EUROPEAN JUDICIAL TRAINING NETWORK

Themis Competition

Semi-Final D

Budapest, Hungary, 3 – 6 July 2017

COMMUNICATING JUDICIAL DECISIONS:
A BLACK BOX OR TRANSPARENCY?

Team Czech Republic
Daniel Askari, Kristina Blažková, Kristina Rademacherová
Tutor: Jan Chmel
“Publicity is the very soul of justice.” (Jeremy Bentham)

“What degree of openness ought to apply to the Court when it is carrying out its judicial tasks?” asks the Advocate General of the Court of Justice of the European Union (hereinafter as “CJEU”) Michal Bobek in a case currently pending before the Court of Justice, Commission v. Patrick Breyer.1 Bobek brought up a very important and pressing issue which concerns each European court. In our paper, we elaborate on the issue of openness, asking what kind of content courts communicate to the public and what means of communication they use. Should courts use social media to present their judgments? Should judges advocate for their opinions in the media? Or should they allow their decisions to speak for themselves?

In our paper, we first explain why the principle of openness is becoming increasingly important, we clarify the concept in relation to the principle of transparency, publicity and legitimacy and we consider the benefits and limits of openness (I). Secondly, we set out the standards of openness established at the European level (II) and we inquire into the current practice of selected Member States (III). Finally, we draw general conclusions from our comparative analysis and formulate recommendations for future practice (IV).

I. OPENNESS AS A RISING PRINCIPLE OF THE EUROPEAN JUDICIARY

The principle of openness consists of cooperation and active communication between the judiciary and the public. Openness of judiciary, as we understand it, means a transparent decision-making process, where the verdict is shared with as well as explained to the public.

The issue of openness is becoming more and more important due to several factors: increasing influence of courts on society, transformation of the relationship between individuals and state, and the emergence of information society. Firstly, the power of courts and their influence on important societal issues has been increasing since the second half of the 20th century. 2 Due to the increased complexity of legal systems and the mass of legal norms, judicial decisions gain on importance even in the continental legal system. As the number of societal issues dealt with by courts increases, there is an objective need to inform the public about judicial decisions. On the other hand, courts try to actively strengthen their position through greater dissemination of their judgments. The wider audience it reaches and the more trust it generates, the more powerful courts become vis-a-vis other national and international courts and other public bodies.

---

Secondly, there is a general shift in modern society from the culture of authority towards the culture of justification. Public power can no longer be exercised based only on authority of the ruler; instead, it must be justified. And this impacts the judiciary as well. Judges traditionally used various tools, such as wigs, to shield their individuality and to enhance the authority of the judicial institution. Nowadays the trend is towards transparency and discursiveness. The public expects from the judiciary thorough justification of decisions, making the decisions public, explaining and defending them. Public officials can no longer hide behind their functions. Their decisions should pass the test of persuading the public.

Thirdly, recent developments in information and communication technologies introduced the idea of information society. Modern tools for communication are changing our world, where living one’s own life in a virtual space has become a real possibility. In a virtual space without any borders, the concept of publicity reaches another dimension. Courts become able to share as much as they please to promote their ideas. Means of accessing relevant case-law have transformed from traditional ones like studying printed collections of decisions; nowadays it is possible to search case-law in online databases.

I.1 Publicity, transparency and legitimacy of the judiciary

Before developing the issue further, it is important to clarify that the concept of openness of the judiciary, as it is understood in this paper, covers both the issue of transparency and publicity. While publicity concerns chiefly the availability and visibility of judicial decisions, transparency guarantees an opportunity to see the path leading to the result reached, together with its reasons.

Transparency means disclosing the way the judge reached his or her decision to the public. The elements of transparency include: public hearings (additionally web streaming of the hearings), justification of decisions (including extra-legal arguments), publication of dissenting opinions, information about decision-making process and identity of judge rapporteur, presentation of judges (including photos and biographical information), access to documents and possibility of obtaining information about particular steps taken by a court in an individual case according to the law on the free access to information, and, eventually, disclosure of the votes of the judicial panel.

---

Publicity means making the content of individual decisions public together with the knowledge of the state of law. As the German Federal Administrative Court put it, “publication of judicial decisions is a public task. It is a direct constitutional duty of the judicial branch and therefore every court. All decisions, on whose publication there is or could be public interest, are to be published”. The basis of publicity is public announcement of the operative part of the judgment and its justification. The elements of publicity may include accessibility of decisions through internet databases, issuance of press releases, existence and activity of press service, communication through social media (i.e. Facebook, Twitter etc.), RSS feeds and media interviews given by individual judges.

The principle of openness strengthens the legitimacy of courts. Nevertheless, Mitchel Lasser in his work Judicial Deliberations questions this assumption through a comparative analysis on how French and American judiciary, traditionally placed on opposite ends of transparency scale, approach the issue of publicity of decisions and transparency of judicial process. While a French decision is collective and anonymous, an American one is individually signed, disclosing votes of the judicial panel and publishing dissenting opinions. French model consists of sheltered judicial deliberations and public, but succinct and syllogistic final decision, which tells the public what the law is and omits the reasons leading to the result. American model, on the contrary, integrates all the arguments into public judicial decision.

