How to maintain and increase public confidence in the judiciary

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1 INTRODUCTION

"The Court has on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a law-governed State, must enjoy public confidence if it is to be successful in carrying out its duties." - European court of Human Rights in case Baka v. Hungary[1] *-*

The judiciary fulfils a special role in the state under the rule of law. As the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties.[2] The need for public support and confidence is also critical for the judiciary, since by virtue of its independence, is not directly accountable to any electorate. Therefore, in particular when democratic societies are facing various changes and challenges, strengthening the confidence in the judiciary represents a goal in itself.

We live in a society where the work of governmental institutions in general is subject to constant public debate and criticism. This also affects the judiciary. Today criticism against the judiciary is expressed with less deference and more readiness than in the past, and we have seen cases where it has been expressed not only by parties to the proceedings or their counsels, but also by the media, the public or even by representatives of the executive or legislative powers. In addition, we have seen cases where the critique has been based on misleading or erroneous information. The judiciary has traditionally not responded to critique in any other way than by the reasoning of its judgments. However, in the society of today, where the discussion in the media and on social media can go wild within days or even hours, this way of response is hopelessly late. This can affect the image of the judiciary and hence the confidence of the general public in the judiciary.

In this essay, we set out to examine whether the judiciaries should respond to this trend and what would be the most appropriate means of response in this information battle in order to maintain and increase confidence in the judiciaries. We will address this matter from the view of the judiciary and an individual judge as a member of the judiciary. How can the judiciary react to attacks on the judiciary or a single judge or possibly prevent these attacks in advance?

[1] ECtHR 27 May 2014, 20261712 (Baka v. Hungary) *§ 164*
[2] ECtHR 26 April 1995, Prager / Oberschlick v. Austria, Series A, No. 313, p. 18, paragraph 34.

In chapter two we will first give a general overview of the subject, whereas in chapter three we will first discuss the concept of confidence. In chapter four we will address the legal framework. In chapter five we will discuss different methods of increasing confidence and finally, in chapter six draw some general conclusions and make some recommendations for the future.

2 OVERVIEW OF THE SUBJECT

Among the three powers - executive, legislative and judicial - the judicial power is the least visible to the public, mainly because it is the one that least intervenes in the public debate.[3] Political leaders communicate constantly to justify their activities to the electorate. Judges on the other hand are in most countries not subject to re-election and the "customers" of the judiciaries have no choice but to use their services. Hence, there is no direct pressure on judges and the judiciary to inform the public about their work.

It has been suggested that public trust in the judiciary has been diminishing across Europe. There is, however, insufficient data to support that this would be the case across Europe, but there is research from several countries that does suggest that public confidence is eroding.[4] It can be argued that this has provided opportunities in some countries to pass legislation that has affected the independence of the judiciaries and also made way for informal measures as well as media attacks which also have had an effect on the independence of the judiciary.[5]

However, this issue is relevant also for countries such as Finland, which traditionally has been a high-trust society with high public confidence in the judiciary, since as further examined below, there have been some, although limited, attacks mainly on social media against the judiciary and individual judges. These attacks may in the long run undermine the trust in the judiciary and open the way for measures that may affect the independence of the judiciary. Therefore, the pressure to inform the public about the work of the judiciary and in some cases also defend the judiciary against criticism has increased. In the first case that we will discuss, a senior research fellow of the Finnish Institute of International affairs recently criticized judges of the Finnish Supreme Court on Twitter in relation to their judgment on a case concerning sexual abuse of a child. He stated as follows: "*These judges do not deserve anything but the disdain of the entire Finnish people*". Although

[3] European Commission for the Efficiency of Justice 2018, p. 4.
[4] European network of Councils for the Judiciary 2017-2018, p. 8.
[5] In the Case of Poland, the European Commission has for example stated that there is a serious breach of the rule of law, see European Commission Press Release, 20.12.2017.

there was clearly a need for rebuttal from the judiciary, both the Supreme Court and the judiciary in general refrained from commenting or defending the judges in question. The only rebuttal was made by the Association of Finnish lawyers and some individual media judges of the Helsinki District Court. They criticized the way the comment was made and the fact that individual judges had been targeted.

