

Privacy versus judicial transparency

Written by Nigel Li

Saturday, 10 June 2017 06:43

US writer Elbert Hubbard once wrote: “At last, the people judge the judge,” but this can only be true if the judiciary is transparent.

Why should it be transparent? In a world where the judiciary is cloaked in secrecy, only the judges and the contending parties know the outcome of the trial.

In this world, secret execution caps the sequence of closed trial and classified judgment.

However, as chilling as this sounds, closed trials were not uncommon throughout most of history.

Just as it does on any exercise of government authority, transparency places a check on the judiciary’s arbitrary use and abuse of power.

When lives, freedoms, property, civil rights and political participation can all be put on the scales of justice and be taken away, and trials are allowed to be closed, our legal system risks losing the kind of legitimacy that is conferred by the public.

The judicial process encompasses trial, deliberation, judgement and enforcement. Should the light of transparency be cast on every stage of the process?

The short answer is no.

Throughout much of history, death penalties were carried out in public to deter criminal conduct, but today, such practice has been abolished in most jurisdictions.

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Showing the public the execution without allowing them into the courtroom to witness the trial does nothing to advance transparency or promote fairness.

Additionally, the state often has to intervene to enforce judgements and such intervention may not be suitable for public viewing, so the enforcement of judgements need not be made public.

How about judges' deliberation and adjudication? Would fairness and justice be served if they are broadcast to the nation?

In contemporary Taiwan, they are not conducted in full view of the public. This may be counterintuitive, but if the deliberation were carried out publicly, it could stifle open discussion and not be conducive to the passing of independent judgements.

On the other hand, court judgements must be released in full to the public. Everyone should be able to see how the parties' claims were adjudicated.

There was a time when the Judicial Yuan redacted the names of parties in judgements in the name of privacy protection.

Such practice, which has now been changed, flew in the face of the principle of public trials and is an alarming reminder of how easily a foundational legal tenet can be overwritten and overridden.

Apart from trial proceedings, which follow an indictment, prosecutors' applications to detain suspects should also be considered part of the judicial process.

In April last year, the Council of Grand Justices rendered Constitutional Interpretation No. 737, ruling that clauses of the Code of Criminal Procedure (刑事訴訟法) exempting detention hearings from due process are unconstitutional and must be amended within one year.

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The grand justices must have concluded that the hearing to decide whether a suspect should be detained ought to be illuminated to the same degree as the other stages of the judicial process, for they know the dystopian consequences of allowing the judiciary's power to grow unchecked.

At this point, the core issue of the transparency debate can be discussed: How and how much of the trial should be made public while meeting the requirements of due process?

In litigation, there are adjudications on legal issues — which is the domain of the Supreme Court — and adjudication on factual issues, which falls within the purview of the lower courts.

According to the Code of Civil Procedure (民事訴訟法), the Supreme Court has to permit oral arguments in civil proceedings, but in the majority of cases, the Supreme Court decides against making the oral arguments public.

For criminal proceedings and administrative proceedings, the law states that the Supreme Court need not make the oral arguments public.

From this perspective, except for releasing judgements as public information, the Supreme Court is indistinguishable from a star chamber.

Judicial transparency cannot become a reality until the law is amended to require that the Supreme Court open the oral-argument proceedings to the public — always.

In some countries, the public is allowed to attend the oral-argument proceedings at the highest court in the land and, for a fee, obtain a complete record of the arguments, including audio and video recordings.

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The preparatory committee of the National Congress on Judicial Reform is deliberating whether live broadcasting of oral arguments before the Supreme Court threatens privacy.

Any hand-wringing over possible erosion of privacy likely comes from the belief that judicial transparency is subordinate to the right to privacy.

However, there are times when the needs of the many outweigh the needs of the few.

In fact, the Supreme Court's practice of holding oral arguments behind closed doors is antithetical to the public interest, not to mention the rule of law.

Live broadcasting of lower court hearings is even more polarizing, because the lower courts review facts, meaning that it is almost inevitable that personally identifiable information will be revealed.

However, if we agree that the principle of the rule of law justifies or requires transparency of trial proceedings, even the public interest cannot be cited to stop trial judges from ruling in favor of direct broadcasting of the trial proceedings of any case.

The primacy of the rule of law is precisely the reason the preparatory committee of the National Congress on Judicial Reform recommends that the Judicial Yuan review this issue prudently.

When the Constitution demands transparency of court proceedings, the protection of privacy must be weighed against judicial transparency: the needs of the few versus the needs of the many.

A meaningful leap toward settling the issue of whether to broadcast court proceedings cannot be made until it is looked at from a fresh angle, keeping the right priorities: How can the judiciary be more transparent to help the public better appreciate the rule of law and rekindle

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their faith in the judiciary?

From this angle, broadcasting itself becomes just a technical issue.

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