition for the exercise of the real rights expressed by this precept, among them the right to information.

And, in fifth place, there is article 10.2, according to which:

The principles relating to the fundamental rights and liberties recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereupon ratified by Spain.

As Bel Mallén explains, the importance of this precept is apparent, since two fundamental questions are defined:

a) that the content of the right to information, as a fundamental right, and its codification in the different norms that have been defining this concept should be developed in accordance with the spirit and the letter of the Universal Declaration of Human Rights and in this case, with the stipulations of article 19, which is where the universal right to information is contained. This of key importance, because it means that, to begin with, there cannot be a norm that develops this right that at the same time goes against the Universal Declaration, and therefore it is possible to argue cases on the basis

of such possible transgressions of the Universal Declaration;

b) the second consideration is to verify how the Universal Declaration and the treaties and agreements that Spain has ratified, through prevailing legislation, are referential standards for the interpretation of Spanish norms, in the sense that the rights codified in the Spanish norms can never be restrictive of those contemplated in these treaties, agreements, and the Universal Declaration itself.¹²

4. Link between the principle of judicial disclosure and the right to information

The judicial branch is part of the state and the questions of state are always public matters. When speaking of “public matters”, we are speaking of questions whose characterization as “public” does not depend on a consideration of the weight or a value judgment as to the general interest that might be conferred in relation to the issue. They are public matters and, therefore, it is presumed that they can interest anyone, because their source is the state, independently of the real or foreseen interest in them. We are dealing with a juridical presumption that in democracy, what affects the state, in principle, can affect all the individuals and should be able to be known by all.¹³

Since its first rulings, the Constitutional Court has emphasized the connection between freedom of expression and the democratic system. Article 20 of the Constitution, in different clauses, guarantees the maintenance of free public communication, without which there is no free society nor,

¹² Bel Mallén, J. I., “El derecho a la información en el contexto constitucional” in Bel Mallén and Corredoira and Alfonso (coordinators), *Derecho de la Información*, Barcelona, Ariel, 2003, p. 151.

¹³ Villaverde Menéndez, Ignacio, *Los derechos del público*, Madrid, Tecnos, 1995, p. 106.

therefore, popular sovereignty. From this axiom flows a basic constitutional postulate, which is consistent with the preferential position that is ascribed to these freedoms, namely, that the foundation of a free and democratic society is freedom of expression.¹⁴

As part of such institutional freedom, it is possible to link freedom of expression with juridical disclosure, which also represents an institutional dimension as a guarantee of the functioning of the judicial branch of government, according to a ruling issued by the Constitutional Court:

“...juridical disclosure has an institutional status in the rule of law that transforms it into one of the conditions of the constitutional legitimacy of the administration of justice”.¹⁵

Furthermore, constitutional jurisprudence has established that procedural disclosure is intimately tied to individuals’ subjective beliefs the defense of which are considered fundamental rights: on the one hand, the right to a fair trial, and as a manifestation of this same right, the right to a public trial; on the other hand, the right to freely obtain information, that is, the right to communicate and receive such data, the right to access the sources of the news and the right to public criticism.¹⁶

This link between the objective guarantee of disclosure and fundamental rights leads to the demand that the exceptions to disclosure anticipated in article 120.1 of the Spanish Constitution be adjusted to the normative provisions, and in their concrete judicial application, to the conditions outside of which the constitutionally possible limitations become violations of such rights.¹⁷

¹⁴ López Ortega, *op. cit.*, p. 101.

¹⁵ STC 96/1987.

¹⁶ STC 13/1985.

¹⁷ *Idem.*

The maximum interpreter of the Spanish Constitution has issued especially significant pronouncements in different rulings on the importance that the principle of judicial disclosure holds in the framework of the democratic state. In one of these rulings, the Constitutional Court held that:

The principle of disclosure established in article 120.1 of the Constitution has a double purpose: on the one hand, to protect the interested parties from a criminal justice system not subject to public control, and on the other, to maintain community confidence in the courts. In both aspects, such a principle represents one of the bases of due process and one of the pillars of the rule of law. [...] The principle of disclosure, meanwhile, has an eminently formal character, because otherwise it could not satisfy the purposes that are derived from its essential elements, namely, public control of the system of justice and confidence in the courts.¹⁸

The distinction between the mandate for disclosure contained in article 120.1 and the provisions in this regard in article 24.2 reside in that only the latter, in reference to criminal-law procedure, represents a fundamental right and enjoys the protection afforded by constitutional relief. The holder of this right is the individual subjected to trial, who has judicial disclosure as a guarantee of the independence and impartiality of the administration of justice in that the initially referred to constitutional norm consecrates disclosure of legal actions for the general public. Of all the classifications that have been made concerning procedural disclosure, it is precisely these two that are most important, namely, disclosure for the parties involved and general disclosure; and immediate disclosure and disclosure through the communications media.