Lasser explains how the two different systems generate public trust by developing two different concepts of judicial legitimacy: substantive and institutional legitimacy. Substantive legitimacy, of which American judicial system is an example, focuses on discursiveness of judicial decisions, as they must provide sufficient reasons to convince the public of the solution being right. Legitimacy of French judiciary, on the contrary, rests on its meritocratic and hierarchical institutional system rooted in the French republican ethos and the idea of sovereignty of legislator. Both approaches are naturally influenced by the differences of distinct legal systems too, i.e. a system of common law and a continental legal system.

Yet we are convinced that the institutional legitimacy does not always substitute for lack of justification. This was demonstrated by the case Perruche where the French Cour de Cassation...
dealt with a very controversial topic of unlawful births. Although the case was thoroughly discussed within the court, with all (legal and factual) aspects of the case, the court’s justification did not reflect any of it. Consequently, the decision was strongly criticised by legal professionals, the public opposed it and the legislator changed the law afterwards, completely opposing the judgment.

I.2 Benefits and Pitfalls of Openness

Openness strengthens legitimacy and overall public trust in courts. Transparency allows the public to control the judiciary, thus making it more accountable. Openness increases the courts’ responsibility towards citizens and ensures democratic control over courts. According to Lord Chief Justice Hewart, “Justice should not only be done, but it should manifestly and undoubtedly be seen to be done.” Moreover, openness improves the quality of judicial decisions as it places a greater argumentative burden on the judge. Through its influence on judicial work, openness improves both the quality of rulings as well as the party pleadings. Publicity, as a particular aspect of openness, increases legal knowledge and public awareness, contributing to legal certainty and stability of the legal system. Publicity additionally helps to generate public debate on important social and legal issues.

Nevertheless, it is necessary to keep in mind the limits of openness. Court must remain the independent third and be perceived as such—the umpire who solves the dispute. For that the judge must keep a certain distance from the dispute and its parties, as disclosing too much of his or her mental process or non-public part of the judicial process could undermine its impartiality and legitimacy of the decision. The issue of right to privacy or to protection of intellectual property of the parties is also related, as openness may sometimes run counter to the parties’ interests. Transparency may also jeopardize the intellectual freedom of a judge as he or she needs some sheltered area to search for and contemplate the right decision. A judicial panel needs to discuss the case at issue and within that discussion any judge must have the room for making an error - to express an opinion which will not be reflected in the decision in the end, as he or she would have

11 Mother of Nicolas Perruche got Rubella infection during her pregnancy. She informed the doctor that if her child was to be disabled, she wanted an abortion. The hospital staff misanalysed the situation, failing to identify disability of her child. After the child was born death, half blind and with a heart disease, the mother brought damage claims against the hospital.


13 Notwithstanding the controversy of the statement, it is supported by empirical findings, see GRIMMELIKHUIJSEN, S.; KLIN, A. The Effects of Judicial Transparency on Public Trust: Evidence from a Field Experiment. Public Administration. Vol. 93, No. 4, 2015, pages 995 – 1011.


been persuaded by the other judges. If we were, in extreme cases, to make judicial deliberations open to the public, the real deliberations would surely move away from deliberation rooms into less formal places. Thus, judicial deliberations would be at risk of being emptied of their purpose as judges would have discussed the case somewhere else, coming afterwards with statements already prepared. Moreover, too much transparency might generate misunderstanding of the final decision or its core meaning.

II. EUROPEAN LEVEL

Within the framework of European institutions, there is an established consensus on minimal standards of judicial openness which stems from the principles of the right to a fair trial according to article 6 of the Convention on Protection of Human Rights and Fundamental Freedoms (hereinafter as "Convention") as well as freedom of information according to article 10 of the Convention. Article 6 of the Convention requires courts to pronounce their judgments publicly and to give sufficient reasons for their decisions. European Court of Human Rights (hereinafter as “ECHR”) ruled in Axen v. Germany that while judgments must be made available to the public in some form, they do not need to be literally publicly pronounced.\(^{18}\) In Ryakib Biryukov v. Russia ECHR held that it is insufficient for a court to only pronounce the operative provisions of its decision without making its basic reasoning available to the public. The public must be able to understand what the judgment means materially.\(^{19}\)

ECHR also held that a court decision must always include sufficient reasons as to inform not only parties to the proceedings but also the public why the court decided as it did; that applies even to cases where questions of fact are decided by lay jury. According to Taxquet v. Belgium, the public must always be able to understand the verdict as given by court.\(^{20}\) However, in Suominen v. Finland, ECHR concluded that national courts are allowed a margin of appreciation in choosing arguments in a specific case. Although the obligation to give reasons cannot be understood as a requirement of detailed answer to every argument, ECHR stated that, regardless the margin of appreciation, “an authority is obliged to justify its activities by giving reasons for its decisions.”\(^{21}\)

It follows that while there are some minimal guarantees of judicial openness present in ECHR’s binding case-law, these standards do not go so far as to guarantee extensive communication of

---


judicial decisions to the public. ECHR does not mandate that judicial decision-making be transparent beyond providing the decision itself and its basic reasons.