The other cases concerned judges working at the District Court. There are two cases in which individual judges have been severely criticized by the public, the media and even professors because of their work and at least to some extent based on inadequate or even erroneous facts regarding the cases, which have caused the critique. There is one incident where the judges in question had heard a rape case and another incident where the judge in question had heard a case concerning incitement to ethnic or racial hatred. Both cases caused a lot of discussion both in the media and on social media because of the special circumstances of the cases. However, the critique was not limited to the case or the judgment, but the judges hearing these cases were doxed [6] quite brutally. The names and addresses of the judges as well as photos of them were published online. Also, their e-mail addresses were published together with an exhortation to "give feedback", which meant that the judges were spammed with e-mails. In both cases, there were no public comments or statements regarding these incidents by any representative of the judiciary.

Unfortunately, the cases described above do not seem to be isolated incidents. A survey by the Association of Finnish judges that has been published recently reveals that both inappropriate communication as well as criticism of the courts have increased. Doxing seems to be a more and more common phenomenon and the judges are quite powerless when trying to defend themselves against unreasonable critique relating to their daily work. To maintain trust in the judiciary and to prevent these unreasonable attacks on judges, someone should be able to respond to this kind of unreasonable public critique.

It should, however, be noted that criticism of judgments or the reasoning of them is of course allowed, as well as criticism of the functioning of the courts. Critique can even be welcomed as long as the criticism refers to a particular judgment, since open debate is an element of a democratic society. However, when the criticism takes the form of personal attacks on individual judges, the situation is alarming.

[6] Doxing or doxing is the Internet-based practice of researching and broadcasting private or identifying information (especially personally identifying information) about an individual or organisation, see Wikipedia (Accessed 8.6.2019)

3 CONFIDENCE IN THE JUDICIARY

3.1 THE CONCEPT OF CONFIDENCE OR TRUST

In order to determine whether the judiciary should take a more active role in the public debate and whether this could affect the public confidence in the judiciaries, we will continue by discussing the concept of confidence or trust.

The concept of trust or confidence and the concept of legitimacy relates to several important moral and practical connections between citizens and social systems. Confidence or trust is an important factor in all human interaction and questions regarding trust and public confidence in political institutions such as the judiciary have for a long time been of interest of scholars of social sciences. It has been argued that confidence in institutions and institutional legitimacy help to sustain social and political institutions and arrangements and hence also facilitates the function of the judiciary.[7]

Public confidence in the judiciary can be defined as positive expectations regarding the conduct of judges and courts. The level of public confidence reflects both short-term satisfaction with the performance of courts and judges as well as long-term attachments and loyalty, of which the latter can mitigate the impact of short-term dissatisfactions. The judiciary and the administration of justice need to generate a certain degree of confidence in the public. Individuals in a democratic society have the right and expectation to live under a system that operates within the rule of law, that acts effectively and fairly within commonly accepted norms and that demonstrates to itself and to citizens its rightful possession of power. Otherwise, it is not about justice, but about tyranny.[8]

Research shows that many factors have an impact on public confidence in the judiciary. The level of confidence can be influenced not only by factors within the judiciary, but also by factors outside the operations of the judiciary. Factors such as socio-demographic characteristics, general tendency to trust other people as well as overall institutional confidence correlate with the level of confidence in the judiciary. [9] However, the level of public confidence in the judiciary is of course also influ-

[7] Jackson, Kuha, Hough, Bradford, Hohl and Gerber 2013, p. 3. FIDUCIA.: http://eprints.lse.ac.uk/50650/ . Accessed 19 May 2019.
[8] Ervasti and de Godzinsky 2014, p. 180 and Jackson, Kuha, Hough, Bradford, Hohl and Gerber, Monica 2013, p. 3. FIDUCIA: http://eprints.lse.ac.uk/50650/. Accessed 19 May 2019.
[9] Urbániková and Šipulová 2018, p. 2113-2115.

enced by the performance of the judiciary. Factors relating directly to the operations of the judiciary, which might influence the level of confidence are for example the outcome of a case and the reasoning of the judgment, the proceedings as well as how the parties to the proceedings are treated by the members of the judiciary. [10] Also, higher judicial independence correlates with higher levels of public confidence.