Disclosure for the parties involved or internal disclosure, means that everything related to the actions of the judge or

¹⁸ *Idem*.

the court and the opposing side is known *ope legis* by the interested party. General disclosure refers to the “broad public” not directly interested in the legal proceedings and is reflected, in turn, in two other two categories, namely, immediate disclosure, which involves the direct knowledge of the judicial proceedings by the public, and disclosure through the communications media, which occurs through an intermediary, usually through the press.¹⁹

Simultaneously with the individual perspective on disclosure, understood as disclosure for the parties involved, its social dimension emerges, that is, citizen control of the activities of the judicial branch of government. This social dimension finds its legal basis in the right to information codified in article 20.1 and emerges as the true element linking public opinion and the justice system. In this sense, if the protection that is provided by article 24.2 through the right to a public trial refers exclusively to the parties involved in the process, for the general public such protection is based on the right to receive information as stipulated in the previously mentioned article 20.1, both of which can be protected through a writ of constitutional relief or injunction, known as *amparo*.²⁰

This dual purpose, individual and collective, is present in the principle of disclosure of court proceedings. This is mainly as a result of the political references in their respective origins. The principle of procedural disclosure represents a conquest of liberal thought that, in response to an inquisitorial and secret trial procedure, affirmed disclosure of the oral trial as a double guarantee: on the one hand, procedural disclosure protects the defendant from possible government manipulation of the justice system; on the other

¹⁹ López Ortega, “La dimensión constitucional del principio de publicidad de la justicia”, *op. cit.*, p. 41.

²⁰ *Ibidem*, p. 66.

hand, this same disclosure strengthens the people's confidence in the courts, at the same time that it represents an effective means of control over the judicial system on the part of the population.²¹

In relation to the guarantee of disclosure contained in article 120.1, it has been argued that the affirmation in and of itself is totally useless, since it is necessary to tie it in with the stipulations in article 24.2 (the right to a public trial) and in article 20.1 (the right to information). Furthermore, it is argued that these guarantees exist without the need for constitutional recognition to extend the range of the jurisdictional guarantees corresponding to article 120 of the Constitution.²²

Another one of the criticisms directed against article 120.1 argues that the principle of disclosure lacks determinative functions in its content, since it leaves the regulation of the exceptions to the legislations, without having established the key criteria that would make the limitation of this fundamental right admissible.²³

However, judicial disclosure represents a fundamental right protected by article 24.2 and, as such, occupies a preferential position in legal systematization. Therefore, its limitations should be interpreted restrictively and under the principle of proportionality, in which the judicial application of the restrictions should be directed toward the protection of another fundamental right or of another constitutionally relevant interest.²⁴

21 Gimeno Sendra, Vicente, *Constitución y proceso*, Madrid, Tecnos, 1988, p. 103.

22 Montero Aroca, *Derecho jurisdiccional*, Tirant lo Blanch, Barcelona, 1989, p. 527.

23 Almagro Nosete, "Comentario al artículo 24 CE", *Comentarios a las leyes políticas*, Alzaga (coord.), vol. III, Madrid, Edersa, 1983, p. 54.

24 López Ortega, "La dimensión constitucional del principio de publicidad de la justicia" *op. cit.*, p. 67.

The principle of disclosure should also be interpreted in accordance with article 11 of the Universal Declaration of the Rights of Man, article 14 of the International Pact on Civil and Political Rights, and article 6 of the European Convention on Human Rights, according to the stipulations of article 10.2 of the Spanish Constitution.

Thus, the difference is expressed between the individual dimension of the principle of judicial disclosure for the parties involved as established in article 24.2, which recognizes the right to a public trial, and the collective dimension supported by articles 120.1 and 20.1 and which is justified as a function of public control over the performance of the judicial branch of government.