Within EU law, openness is generally accepted as an important principle of exercising public powers. CJEU firstly integrated this principle into EU law in relation to the right of access to documents which was followed by treaty amendments and secondary legislation. Pursuant to article 15 (1) of the Treaty of the Functioning of the European Union (hereinafter as “TFEU”), “in order to promote good governance and ensure the participation of civil society, the Union’s institutions, bodies, offices and agencies shall conduct their work as openly as possible”. Article 42 of the Charter guarantees the right of access to documents which is further elaborated by secondary legislation on public access to documents, specifically Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 on public access to European Parliament, Council and Commission documents. To what extent this regulation applies to court documents is currently being considered by CJEU in the abovementioned case Commission v. Patrick Breyer.

The Council of the EU continuously promotes the idea of easier access to national case-law or the information databases managed by the judicial institutions of member states. Recently, there has also been a concerted effort of EU Member States to increase cross-border accessibility of national courts’ case law. In 2011 the Council adopted conclusions inviting the introduction of the European Case Law Identifier (ECLI) and a minimum set of uniform metadata for case law. The aim of the database is to provide a unified system of identification of all published decisions of Member States as well as metadata which indicate the legal basis of the decision.

The topic of judicial openness is also of interest to several European advisory bodies. The Consultative Council of European Judges, a Council of Europe working group, has issued a number of opinions dealing with this issue. In Opinion No. 7 the CCEJ expressed the opinion that reasonable accessibility of judiciary to the public is helpful to public trust of the courts and increases general awareness of case law:

"Integrating justice into society requires the judicial system to open up and learn to make itself known. The idea is not to turn the courts into a media circus but to contribute to the transparency

26 Council conclusions of 29th April 2011, 2011/C 127/01.
of the judicial process. Admittedly, full transparency is impossible, particularly on account of the need to protect the effectiveness of investigations and the interests of the persons involved, but an understanding of how the judicial system works is undoubtedly of educational value and should help to boost public confidence in the functioning of the courts.”

In a report issued in 2012 titled *Justice, Society and the Media*, the European Network of Councils for the Judiciary (ENCJ) made recommendations related to judicial communication with the public and media. The recommendations are divided into five categories: (i) judicial spokespersons, (ii) audio-visual recording of proceedings, (iii) online publication of judgment, (iv) press guidelines and (v) proactive approach to communication with the media. ENCJ adopted main recommendations in which it took a rather liberal approach to the various issues at hand. It recommended that courts appoint trained press judges and communication advisors; allow audio and video recordings as long as it applies to professionals only; and have a generally open relationship with the press. While ENCJ believes social media can be a useful tool for courts, it recommends courts develop a comprehensive strategy of using them.

There is a general trend towards more transparency among European countries. Although individual legal cultures differ in the level of judicial openness, it may be advisable to identify certain common standards of good practise. In future, EU and CoE advisory bodies should continue to deal with the relationship between courts and media. Inspiration might be found for example in Latin America where detailed guidelines of judicial transparency have been developed. One of the aims of our paper is to formulate specific guidelines which could be used by the judiciary. For this, we have carried out an analysis of recent practice among European courts.

### III. Comparative Analysis

#### III.1 European Court of Human Rights

According to articles 44 and 45 of the Convention, the final judgement is published with given reasons. If judgement does not represent a unanimous opinion of the judges, any judge is entitled to deliver a separate opinion. The decisions declaring an application admissible or inadmissible

---

27 Opinion No. 7 (2005) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers on "justice and society", paragraph 9.
30 We have included in our comparison the two European courts and a representative of each of the major European legal families: German, French, Anglo-Saxon and Post-Communist.
are reasoned as well, although the Convention does not require their publication. ECHR’s decisions are thoroughly explained, having quite a comprehensible language. All judgements are published in HUDOC database (Human Rights Document Online), where some cases are also provided with legal summaries - brief information about relevant facts and law. ECHR’s practise is to publish large scale of documents on HUDOC, i.e. decisions, consultative opinions, information on communicated cases, legal summaries etc. Consequently, ECHR is developing towards the broad publicity of its work.