In addition to the factors mentioned above, the visibility of the judiciary, measured as the media exposure of courts and judges correlates with public confidence[11]. Also, knowledge about an institution correlates with the level of trust in the same.[12] Since research shows that these factors correlate with the levels of public confidence in the judiciary, it can be argued that increasing both the visibility of the judiciary and the knowledge of the public about the same could increase confidence in the judiciary. This argument is also supported by a recent study regarding the conceptions of the Finnish people regarding appropriate punishments. In the study the peoples' conceptions regarding appropriate punishments were compared with the answers by judges. The survey was conducted by addressing it to two different groups of people, the lay respondents and the judges. The first group was asked to determine an appropriate punishment for given example cases, whereas the latter was asked to determine a punishment for the same example cases according to the Finnish law and punishment policies. One major finding observed, was that in terms of severity, the described cases were ranked in quite similar order by both the laypeople and the judges. In this respect, the punishment policies and people´s "sense of justice" seem to be quite well aligned as regards to these cases.[13] Hence, one could claim based on these survey findings that the more the lay public knows about publicly debated cases, the better they understand the judges' work. It should be noted that the importance of public confidence in the judiciary has been widely recognized throughout Europe.[14] However, the understanding of the role of the judiciary as well as the public trust in them varies significantly between the European countries. Both historical, social and economic reasons

[10] Tala 2002, p. 19. See also Hagsgård Mari B. 2018, p. 243- 260.
[11] Urbániková and Šipulová 2018, p. 2122-2123.
[12] European Commission for the Efficiency of Justice 2018, p. 5.
[13] Kääriäinen 2018. https://helda.helsinki.fi/handle/10138/232414?_ga=2.168121633.1214417198.1560144669-1300297784.1560144669. Accessed 10 June 2019.
[14] Urbániková and Šipulová 2018 p. 2122-2123, see also for example European Network of Councils for the Judiciary 2004-2017, p. 13, European Network of Councils for the Judiciary 2017-2018, p. 8 and European Court of Human Rights 2019, p. 4.

have an impact on these differences and this issue cannot be viewed separately from the general differences between high trust societies mainly in the north-west of Europe, and low trust societies, mainly in the south and east.[15]

4 LEGAL FRAMEWORK

We will address this matter mainly from a European point of view, although we are aware that many countries have national provisions regulating e.g. the freedom of expression of judges for example in their constitution or other relevant legislation.

To begin with, when we discuss how a judge or the judiciary can react to attacks on them or increase the visibility of the judiciary in the public, there are at least two freedoms protected by the European Convention on Human Rights (ECHR) that may be in conflict or at least constitute two different perspectives on the matter: the right to a fair trial and under Article 6 and the right to freedom of expression under Article 10 ECHR.

Also, Principle 8 of the UN Basic Principles on the independence of the Judiciary and Application 4.6 of the UN Bangalore Principles of Judicial Conduct, which explicitly recognizes the freedom of expression and association of a judge, could be noted. Furthermore, the same rights and freedoms are recognized in some national and supranational ethical codes of conduct.

4.1 CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

The European court of Human Rights (ECtHR) takes as a starting point in its case law that the guarantees under Article 10 of the European Convention on Human Rights (ECHR) extend to also to judges.[16] However, as stated in Article 10 (2) of the ECHR, the exercise of freedom of expression

[15] European Commission for the Efficiency of Justice 2018, p. 4 and European network of Councils for the Judiciary 2017-2018, p.8.

[16] The guarantees under Article 10 of the European Convention on Human Rights ("ECHR") extend to also to employment relations in general and to public servants in particular. Article 1 ECHR stipulates that "everyone within [the] jurisdiction" of the Contracting States must enjoy the rights and freedoms defined in Section 1 of the ECHR. Moreover, Paragraph 2 of Article 10, which lays down possible restrictions to the right to freedom of expression provided by Paragraph 1, does not refer to any category of persons, but to a number of legitimate aims, allowing the freedom of expression to be interfered with only in cases where it is provided that the interference is in accordance with the law and necessary in a democratic society. See also Venice Commission Report on the Freedom of Expression of Judges 2015, p. 19.