The disclosure of court proceedings protects those on trial against secret judicial proceedings hidden from the public's scrutiny. It also represents a means for preserving citizens' confidence in the courts, so that, by endowing the administration of justice with transparency, this contributes to achieving the objectives of the right to a fair trial.²⁵

The disclosure of court proceedings is linked to the fundamental right to information, because, in principle, the very existence of a judicial process, especially involving criminal law, is of interest to public opinion and, as a result, information on such developments is encompassed within the protective scope provided by constitutional article 20.

5. Limits to judicial information

In relation to the right that is subject to the limitation, and to the legally protected interest that serves as its justification, the following classification can be made of the acceptable limitations to the disclosure of information on judicial proceedings:

²⁵ STC 174/2001 adopted on June 26, 2001.

1. Limits to the right to access court proceedings.
2. Limitations on the right to information to preserve the honesty and accuracy of the proceedings.
3. Limits to the right to information to protect the right to privacy, honor, or one's own image.
4. Limits to the right to criticize the functioning of the judicial branch of government.

As we already point out, the Spanish Constitution anticipates that the disclosure of court proceedings is susceptible to limitations in accordance with the stipulations of the corresponding procedural laws. The following sections of this essay will be devoted to an analysis of the legal framework regulating judicial disclosure.

6. Legal régime of judicial disclosure

A. Organic Law of the Judicial Branch of Government

Organic law 6/1985 on the Judicial Branch of Government, adopted on July 1 (henceforth to be referred to as the LOPJ), stipulates in its article 232, in accordance with article 120.1 of the Spanish Constitution, that as a general principle of court proceedings, disclosure of the corresponding information can be limited in the terms of the precepts anticipated in the procedural laws. Although, in paragraph 2 of the same precept, the LOPJ establishes an exception to the rule of disclosure, according to which, independently of what is specified in the procedural laws, the judges and courts can agree to secrecy in legal proceedings as an exception to the rule whenever such a decision is motivated on the basis of reasons of public order or to protect fundamental rights of those involved in the court proceedings.

Certain limitations are placed on this principle of disclosure of court proceedings, such as the judicial examination

of the issues of fact in criminal or military cases that are secret. Furthermore, the deliberations of the courts as such are secret, as are the results of their votes on rulings (article 233 of the LOPJ).

The opening up of information on court proceedings to the parties involved is explicitly codified in article 234. This article requires the court secretary and judicial personal to provide the interested parties—who may or may not be formally involved as plaintiffs or defendants—with the information that they request on the legal proceedings unless the latter have been declared secret in accordance with the law.

B. Criminal Prosecution Law

The limitations on the principle of disclosure of court proceedings are regulated with greater precision in the Criminal Prosecution Law (LECr). On the level of criminal law, the principle of disclosure is different in its two phases. In the oral phase, disclosure of court proceedings is the general rule, without this meaning that in exceptional cases, some limitations can be introduced, according to the stipulations contained in article 680 of this legislation.²⁶ In the phase of the judicial examination of the issues of fact, the general rule is that summary court proceedings are private, except for the presence of the parties involved, in accordance with the stipulations of article 301 of the same law.²⁷ Article 302 comple-

²⁶ Article 680:

The proceedings of the oral trial will be public. If not, its results can be annulled. Nevertheless, the chief justice of the court can order that the sessions take place behind closed doors when this is required for reasons of morality or public order or the respect due to the person affected by the crime or his or her family.

To adopt such a resolution, the chief justice either ex-officio or at the request of the plaintiffs, will consult the court, which will deliberate in private, which will issue a ruling explaining its motivation, against which it will not be possible to appeal.

²⁷ Article 301 of the Criminal Prosecution Law stipulates that:
The summary judicial proceedings will be private until the oral trial begins, with the exceptions established in this law.

ments the previous disposition, establishing internal disclosure and external secrecy in the summary phase of the proceedings.

In this regard, Spanish jurisprudence distinguishes between first degree or generic summary secrecy (article 301 LECr), which is obligatory for all except for the sides involved in the case, and second degree or special secrecy (article 302 LECr) that, once declared by the properly motivated judicial resolution, is also binding on plaintiffs and defendants. In its ruling 13/1985, the Constitutional Court defined the scope of summary secrecy. Thus, with regard to the possible knowledge by third parties of the content of the summary proceedings, such secrecy implies:

...that the reserved character of the summary proceedings cannot be transgressed by means of the improper release of such data (article 301.2 of the L.E.Cr.) or through an illicit knowledge and its subsequent disclosure. But summary secrecy does not in any way mean that one or several elements of social reality (singular developments or collective facts whose knowledge is not limited or forbidden by another fundamental right according to the stipulations contained in article 20.4 of the Spanish Constitution) can be removed from the realm of freedom of information, in the double sense of the right to inform and to be informed, based on the single argument that in relation to these elements certain summary proceedings remain underway. If that were the case, the not well understood notion of summary secrecy would result in the equivalent of creating an atypical and illegitimate category of reserved data concerning the very

The lawyer or legal representative of either of the sides that improperly reveal private data from the summary proceedings will be subject to a fine ranging from 250 to 2,500 pesetas.