ECHR has a Press releases collection with all the press releases issued by the Registry since 1999. Press releases inform simply and shortly about the most relevant judgements and decisions rendered by ECHR, both before and after the decision is rendered. Press releases generally contribute to the publicity and transparency of decision-making processes. Due to their comprehensible language, readers do not have to possess expert legal knowledge to follow the information. As press releases contain references about cases and publication of full-version judgements and decisions, anyone may inspect the original version and deepen his or her own knowledge about relevant case-law. The press releases provide recipients with brief but needed information about the case. ECHR’s press releases may be followed on Twitter, through a mailing list or by RSS feeds.\(^{31}\) RSS feeds are quite user friendly, as subscribers can choose country-specific feeds relating to their countries of origin or other parties to the Convention they desire to follow.

ECHR tends to be quite transparent about the proceedings and other activity. According to article 40 of the Convention, all deposited documents are publicly accessible, unless the president of ECHR states otherwise. The Convention and ECHR’s practice contribute to the transparency of the decision-making process. On the other hand, ECHR publishes its decisions only in English or French, therefore insufficient knowledge of those languages may discourage both judges and other professional as well as lay public from any further study of ECHR’s decisions.

ECHR mainly communicates with the public through a website, which is available in English and French mode. The website provides links to the press releases, statistical data, advices for applicants and detailed information about the court or its proceedings. The Registry of the ECHR publishes materials and guides in case-law to enhance the comprehension of ECHR’s practise of law. Furthermore, ECHR informs about its study materials on Twitter, where the latest publications, information about a new case-law or other documents are published also in different languages.

\(^{31}\) Available at http://www.echr.coe.int/Pages/home.aspx?p=press&c=\#n1347882722901_pointer [cited 2017-05-21].
ECHR particularly honors the obligation of public hearings, having them streamed on the Internet via webcasts. When a person cannot travel to Strasbourg to be personally present in a specific hearing, there is the possibility to watch its video recording. The ECHR’s practice of broadcasting a video from public hearing across the Internet is a good example how courts may use specific tool of information and communication technology to promote publicity of court’s hearing and its decision to the public. While watching webcasts in cyberspace, no boundaries apply for recipients, except their insufficient knowledge of English or French.

**III.2 COURT OF JUSTICE OF THE EUROPEAN UNION**

CJEU ensures the uniform interpretation of Union law “as it must be or ought to have been understood and applied from time of its coming into force”. The manner of communicating decisions of CJEU and a favourable level of openness including transparency is thus crucial for good interpretation, application and effective enforcement of Union law.

The demand for openness and publicity applies for judges and advocates-general assisting the Court of Justice. Pursuant to article 252 TFEU the advocate-general, acting with complete impartiality and independence, makes reasoned submissions on cases which require his involvement, in open court.

CJEU informs thoroughly about all its decisions through a link on its website. CJEU’s website provides additionally links to press releases, schedule, advises on the method of citing its case law or national and international case law. Search form of CJEU case law is available in all EU official languages. Very useful is the possibility to use own language when typing down selected note of criteria, i.e. the referential text to look up needed case law. The website provides for another important source of Union law - the Digest of the case law (Répertoire de jurisprudence), a systematic collection of relevant judgements and orders of the Court of Justice, the General Court and the Civil Service Tribunal, from the very beginning of their ruling activities in EU. Digest of the case law brings summary of relevant decisions relating to specific areas of EU law and therefore is quite important in the recognition and application of Union law. However, the impact could be more significant, if the Digest of the case law was accessible in more languages than in French only. The same applies to the Annotation of judgements (Notes de doctrines), i.e. the opinions by legal commentators relating to the judgements delivered by the CJEU. Although both the Digest of the case law and the Annotation of judgements are mainly used by legal professionals focused on EU law who might be mostly fluent in French,

---

translation to more official languages would contribute to better insight in Union law, at least within wider public.

According to the Rules of Procedure of the Court of Justice and the General Court, reports of cases are published in all official languages of EU. They inform about the original language of the proceedings and language spoken by the advocate-general which enables comparison of the original language version with the other official language versions. Reports contain CJEU’s decisions accompanied by respective opinions of the advocate-general where those are given. Some decisions\(^\text{33}\) are not published in the reports, unless it is decided otherwise, and, exceptionally, the Chambers of three or five judges may decide not to publish their preliminary ruling in the reports.

CJEU has a press service with an account on Twitter in English and French. Tweets inform about the latest activity of the Grand Chamber, about current opinions of advocates-general or schedule of hearings. The Court of Justice also regularly publishes educative videos about its activities. Each tweet provides a link to the relevant press release or decision. Tweets facilitate circulation of quick and apt information about ongoing activities; however, their considerable part is available only in French. Another disadvantage is that CJEU does not inform about all its decisions. Furthermore, the form of tweet may be sometimes misleading, if part of relevant information is omitted. This particular shortcoming is typical for all forms of brief information on social media.