entails duties and responsibilities. Therefore, under the same paragraph, an interference in the freedom of expression is allowed if it meets the following three conditions: it must be prescribed by law, serve a legitimate aim and be necessary in a democratic society. One of the legitimate aims mentioned in the paragraph is maintaining the authority and impartiality of the judiciary. Therefore, the duties and responsibilities mentioned in Article 10 (2) of the ECHR have special significance in cases concerning the freedom of expression of judges. It can be expected of public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called into question[17]. Dissemination of even accurate information should be carried out with moderation and propriety.[18] It should also be noted that the Member States, comprising both the legislator and the national judiciary, are allowed a margin of appreciation when assessing whether an interference is reconcilable with the ECHR. However, the ECtHR is empowered to give the final ruling on whether an interference is reconcilable with the freedom of expression as protected by Article 10.[19]

Article 6 (1) ECHR on the other hand protects the right to a fair trial. Especially relevant for the topic at hand is the first sentence of Article 6 (1) ECHR which states "*[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within reasonable time by an independent and impartial tribunal established by law*". According to settled case law of the ECtHR, impartiality means the absence of prejudice or bias. The existence of prejudice or bias are to be determined according to a subjective and an objective test.[20] Even appearances may be of importance, as "justice must not only be done, it must also be seen to be done" as the ECtHR has often stated.[21]

The ECtHR has dealt with several cases concerning judges who have expressed their opinion in the press, such as in interviews or in open letters to the press.[22] In the cases *Lavent v. Latvia* and *Olujic v. Croatia* the judges had made statements regarding the case heard by them, which constituted a violation of Article 6 (1) ECHR. In these cases, the ECtHR formulated the following rule:

[17] ECtHR, 28 October 1999, 28396/95 (Wille v. Lichtenstein), para. 64.
[18] ECtHR, 26 February 2009, 29492/05 (Kudeshkina v. Russia), para. 93.
[19] ECtHR 7 December 1976, 5493/72 (Handyside v. the United Kingdom), paras 48-49.
[20] See for example ECtHR 1 October 1982, 8692/79 (Piersack v. Belgium), ECtHR 9 January 2013, 21722711 (Volkov v. the Ukraine); and ECtHR 15 December 2005, 73797/01 (Kyprianou v. Cyprus).
[21] See for example ECtHR 2 June 2016, 45959/09 (Mitrov v. the former Yugoslav Republic of Macedonia).
[22] See for example ECtHR 16 September 1999, 29569/95 (Buscemi v. Italy) para 67, ECtHR 28 November 2002, 58842/00 (Lavents v. Latvia) para 118 and ECtHR 5 February 2009, 22330/05 (Olujic v. Croatia) para. 59.

"*The Court stresses, above all, that the judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges. That discretion should dissuade them from making use of the press, even when provoked. It is the higher demands of justice and the elevated nature of judicial office which impose that duty*."[23]

Although these cases concern expressions of opinions made in the press, it can be argued that some more general conclusions can be drawn from these cases with regard to other public statements. Any public statement about a case which the judge is hearing is precarious since it may jeopardize judicial impartiality.[24]

Hence, when assessing judges' freedom of expression under the ECtHR case law two perspectives can be identified. First, this matter can be examined from the perspective of the individual judges exercising their rights under Article 10 ECHR. Second, the matter can be examined from the perspective of Article 6 (1) and the limitation on judicial freedom implied by that Article.

According to settled case law under Article 10 ECHR, the judge is required to show restraint when the authority of the judiciary and impartiality come into question[25]. However, when judge's expressions are seen as part of a public debate, judges have been granted more freedom, since the ECtHR has viewed public debate essential for democracy. [26] Since the states are granted a margin of appreciation and the requirement that the interference is necessary in a democratic society requires that all facts of a case are weighed, it is difficult to draw general conclusions regarding the judges' right to freedom of expression based on the ECtHR case law. Under Article 6 (1) on the other hand, the sole focus is on independence and impartiality and the right of the litigant or suspect to a fair trial. Taking into account the limited scope of Article 6 (1), it adds to the understanding of judicial freedom of expression, but the meaning is limited due to its narrow scope.[27] However, it could be argued that as long as a judge or another member of the judiciary is mainly taking part in the public debate and not undermining the authority or the impartiality of the judiciary or commenting on a specific (and especially not a pending) case, the ECtHR case law does not pose strict limitations on the freedom of expression.