Any other person who commits the same transgression and who is not a public official will be considered to have incurred in the same offense.

In the case of the previous paragraphs, the public official will be subject to the liabilities that the Penal Code indicates in its respective sections.

developments on which court investigations and the judicial examination of the issues of fact are underway and not in relation to the proceedings of the judicial body hearing the summary case (article 299 of the LECr).

With this ruling, the interpretation of article 301 of the LECr presents a double perspective. On the one hand, the secrecy provisions of article 301 do not concern the object of the trial, that is, the facts and the controversy that led to the concrete judicial proceedings, but rather to summary diligences. The importance of this ruling was that it:

...eliminated an expansive conception of summary secrecy, very much in vogue at the time, in which it was felt that all the facts around which the summary proceedings were held were not subject to the right to communicate information. The relevance of this resolution resided in that summary secrecy would be circumscribed to the corresponding judicial proceedings, and that it would not be an obstacle for information being made available concerning the facts of the summary diligence, legally known through other sources or mechanisms, without such circumstances qualifying as summary discovery.²⁸

At the same time, this precept should be strictly interpreted. In words of the Court:

The rule that stipulates secrecy in summary proceedings is, above all, an exception to the institutional guarantee codified in article 121.1 of the Constitution... The penal process can have a summary phase protected by secrecy and as such, limiting in terms of disclosure and freedom. But this generic constitutional conformity to summary secrecy is not, however, directly im-

²⁸ Carrillo, Marc, "Los tribunales de justicia y sus obligaciones informativas", *Revista del Poder Judicial*, no. especial XVII, Justicia, información y opinión pública. Encuentro Jueces-Periodistas, *op. cit.*, p. 183.

sed or demanded by any constitutional provision and, therefore, requires a strict interpretation in its concrete application...²⁹

Summary secrecy basically encompasses the content of court declarations made by the parties involved, witnesses, police investigative findings, and other such documents. It should also be kept in mind that the violation of summary secrecy can fall within the conduct characterized by the Spanish Penal Code as a crime or a serious or very serious disciplinary infraction according to the LOPJ, in relation to a judge or lawyer revealing facts or data aired during the exercise or resulting from their functions.

In conclusion, the exceptions to disclosure can only be imposed to preserve the virtuousness of the legal proceedings or for the protection of rights and freedoms, but not to achieve a different end, such as imposing silence on the communications media. Thus, summary secrecy exclusively affects the corresponding diligences, without extending further, and therefore general prohibitions on the publication of sub iudice facts and data are inadmissible.

C. Civil Prosecution Law

In terms of the Civil Prosecution Law of 2000, it should be pointed out that in article 138, it is stipulated that legal proceedings can be held behind closed doors when it is necessary for the protection of public order or national security in a democratic society, or when the interests of minors or the protection of the private lives of the parties involved are at stake, as well when other rights and freedoms demand it. The legislation also contemplates this possibility if the court considers it strictly necessary when due to the presence of special circumstances, the disclosure of court proceedings could harm the interests of justice being served. And, al-

²⁹ STC 13/1985.

though, it is not explicitly indicated, it should naturally be pointed out that the decision to hold legal proceedings behind closed doors should be extensively motivated by the judge or court issuing such a ruling.

7. Disclosure of court rulings

Article 120.3 of the Constitution imposes the obligation to pronounce sentences in a public hearing, that is, the reading of the ruling before the public. The criticism of this section is based on the argument that it represents a mere useless and unjustified formality if we take into account the limited or null interest that such a judicial procedure can evoke among citizens. Indeed, the normally unclear comprehension of the rulings due to both the juridical language that is employed as well as the absence of background information often necessary for their understanding, makes this imperative into mere window dressing and a formalism that is reduced to a vain additional work load for the jurisdictional bodies. Therefore, it is preferable that before the rulings are read, they should be published.³⁰

In response to this criticism it has been said that the public pronouncement of court decisions represents an important element for injecting a moral quality to the procedures, since for the parties involved it is of great interest to hear the decision directly from the court. In addition, from a broader perspective, disclosure of court rulings is a precondition for the effectiveness of control over the judicial branch of government on the part of public opinion and ultimately for the right to criticism.³¹

³⁰ Gutiérrez-Alviz and Moreno Catena, "Comentario al artículo 120 CE", *Comentarios a las leyes políticas*, Alzaga (coord.), vol. IX, Madrid, Edersa, 1987, p. 429.