In conclusion, the publicity of judgements and advocates-general opinions in all official languages of EU contributes to better level of transparency of the decision-making process. Press releases and use of RSS feeds and Twitter enhance the level of openness, but in comparison to ECHR the use of modern media by CJEU is rather limited, without any webcasts. On the other hand, CJEU seems open towards media professionals, allowing them to contact Press and Information Unit for explanation on legal theory and questions of law addressed in the decisions. Besides, Press and Information Unit organises meetings with judges and advocates-general; each CJEU’s language section has staff from the Unit responsible for organisation of the meetings and the questions from media towards CJEU’s judges.

\(^{33}\) Judgements of the General Court ruled by a single judge and orders with a judicial determination.
III.3 GERMANY

It is generally accepted in Germany that all courts have a duty to publish their significant decisions. These decisions are made available to the public, although in an anonymized form – excluding personal data of the persons involved. That allows for broad case-law databases, of which some are accessible free of charge (e. g. dejure.org). Since German courts follow the Central European tradition of written judgments which contain thorough reasoning, the informative value of publishing the judgment itself is great. However, for a non-lawyer, whether it be a journalist or a member of the public, an extensive and thorough legal argument may pose a hindrance in understanding how the court in fact decided.

German Courts tend to be generally conservative in their approach to direct communication with the media and the public. They normally do not have a professional press secretary. Each court appoints a judge who serves as spokesperson; he or she is responsible for issuing press announcements and communicating with the media. It is established practice that upon issuing a significant judgment, the court will make available a press announcement, briefly explaining the main principles of the judgment. These announcements are usually published on the court’s website. They regularly include a brief summation of the facts of the case, the legal reasoning of the court and an information about recourses which may be taken by the parties. The press releases usually use rather factual as well as concise language; occasionally, one may encounter a “catchy” headline, such as: “Does a psychologist need to have studied psychology?”.

High courts in Germany also have an established practice of including normative sentences (Leitsätze) in their judgments, which summarize the decision’s core conclusion. These sentences are created by judges who ruled in the respective case. The federal courts usually point out the decisions with normative sentences (Leitsatzentscheidungen) on their website’s main page. While the Federal Administrative Court often does not add further commentary, the Federal Social Court almost always publishes a press release as well. The Federal Court of Justice, on the other hand, does not usually actively draw the public’s attention to its significant judgments and publishes them amongst others in its database of decisions.

Courts in Germany usually do not communicate with the public beyond the means described above. Judges in Germany do not generally give interviews related to specific cases. As for social media presence, the only German court which has a Twitter account is the Federal Court of Justice. The account used to be very active and between March 2009 and October 2016 it shared

34 Judgment of the Supreme Administrative Court of Germany, BVerwG 6 C.96.
around 10,900 tweets, usually announcing a significant judgment. However, since November 2016 the account has ceased to tweet in an apparent, yet officially unannounced change of policy. Thus, there is no active social media account of a German court at this time.

III.4 FRANCE

Judgments of both Cour de Cassation and Conseil d’État are relatively short and always begin with the same introductory phrase. Decisions refer very briefly to the facts of the case, with no past judgments citation. In plenary cases, names of the judges in panel are stated, while in chamber judgments only the president of the chamber is named. Judge rapporteur is not stated but dissenting opinions are published. Cour de Cassation’s mode of application of law is syllogistic, mechanical and deductive. One of the most striking things is that the reasoning refers only to the legislation, other reasons for justification are not given.

On the contrary, Cour de Cassation’s website is user-friendly and informative. It contains materials about structure and activity of the court, names of the judges and photos of the president of the court and its chambers, however it does not contain any biographical information. A great benefit of the website is a possibility to use an individual password to follow the progress of a case by its parties.

Cour de Cassation communicates its judgements and other important events through press releases, RSS feed and Twitter. It has a press service and translates the most important judgements into English, Spanish, Arabic, Chinese, Japanese and Russian. It also issues case reports, the so called “notes explicatives”. Its case-law may be searched through the website legifrance.gouv.fr. Cour de Cassation also publishes a compilation of civil, labour and criminal law judgements. The decisions of French lower courts are accessible through the website legifrance.gouv.fr as well, however in a relatively small number.

Cour de Cassation is currently undergoing a reform. It has been proposed that the court should enrich justification of its decisions, cite previous case-law and the case-law of CJ and the European Court of Human Rights. Furthermore, opinions of advocates general should be published to enhance the transparency of the judicial process.

---

37 See the Regulation No. 2002-1064 of 7 August 2002 concerning the diffusion of law on the Internet.
38 There are only two decisions for the year 2016 and none from the years 2015 and 2017.
39 Recommendations of the Commission on the reflection of the reform, April 2017, see https://www.courdecassation.fr/cour_cassation_1/reforme_cour_7109/reflexion_reforme_8182/liste_propositions_36786.html
While it is also possible to find its judgments through the general website, Conseil d’État has its own web database called ArianeWeb, which contains over 230,000 decisions, the most important judgments since 1873 and the majority of all decisions since 1999. Collection of the most important judgments is called “Recueil Lebon”. On ArianeWeb, Conseil d’État publishes an analysis of the public rapporteurs. Conseil d’État communicates its judgments through press-releases and press-service. It does not use Twitter or Facebook account, just RSS feed.