[23] ECtHR 16 September 1999, 29569/95 (Buscemi v. Italy) para 67 ECtHR 28 November 2002, 58842/00 (Lavents v. Latvia) para 118 and ECtHR 5 February 2009, 22330/05 (Olujic v. Croatia) para. 59.
[24] Dijkstra 2017, p. 11.
[25] Dijkstra 2017, p. 15.
[26] See ECtHR, 26 February 2009, 29492/05 (Kudeshkina v. Russia) and ECtHR 27 May 2014, 20261712 (Baka v. Hungary).
[27] Dijkstra 2017, p. 17.

5 MEANS TO MAINTAIN AND INCREASE PUBLIC TRUST IN THE JUDICIARY

5.1 GENERAL REMARKS

As stated above, this article deals with the means which could increase public trust in the judiciary. The focus lies on the means and strategies that the judiciary itself and also an individual judge could use. It is obvious that an individual judge is able to affect some of the factors mentioned above and known to increase confidence, such as for example by writing well-reasoned judgments and acting in a way that generates trust. We will, however, focus on how judges and the judiciary can increase confidence by controlling publicity and by contributing to the public discussion.

5.2 MEANS OF AN INDIVIDUAL JUDGE

It is usually suggested that, in order to maintain their impartiality, judges should refrain from commenting cases heard by them and judgments delivered by them. Hence, judges should, as a general rule, consider carefully before commenting his or her own case even if under attack in the public discussion.[28] As mentioned above, also the ECtHR has in cases heard by it considered that judges should refrain from commenting on cases heard by them.[29]

Despite the fact that a judge should refrain from commenting on his or her own cases, there are means for an individual judge to increase the transparency and understanding of the work of the judiciary and hence possibly increase confidence in the judiciary and also prevent public outbursts in advance.

One of the potential means for an individual judge to increase the understanding of the work of the judiciary could in some cases be to pronounce judgments rather than to deliver a written judgment possibly several weeks after the hearing. In connection to the pronunciation of the judgment the judge can explain the judgment and answer questions related to it. In Finland, the judgments in small criminal cases at the district courts are usually pronounced right after the hearing. When it comes to the appellate courts on the other hand, pronouncement of judgments are rare. Would it be more informative to pronounce judgments more often so that parties to the case and also the public could receive an oral summary of the main points on which the judgment is based? This would be

[28]European Commission for the Efficiency of Justice 2018 p. 29.
[29] See Lavent v. Latvia and ECtHR 16 September 1999, 29569/95 (Buscemi v. Italy).

important especially in cases that have attracted a lot of publicity and could minimize the risk of the judgment being misunderstood. It should, however, be noted that pronouncements right after the hearing are restricted by the characteristics of the case such as the size and type of the case. Large cases with extensive evidence and complex judicial questions often require a lot of time in order to render a comprehensive judgment. It can also be hard for the audience to comprehend the reasoning when given orally. What the judge can say is also limited to the reasoning of the judgment and the judge cannot go beyond it, but it is possible to clarify a certain issue for example by rephrasing it.

Another method to increase the understanding of a judgment and its reasoning could be to arrange a press conference. Usually press conferences begin with a presentation made by a judge, a prosecutor or a spokesperson and continues with the possibility for journalists to ask questions. When arranging a press conference by live broadcast it helps to prevent the message from being altered. However, this requires clear, concise and considered speeches from the judges. [30] Since the appropriate presentation is extremely important the judges giving speeches could make use of audio-visual and graphical tools, such as power point slides, to clarify their reasoning even more. One question to be considered when arranging a press conference is whether the judges who have heard the case in question should be present to answer questions. They are better aware of the merits of the case than an outside spokesperson, but on the other hand holding a press conference requires a lot from the judge giving the presentation.