³¹ López Ortega, "La dimensión constitucional del principio de publicidad de la justicia" *op. cit.*, p. 67.

Meanwhile, article 266 of the LOPJ stipulates that court rulings, once they have been prepared and signed by the judge or by all the magistrates that have handed down the decision, will be deposited in the Court Secretary's Office, and any interested party will be able to have access to them. Minority opinions, differing from the majority ruling, can be published. Access to the text of the rulings or the specific way and reasons for which they were adopted, can be restricted when their release could affect the right to privacy, the rights of individuals who could require special protection or the guarantee of anonymity for victims or those who have been harmed, when applicable, as well as, in general, to prevent court decisions from being used for ends contrary to the law. Access to judicial files and court ledgers and records is available to all interested parties. Custody and the depositing of such documentation corresponds to court secretaries.

Regulation 5/1995, which deals with the accessory aspects of court proceedings, regulates their different elements. From the point of view of disclosure, the Regulation distinguishes between courtroom proceedings of a procedural character that have been carried out in the course of a trial and those that have already been concluded and incorporated into a judicial file or court ledgers or records. The former are not included in the items covered by the Regulation, since their treatment corresponds to procedural laws and the Organic Law of the Judicial Branch of Government.

Access to judicial rulings corresponds to the interested parties, who must file a request with the secretary of the corresponding court, motivating the reason behind their application. The secretary will resolve the request within two days. A decision to deny the petition will be reviewed by the judge or chief court judge at the request of the interested party.

The decision adopted on June 18, 1997 by the full session of the General Council of the Judiciary, which modified Regulation 5/1995, concerning accessory aspects of court proceedings, seeks to regulate the conditions under which judicial rulings and other resolutions of interest to the Documentation Center of the General Council of the Judiciary are forwarded to the Center for subsequent processing and disclosure.

Such rulings will be sent to the Center at least once a month. The disclosure of these rulings should guarantee access to them and their doctrinal and scientific content on the part of all interested parties and, at the same time, assure protection of their fundamental rights to honor, privacy, and their own image. Such protection corresponds primarily to the courts, but also to the Judicial Documentation Center itself in its efforts at compiling and issuing the printed or electronic edition of the sentences. In this sense, the reforms to the Regulation stipulate that “in the processing and disclosure of the court rulings efforts will be made to eliminate identifying data to constantly assure the protection of the honor and personal and family privacy”.

8. Communications media and judicial disclosure

The freedom to investigate and to access news sources is a fundamental component of the right to information.³² When this generic right to inquire into news sources is concretized in the discovery of data related to judicial proceedings, the content of this right extends to the effective possibility to access the court cases, the debates in the oral trial, and the sentence at the end of the process. From this point of view,

³² Fernández-Miranda and Campoamor, “Libertad de expresión y derecho a la información. Comentario al artículo 20 CE”, *Comentarios a las leyes políticas*, Alzaga (coord.), vol. III, Madrid, Edersa, 1984, p. 508.

the right to access right is confused with disclosure of the trials, and even more along the same line, it is considered a precondition as a guarantee of effectiveness.³³

The principle of disclosure, as a general principle of the functioning of the judicial branch of government, does not only produce effects in court proceedings, but rather logically also transcends its scope to the social layers who hear of the judicial rulings. This explains why the guarantee of disclosure in court cases cannot be conceived as being satisfied through immediate disclosure, in the sense of only referring to those who can directly witness the legal proceedings. Together with immediate disclosure it is necessary to guarantee media disclosure, which makes such court proceedings accessible to an indeterminate number of people. In this context, the communications media appear as an mediating instrument between the branches of government and the rest of society, exercising both the fundamental right to communicate truthful information (article 20.1 d) as well as freedom of expression (article 20.1 to) in relation to judicial activity in general and jurisdictional resolutions in particular.³⁴

In the current makeup of society, media disclosure is called upon to occupy a preeminent position, and therefore, rules limiting the right to witness court proceedings to a handful of people represents a substantial blow to the principle of disclosure. As a result, there is no other possibility than to recognize the journalist's right of attend court proceedings, report on them, and circulate opinions regarding

³³ López Ortega, "La dimensión constitucional del principio de publicidad de la justicia", *op. cit.*, p. 105.