French judges in general do not tend to give interviews related to specific cases. Interviews given by judges usually concern judicial activity in general and the role of a judge. Cour de Cassation publishes on its website speeches and interviews given by the president of the court and its chamber presidents.

In conclusion, the French judiciary is, on the one hand, rather non-transparent, as the names of the judges sitting in a panel nor of the judge rapporteur are disclosed; no dissenting opinion is published and the reasoning is short and syllogistic. On the other hand, publicity of its decisions is quite significant as supreme courts, Cour de Cassation and Conseil d’État respectively, make their decisions available on the Internet. Furthermore, both institutions communicate with the public through press releases, spokespersons and, in the case of Cour de cassation, also via Twitter.

III.5 IRELAND

Opinions of the Supreme Court of Ireland are written by one judge of the majority; however, any judge in any case may deliver a separate dissenting opinion, which is then published together with the ruling one. The only exception is judicial review of legislation is being carried out – then, no dissenting opinion shall be pronounced.

Website of the Supreme Court of Ireland has a simple form to search for the court’s judgements. Each judgement includes information on concurring and dissenting opinions. Majority of judgements are written in a very intelligible language. Each judge is speaking for himself or herself, presenting his or her personal point of view. Most of the judgements contain introduction to the facts of the case, history of the proceedings and the conclusion. However, a short and distinctive clause of the issue of law is normally missing which is a disadvantage. Such approach does not contribute to clear outcome of judgements for future disputes and leaves the decision open for future interpretation.

The Supreme Court’s website provides a list of its important judgements. This inventory consists of judgements from different legal branches since 1934. However, a present disclaimer warns that the list of selected case law is arbitrary and not intended to be comprehensive. The question then arises, what is the key for selection of relevant Irish case law. The process of selection is significantly influenced by the Law Reporting Council of Ireland, which is a joint venture of judiciary and other legal professionals.

Compared to other courts, the Supreme Court of Ireland’s website has poor content. Digest of the case law is missing as well as any link to Press Service. The Supreme Court of Ireland does not communicate with public through any social platforms such as Twitter or Facebook. Its judges usually do not individually communicate with the public. Information about the court system in general is provided by The Court Service of Ireland, which has its own website where judgements of all Irish courts are published.

To conclude, the means of communicating judicial decisions by the Supreme Court of Ireland are quite limited. Notwithstanding intelligible language of its judgements, the Supreme Court of Ireland does not communicate its decision via social media platforms.

III.6 THE CZECH REPUBLIC

The approach of Czech judiciary to communication with the public significantly differs amongst different courts. When the decision is pronounced by Czech courts during a hearing, brief reasoning is given by presiding judge to the public present. However, in some cases no hearing is held and the parties (and the public), at the point of formal announcement, only learn the result and not its reasons. In cases where the ruling is widely expected by the public, that often creates an atmosphere of nervousness and speculations which can quite damage reputation of the judiciary.

Recently, the Supreme Court ordered a new decision of the appellate court in a case in which an advisor to a former prime minister had been convicted of corruption charges. This decision became immediately known to the press as the convicted person was released from prison. However, the Supreme Court’s spokesperson refused to indicate in any way what the judgment’s reasoning might be, announcing that the written judgment would be published within thirty days. Wild speculations among journalists as well as the public followed as to the possible, even illicit reasons for which the judges might rule in favour of the accused. After being subjected to enormous public pressure, the court issued a press release explaining the main reasoning of its decision (based on which the accused would very likely be convicted again.
in the continuing proceedings). However, the Supreme Court insisted that it would not bow to public pressure and would continue the practice of firstly writing the full judgment and delivering it to the parties and only subsequently informing the public.\(^{41}\)

Some of the other courts, especially the Supreme Administrative Court, choose a different approach. Firstly, the court usually does not issue a ruling until it can immediately release the full written judgment. Secondly, a press release is issued right after the decision, explaining the main points of the judgment. While it is understandable that the written judgment must at times be subject to finishing touches, the court must obviously always be aware of the basic reasons of the decision and can share those with the public in a brief press statement. Nevertheless, this sensible approach is rarely taken by any other Czech court.

All courts in the Czech Republic appoint a spokesperson. It is usually one of the judges at lower courts who communicate with the media only occasionally. Higher courts and courts dealing regularly with cases which are of interest to the public often hire a professional press secretary who is not a judge and sometimes not even a lawyer. Judges rarely give interviews to the press regarding recently decided cases; at times, however, involuntary interviews are recorded when a judge is ambushed by a journalist. Czech courts lack social media presence with the sole exception of the Constitutional Court, which has a Facebook account. The account draws followers’ attention to the latest press releases regarding significant decisions, sometimes with a witty commentary.