Both pronouncing a judgment and holding a press conference require appropriate tone and behaviour, calmness as well as neutral attitude with no emotional emphases. In addition, both pronouncing judgements and holding press conferences require considerable presentation skills and experience of the media from the judge and not everyone is capable of handling or willing to handle difficult questions of the media. Moreover, the principles of judicial ethics apply to these occasions. The contents of both a pronouncement and a press conference should only concern the judgment itself, its reasoning and conclusions, not the personal opinions of the judge. In particular, speeches create the opportunity for "spontaneous statements" and the possibility that the "judge will misspeak or abandon discretion in follow up questions".[31] Answering questions should only be limited to the reasoning of the case and clarifying the conclusions, not the negotiations outside the reasoning of the judgment. Considering the above-mentioned risks, the advantages of a press conference as well as the practical arrangements should be considered on a case-by-case basis.

[30] European Commission for the Efficiency of Justice 2018 p. 12-14 and 31.
[31] Moran 2015, p. 470.

The third measure to be considered to increase the understanding of a judgment and its reasoning and hence the confidence in the judiciary is to give a press release. This measure is already quite common, but it could be further developed to better serve the needs of both the press and the general public. The wording of the press release should be carefully considered as well as the possibility to publish press releases or short summaries of them for example on social media. When publishing information on social media special attention should be paid to the expression and clarity of the message. However, it should be noted that press releases do not answer possible questions that the press may have. Therefore, contact details of a judge or other staff member available to answer possible questions in relation to the judgment could be added.

In addition to the measures mentioned above, all relating to the publicity and communication of a particular case, there are also more general measures in order to increase the public's understanding and hence the confidence in the judiciary, that could be considered. Judges can consider taking part in the public debate or even giving interviews in matters that concern the judiciary. However, participation in the public debate on any topic may entail the risk of undermining public perception in the impartiality of the judiciary. This can be the case even if the judge's comments would not lead to recusal from a particular case. It should also be noted that this risk may arise also because the judge has no control over the interpretations given to his or her comments.[32] Moreover, there is a risk that judges may express views that will give rise to issues of bias or pre-judgment in future cases before the judge in question. This is especially noteworthy if the judge comments on political or otherwise controversial questions. Also, the risk of different judges expressing conflicting views should be taken into account. A public conflict between members of the judiciary as well as inconsistent or contradictory information given by members of the judiciary, may diminish the authority of the court and reduce public confidence in the judiciary.[33] Therefore, careful consideration should be made regarding what the judge can express in public.

[32] See also Guide to Judicial Conduct (United Kingdom) 2018, p. 16.
[33] See also Guide to Judicial Conduct (United Kingdom) 2018, p. 17.
See also European Commission for the Efficiency of Justice 2018, p. 29.

5.3 MEANS OF THE JUDICIARY

5.3.1 General remarks

In some cases, it can be more appropriate that public commenting or a rebuttal to a public outburst is made not by the individual judge concerned, but by a specially assigned representative of the judiciary such as a media judge or spokesperson or by for example a representative of a judicial council. For example, during a public outburst against an individual judge his possibility to defend himself is very limited. The judge cannot comment on the case or the judgment. In this case, it is important that someone within the judiciary can take part in the debate and for example correct erroneous information or defend the judge being criticised.

5.3.2 Media judges or spokespersons

The media judge or press judge system, which is in use for instance in Finland, Norway, Sweden and in the Netherlands, has been developed to communicate judgments and to insure the correctness and sufficiency of the information. Experienced judges are appointed for a few years at a time as media judges or spokespersons to monitor public debate, correct erroneous or distorted information about judgments, and appear publicly when needed. Media judges, as such, do not represent the court or its collective view, but act as experts in their own field.

The media judge or spokesperson is responsible for all communication activities on behalf of his or her judicial body, however, sometimes together with other staff or judges. The spokesperson is responsible for ensuring proactive, accurate, sufficient and appropriate information and communication[34]. As the spokesperson is not judging the case under discussion, the neutrality of the judge is not compromised.

Spokespersons or media judges are able to communicate more openly to the public than an individual judge hearing the case in question. Open communication enhances knowledge and confidence in the functioning of the judiciary. It is also essential for the credibility of the judiciary and for the trust of the citizens that public information about the courts and their decisions is correct and based on the correct facts.