³⁴ Carrillo, Marc, "Los Tribunales de Justicia y sus obligaciones informativas", *Revista del Poder Judicial*, no. especial XVII, Justicia, información y opinión pública. Encuentro Jueces-Periodistas, *op. cit.*, 1999, p. 184

such trials, as well as the right to criticize the functioning of the judicial branch of government.

The Constitutional Court recognizes that journalists have a preferential right to attend trials, as a result of the principle of disclosure of legal proceedings and the right to information that extends the constitutional protection to the search for and obtaining of information. In its ruling 30/1982,³⁵ the maximum interpreter of the Spanish Constitution emphasized the function of natural intermediaries played by the communications media:

The principle of disclosure of trial proceedings, guaranteed by the Constitution (article 120.1), implies that they be known beyond the circle of those present during the court case, and can have a general projection. This projection can only be made effective through the communications media's attendance at the trials, in that such a presence allows them to acquire information from their same source and to transmit it to many others who, due to a series of space, time, distance, work, etcetera imperatives, are unable to do so themselves. This role as natural intermediaries performed by the communications media between the news and those who might not be in a condition to obtain first-hand knowledge of such developments, increases with regard to events that due to their scope can affect everyone.

The ruling concludes with a recognition of the preferential right of journalists to attend trial sessions:

The representatives of the communications media, when attending the sessions of a public trial, do not enjoy a gratuitous and discretionary privilege, but rather what has been characterized as such is a preferential right afforded to journalists due to the

³⁵ In this ruling, an injunction was granted to the publishing house of a newspaper whose journalists had their accreditation revoked and were expelled during the trial sessions by the chief justice of a military tribunal in charge of judging those prosecuted for the "23F" affair, following an interview conducted with a soldier who had participated in the events under the orders of one of those implicated.

function that they fulfill, for the sake of the constitutionally guaranteed duty to provide information.

Subsequently, the Constitutional Court, in its ruling 30/1986, declared that it was acceptable to limit access to trials based on the physical capacity of the courtroom or requirements to preserve order in the court. In rulings 96/1987 and 65/1992, the Constitutional Court established a general rule concerning the scope of the limitations on the principle of procedural disclosure, namely that disclosure of the legal proceedings cannot be restricted other than for explicit reasons that the law authorizes.

In the past few years, a strong debate has emerged in Spain on whether the audiovisual media should or should not be allowed access to the courtroom. The controversy began in 1995, as a result of the ruling issued by the Governing Chamber of the Supreme Court on September 25 of the same year, through which modifications were introduced in the Norms on Access to the Supreme Court Building, which prohibited the presence of photographic, video, and television cameras, with the exception of during solemn governmental ceremonies.

These general norms were confirmed, with the exception of the last point, by the General Council of the Judiciary in its ruling of February 7, 1996, when the court resolved a writ of appeal filed by a group of journalists. The reasoning for this partial repeal of the ruling of the Governing Chamber clarified that the jurisdictional powers of the Chambers of Justice should be respected in terms of authorizing access of audiovisual media to the courtroom in each specific case and that the prohibition could not be considered prejudicial to the right to information because it deals with the right to honor, to privacy, and to one's own image.

In response to this ruling, different administrative law appeals were filed, which were resolved by Chamber III of the

Supreme Court in its ruling of July 9, 1999. This ruling confirmed the decision of the Governing Chamber of the Supreme Court, which was, in turn, clarified and modified by the decision of the Council because it felt that the right to communicate or to receive truthful information through any media outlet had not been violated.

The situation that emerged from these court agreements and the ruling can be summarized as follows:

- a. Unrestricted access for journalists with recording devices and lap top computers, with the exception of compliance with ordinary security norms;
- b. General prohibition of access to the courtroom for those with photographic, video, or television cameras;
- c. Need for explicit authorization from a judge or court, on a case by case basis, for access for the audiovisual media.

As could be expected, the controversy did not end on the level of the Supreme Court and was resolved, through a writ of injunction, by the Constitutional Court, in its ruling 57/2004 of April 19.