The Judiciary Union of Czech Republic, a professional association of Czech judges, supports the general idea of providing media with information about Czech judiciary and justice, but it does not declare anything particular regarding spokesperson.\(^ {42}\) It is also currently considering the issue of judges’ activity on social media and on the Internet in general.\(^ {43}\)

Interestingly, when a higher court decides in criminal cases outside of public hearing, the decision does not include names of all judges on the deciding panel. The presiding judge is signed and sometimes the judge rapporteur's name is also included; however, names of the full panel are known to the parties only. Therefore, public and media often interpret the decision as having been primarily authored by the presiding judge even though he or she may well have been outvoted by other judges on the panel (dissenting opinions are not issued at Czech criminal courts). It follows that the presiding judge is usually targeted by the media as being responsible for explaining the decision and even advocating for it.

---


\(^{43}\) Interview with the President of the Judiciary Union, Daniela Zemanová. *Soudce*. 2017, No. 1, p.7.
Only the supreme courts publish all their decisions (anonymized) on their respective websites,\(^{44}\) once they have been delivered to the parties; judgments of lower courts are not regularly published (with the exception of decisions in administrative matters). However, any court is obliged to publish any judgment upon a freedom-of-information request. As the Constitutional Court ruled in 2010, the constitutional guarantee of freedom of information requires courts to make available any decision which the public might require, even if it is still subject to overturning by a higher court.\(^{45}\)

There is a significant difference between the approach of the Supreme Administrative Court and the Supreme Court to writing their judgments. With a certain degree of generalization, one might conclude that while the Supreme Administrative Court usually gives quite thorough reasoning, citing domestic as well as international case law, the Supreme Court often limits its decisions to more simplistic statements of what the law is. However, it has been apparent in recent years that many of the Supreme Court’s chambers slowly move towards more thorough arguments, which might be more persuading to the professional public.

Each of the supreme courts publishes its selected decisions and occasionally even important decisions of lower courts in case reports. These always include normative sentences which should summarize the decision’s *ratio decidendi*. However, unlike in Germany, these summations are formulated only after the decision had been written. These decisions are generally, although informally, respected as binding case law. There are also numerous private databases of case law aimed at the professional public; these databases work with the decisions which are published on the supreme courts’ websites even when they have not been officially published in case reports.

**III.7 Analysis**

According to the survey conducted by the European Network for Councils for the Judiciary in 2011 among European judges, it was very unusual for courts to have an official Facebook or Twitter account or even to have an experience with social media at all.\(^{46}\) However, in our comparative analysis a number of courts turned out to use Twitter to inform about public hearings or recently published judgements. Nowadays, most top European courts such as ECHR, CJEU, German Federal Court of Justice and French *Cour de Cassation*, have their own account on Twitter. Czech Constitutional Court prefers on the other hand Facebook. Only the Supreme Court

\(^{44}\) See [www.nssoud.cz](http://www.nssoud.cz) and [www.nsoud.cz](http://www.nsoud.cz).


of Ireland, French *Conseil d’Etat* and Czech supreme courts do not use either Facebook or Twitter.

All mentioned judicial institutions have their own website with general information about the respective institution and its proceedings. The website of ECHR has the richest content. ECHR is also the only court which has adopted the practise of live broadcasting of public hearings through webcasts.\(^{47}\) Webcasts enable the public to follow public hearing before the court online, without the need to sit in the court room. Webcasts are therefore a very good example of effective use of cyberspace with the aim of promoting publicity and transparency of proceedings, especially when deposited documents are publicly accessible as well. On the other hand, in most EU Member states’ courts live broadcasting of court sessions is not allowed, but there are notable exceptions: it is possible before the UK Supreme Court or Italian courts, if the judge and the parties of the case agree, or in civil proceedings in Norway.

In most EU Member states, it is deemed inappropriate for a judge to give interviews to the media regarding a specific case, even after delivering the final ruling. The court's spokesman is often the only person entitled to inform the public about cases through the media.\(^{48}\) Having a press service or at least a spokesman is not a rarity but a necessity for all the courts. Nevertheless, some press services are more active than others. CJEU’s press service expressly offers organised meetings with judges where media may ask a legal question addressed in the court’s decision. On the other hand, spokespersons of Czech lower courts are usually judges who suffer considerable lack of time and therefore avoid any unnecessary communication with the media or the public.

Surprisingly, there are still judges who argue that giving reasons for judicial decisions is mostly unnecessary, as courts are primarily expected to hand down a ruling, not to provide the public with elaborate explanations. For illustration, the vice-president of Czech Supreme Court noted that “*If European courts stopped giving reasons for their decisions with only a few exceptions, the problem of speedy process in Europe would be solved.*”\(^{49}\) In the light of relevant ECHR’s case law, this opinion appears untenable, though. Proper reasoning of the decision should serve not only to the parties of the proceedings. It shall create a better future judiciary and contribute to a just society itself.