[34] European Commission for The Efficiency of Justice 2018, p. 9.

Furthermore, the spokesperson gives a face to the court and the judiciary and can also take part in discussions on social media, for example. Spokespersons can also quickly participate in the public debate and, if necessary, direct the discussion towards the right track. In addition, if the discussion concerns a specific case, a spokesperson being a legal professional is more knowledgeable than a press secretary about relevant legislation and case law in relation to the case at hand. These are all substantial benefits of the spokesperson, and factors which could help judicial bodies to increase public trust in them.

However, in order to maintain legal expertise, it is recommended that there are several spokespersons who are specialized in different fields of law. Respectively, the spokespersons can share the cases that require commenting by their specializations. It should also be noted that there can be disadvantages with spokespersons defending a judge working at the same court or commenting on judgments regarding cases heard in the same court, since it can appear that the spokesperson is not impartial if he or she is defending a close colleague. This should be taken into account when considering who is responding for example to critique against a judge.

The ultimate goal of the spokesperson or media judge system is to secure citizens' access to information and confidence in the work of the courts. The system can increase the involvement of the courts in the public debate without reducing independence and impartiality.

5.3.3 Council of the judiciary

An alternative to the court's own spokesperson is a spokesperson of a separate and independent government agency. For example, in Finland the government has recently established a council of the judiciary. This kind of a government agency has been established in several European countries[35]. The councils usually have a department dedicated for public communication.

As the ENCJ has stated, the councils of the judiciary, in order to maintain the rule of law, must do all they can to ensure the maintenance of an open and transparent system of justice, which is a further precondition for establishing and maintaining the public trust in justice.[36]

[35] Tuomioistuinlaitoksen keskushallinnon kehittämistä koskeva selvitys, OM:n julkaisu 2009:3 and Urbániková and Šipulová 2018 p. 2106.
[36] ENCJ Strategic Plan 2018-2021, p. 2; ENCJ: Public Confidence and the Image of Justice 2017-2018, p. 3.

A notable advantage of a spokesperson working for the council of the judiciary compared to the court's own spokesperson is that they are independent from the courts. A person, not being a colleague of the judge in question, may appear more trustworthy than a spokesperson of a court. Hence, it may have positive effects on confidence in the judicial system. Moreover, the legal expertise would remain on a good level, since the spokesperson is working for the council of the judiciary which has the capability to hire and train experts for this kind of position. However, although being more distant from the case in question can be considered as an advantage, it also has its disadvantages. A spokesperson working at the council of the judiciary may not know the case in question on a deeper level. He or she cannot comment on the proceedings or other arrangements of the hearing like the spokesperson working at the court in question.

All in all, the council of the judiciary has the potential to represent the judiciary and act as their mouthpiece. Considering the above-mentioned hostile statements against the judiciary, this kind of an institution is nowadays even more necessary for maintaining trust and respect for the judiciary.

The council of the judiciary can also play a central role in generally informing the public about the judiciary and the work of the courts and hence increase general knowledge. As a central administrative institution, it can speak for the judiciary as a whole, while for example a spokesperson of a court or a chief judge only can speak for the court he or she works for. It should be noted that many aspects of the justice system and the functioning of the courts are the subject to public interest. The functioning of the judiciary can be rather unknown not only to the general public, but also to both politicians and the media. Therefore, the contribution of the judiciary to a discussion regarding the justice system and the functioning of the courts as well as commenting on for example legislative proposals can contribute to enhanced public understanding of matters regarding administration of justice and hence contribute to public trust in the judiciary. [37] Since an individual judge commenting on proposed legislation he or she later will have to apply, can be seen to be in conflict with the division of powers, it could be more appropriate if commenting of such legislation would be administered by an administrative institution such as the council of the judiciary.

Another advantage of having a council of the judiciaries being responsible for expressing the view of the judiciary in the public debate is that this avoids the problem of conflicting views between

[37] See also Guide to Judicial Conduct (United Kingdom) 2018, p. 16.

members of the judiciary being expressed in the public. In addition, as discussed above, the participation of an individual judge in the public debate on any topic always entails the risk of undermining public perception in the impartiality of the judiciary. Hence, the risk of weakening impartiality is decreased if it is an administrative institution that is speaking on behalf of the judiciary.