The central thesis of this ruling, in relation to the general prohibitive norm of the Governing Chamber of the Supreme Court, is to allow access for television cameras to the sessions of an oral trial. This criteria established by the court are as follows:

1. That the establishment of a general prohibition, with the exception of explicit authorization on a case by case basis, of access for photographic, video, and television cameras to the public audiences is not compatible with exercising freedom of information. Therefore, the general rule is the right of access for such audiovisual apparatuses, because public judicial hearings represent informational sources access to which should be general.

2. That this right (of access with cameras) is part of the sphere that is constitutionally protected by the right to information, since it was not limited in general by the legislators, in an interpretation in accordance with the literal text of article 20.1d), which proclaims the “fundamental right to communicate truthful information freely by any means”. This right not only extends to the transmission of what occurs in the public court proceedings through written texts, but also by any other audiovisual means, which encompasses the installation of technical apparatuses in the physical venue where the news takes place, that is, in the very courtroom in which the judicial proceedings occur.
3. That the right to inform is intimately related with the principle of disclosure of legal proceedings established in article 120.1 of the Spanish Constitution, which implies that what transpires in the trial can be known beyond the circle of those who could be physically present in the courtroom.
4. Each court will have to resolve the problem of other fundamental rights in the proceedings that could be affected, such as the right to privacy, to honor, and personal and family intimacy (article 18.1 of the Spanish Constitution) that could result from the use of these audiovisual cameras and recorders (to a greater extent than with written reports). The courts should resolve such issues in accordance with the requirements of the principle of proportionality and weighing the different factors. They should also evaluate whether taking photos during the trial can have intimidating effects on those who intervene in such legal proceedings (detainees or witnesses).
5. However, the Constitutional Court reiterated that, given the existence of these dangers, the limitations on ac-

cess to public legal proceedings for cameras and video recorders can be more far reaching than those applied to written reports. At the same time, this does not mean that access to the news, also with cameras and video recorders, and its elaboration and circulation is now excluded from the content of the right constitutionally guaranteed by article 20.1 d) of the Spanish Constitution.

Therefore, the reasoning behind the ruling of Chamber III of the Supreme Court was inverted, specifically the idea of a general prohibition on access to trials for cameras and video recorders and that such a ban could be lifted on a case by case basis with the authorization of the chamber of the court. If there is no such resolution from the Court authorizing their presence, the security services should prohibit access on the part of cameras and video recorders.

The adhesion of Spanish judges and courts to the criteria established in ruling 57/2004 is not open to question under the terms of the stipulations of article 5.1 of the Organic Law on the Judiciary. This clause stipulates that the laws and regulations will be interpreted and applied in accordance with the interpretation resulting from the resolutions of the Constitutional Court in all types of legal proceedings.

However, the existence of this ruling does not annul the need to legally regulate access of the media in general and the audiovisual media in particular. Meanwhile, the rulings that are issued on a day to day basis in situations in which the right to information is restricted, should be duly motivated.

Meanwhile, on June 30, 2004, the General Council of the Judiciary, through the Communication Commission, approved the Communication of Justice Protocol, which was ratified by the full session of the Council on July 7 of the same year. This document stipulates that it will correspond

to the Communication Advisory Boards of the Supreme Court, the National Courts, and the Superior Courts of Justice, in coordination with the chief justices of the courts, to assure the organization and control of access for the audiovisual media to courtrooms.

In addition, the Protocol has spurred the relaunching of the so-called Self-Regulation Accord concerning television coverage of legal proceedings, which it promoted between 1998 and 2000 together with the Audiovisual Council of Catalonia and whose initiative has been assumed by the Federation of Spanish Press Associations (FAPE). The draft of the above-mentioned Accord contemplates all the singularities and specifications necessary to guarantee fair coverage of court proceedings that have a social relevance, respecting the rights of those directly involved in the cases.

Once the Self-Regulation Accord was signed by all the television chains, it will be sent to all the judges and magistrates for their knowledge. This document will undoubtedly be decisive in improving the relations between the media and the judicial branch of government.

This is, in a broad overview, the panorama of the right to information and the disclosure of information on legal proceedings in Spain. As we have indicated, regulations to be adopted by the legislators are still pending in relation to access of the audiovisual media to courtrooms. But on the other levels, Spain has a legislation that is more or less modern and an abundant jurisprudence, in which the scope and limits of the rights that converge in this field are delineated.

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