All top courts have online databases of their decisions. They generally publish various types of decisions, including dissenting opinions. CJEU is a leader in online publication of decisions. It puts emphasis on greater publicity of its decisions through a well-organized internet database,

---


\(^{49}\) Interview with Roman Fiala, 1 November 2016. Available at: [www.rozhlas.cz](http://www.rozhlas.cz).
press-releases and social media. However, CJEU still lags behind in transparency, as it does not publish dissenting opinions, judgments are quite short and syllogistic. Moreover, as the case Breyer vs. Commission has recently shown, the issue of access to documents before CJEU may be problematic. Similar observation applies to French judiciary, where both supreme courts do not publish dissenting opinions and only briefly explain their decisions.

Our comparative analysis has shown that all European courts are moving towards greater transparency. Even the French Cour de cassation, which is according to Lasser a non-transparent institution, is considering a revision of its concept of formulating reasons of its decisions. Surprisingly, in the field of openness, all the courts mentioned above go beyond the requirements of the case-law of ECHR or CJEU. As judges and courts are playing more significant role in society today, their will to enhance communication with the public through publication of judgments, press-releases and social media posts is understandable. The public consequently wants to have greater control over judiciary through the ability to see what is going on in the judicial process. The increase of judicial powers might lead to deeper curiosity related to the judges’ identity and background. In this aspect, the courts mentioned above differ. For example, the Czech Supreme Administrative Court publishes both photos and biographies of its judges, some courts publish only the names of judges and others do not present their judges to the public at all.

IV. CONCLUSIONS AND RECOMMENDATIONS

Our empirical findings show that publicity and transparency do not correlate. Publicity without transparency contributes to a deity-like perception of judiciary where judges decide cases from an inaccessible divine position. A strong example of this approach is the Czech Supreme Court which significantly lags in the field of transparency. An illustration of the god-like picture of the court is the claim of its vice-president, pronounced with a degree of hyperbole, that judges should be trusted to decide cases based on general principles of justice as expressed in the Ten Commandments.50

Although publicity of judicial decisions issued in processes which lack transparency at least raises public awareness of case law, transparency without publicity defeats its own purpose. Even when court documents are broadly accessible, the public has a difficult time perceiving what information is significant and how to interpret it. That may result in misrepresentations capable of damaging the relationship between courts and the public. Therefore, judicial

50 Roman Fiala's key note speech at the Olomouc conference Olomoucké právnické dny, 18 May 2017.
transparency should always come in hand with an adequate strategy for active communication with the public. Nonetheless, different states have different dispositions towards judges speaking to the media. In Germany, no one even thinks about asking judges directly, in Italy and Spain, it is considered as a professional transgression.

Some believe that courts can decide promptly and effectively only when they do not have to provide extensive reasoning to support their conclusions. In a world where authority is derived from persuasiveness, this approach deteriorates public trust in the judiciary. In its extreme form, it is also incompatible with the right to a fair trial, as interpreted by ECHR’s case law.

In conclusion, our proposal of common standards of judicial good-practice in the field of openness, might be as follows:

- It goes without saying that the proceedings must be open to the public and judgments shall be given in written form and subsequently published.
- Courts, particularly high courts developing case law, should have a professional spokesperson who would be the point of contact between the public and judges.
- It is very useful to communicate important judgments to the public through press releases. Courts are then able to ensure a certain degree of control about the way in which their decision is presented in the media to the public.
- In contrast to outcomes of our empirical findings, we believe that a judge should have a right (not an obligation) to communicate with media and the public. Explanation of the decision to the public enhances legal awareness and public trust towards judiciary and improves the quality of judicial decisions.
- Judges and spokespersons shall explain the decisions, not try to defend them, as there is no place for further justification of the result. What is not in the decision, should not be communicated to the media. The judge must keep a professional distance.
- Media presentation and media communication should be part of the judicial education.
- Case law should be published to the greatest possible extent via public and well-arranged web databases. Decisions of lower courts should not be generally excluded.
- Social media are useful for brisk information about newly rendered judgments but they must be used conservatively. There is a great risk that inappropriate social media coverage could undermine the public picture of the court.
- High courts should provide short information on their own judges' professional background and expertise. The manner of case allocation should be stated perfectly clearly.
**BIBLIOGRAPHY**

**Books and Articles**


**Case law**


Judgment of the Supreme Administrative Court of Germany, BVerwG 6 C.96.


**Soft law**


Council conclusions of 29th April 2011, 2011/C 127/01

Opinion No. 7 (2005) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers on "justice and society", paragraph 9.

Recommendations of the Commission on the reflection of the reform, April 2017, see [https://www.courdecassation.fr/cour_cassation_1/reforme_cour_7109/reflexion_reforme_8182/liste_propositions_36786.html](https://www.courdecassation.fr/cour_cassation_1/reforme_cour_7109/reflexion_reforme_8182/liste_propositions_36786.html)