5.4 Closing remarks

As mentioned above, there are many different ways for both the individual judge and the judiciary as a whole to try to control publicity and also to increase the general visibility of the judiciary. In order to control the public debate, it is essential both for the individual judge and the judiciary as a whole to recognize cases that probably will attract the attention of the media and the public and to prepare well to be able to avoid negative publicity and misleading information in relation to these cases. At least the cases that have been reported in the media before the trial or during the preliminary investigation are certain to be of interest. Furthermore, serious violent, financial, property, drug crimes and sex offences are often of interest, as well as if the party concerned is a celebrity or a public figure. This kind of cases can be identified beforehand, and careful consideration should be given to how the publicity should be handled.

Since there are several means of communication and possible parties that might take part in the public discussion on behalf of the judiciary, it is essential that the judiciary adopts a communication strategy. The relevant measures depend on the factual circumstances. Therefore, a communication strategy should comprise not only the communication within a single court, such as the division of responsibilities between a judge handling a particular case and the spokesperson or for example the chief judge, but also the distribution of responsibilities between separate courts and for example the council of the judiciary. It is essential that the communication is handled by the most appropriate party, which depends on the relevant circumstances. All in all, it is of the essence that when appropriate, someone reacts and tries to do what is possible in order to calm a public outburst or to defend an individual judge being targeted. Cases such as the ones mentioned in section 2 should not be met with silence from the judiciary.

6 CONCLUSIONS

We have seen in recent years in Europe cases where both politicians and the general public openly have expressed their opinion on ongoing proceedings or criticized judgments or decisions, or even directly tried to influence certain judges by questionable means.

Courts cannot influence the way in which the media creates headlines, or how the general public make up their mind about a case or the judiciary on the sole basis of these headlines. However, a change in the attitude of the judges regarding publicity would contribute to the wider dissemination of correct information and to the public awareness of the correct content of the judgments. Attitude change involves not only the adoption of the active communication as part of the normal workflow, but also understanding the central role of publicity of the trial and the abandonment of the idea that publicity would always be the enemy. Nowadays it is not enough for the courts to participate in the public debate only through their judgments. This way of communicating is no longer enough to maintain confidence in the judiciary. Justice cannot escape standing up for itself and confine itself in an ivory tower and deliver judgments without considering how they will be received and understood. Neither can the judiciaries anymore detach itself from the public discussion and look down on the agitation from the public and the media without reaction.

We have discussed several means to increase confidence in the judiciary and to respond to the challenges described above. All the measures discussed contribute to increased transparency and understanding of the work and role of the judiciary, which in turn can help to increase confidence in the same. However, it should always be taken into consideration when assessing possible means of increasing the visibility of the judiciary or the adequate response to a public outburst, that the judge is required to show restraint when the authority of the judiciary and its impartiality come into question.

When assessing means to respond to a public outburst or generally increase the visibility of the judiciary it is essential not only to consider the appropriate means, but also to consider who is responsible for the communication or how the responsibilities are divided between different persons or entities. The best way to proceed should be determined on a case by case basis, but we recommend that a strategy to guide this decision-making is drawn-up, since otherwise there is a risk that no-one

takes responsibility for the matter and the judiciary remain silent. This is especially a risk if it is unclear which organization is responsible. The strategy should also include a recommendation regarding the forum on which communications are published. For example, an outburst on social media can best be rebutted on social media. There is no use of publishing a press release on the homepage of the court if the matter is discussed on Twitter.

All in all, it is essential that judges and the judiciary do not remain silent but express their concerns and remind both the public and the politicians of the separation of powers in a democratic society and the integrity and impartiality of the judiciary. Otherwise there exists a severe and long-term risk of the European legal order disintegrating as more and more people are encouraged by hostile statements to see fit to attack the judiciary. This could violate the basic democratic standard and also endanger the legal systems that hold the European Union together.[38] Judicial institutions should demonstrate that for the effective function of society, the judiciary is equally important as the legislative or executive power.[39]

[38] See also Davies 2018, p. 7.
[39] See also European Commission for the Efficiency of Justice 2018, p. 4.

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