

## Procedural Justice Elements of Judicial Legitimacy and their Contemporary Challenges

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### Abstract

Low trust in courts has been recorded in many EU countries. According to the procedural justice paradigm, this phenomenon has negative repercussions for judicial legitimacy, since people who (or when they) distrust an authority tend also not to perceive this authority as legitimate (which, in turn, has consequences for their compliance and cooperation with this authority and its decisions). Legitimacy of judiciary, objectively conceived, has several elements, some of which are connected to procedural justice concerns. This article focuses on the latter. In the second part, moreover, the article addresses some of the possible challenges to the judicial procedural justice, drawing on sociological and socio-legal observations regarding legal institutions in the late modern world, where, for example, efficiency-oriented goals mix with justice- and other public good-oriented ones, often creating internal pressures that may impact on the legitimacy of the institution in question.

### Key words

Procedural justice; legitimacy; courts; effectiveness; judiciary; institutions

### Resumen

Numerosos países de la UE han registrado una baja confianza en los tribunales. Según el paradigma de la justicia procesal, este fenómeno tiene repercusiones negativas para la legitimidad judicial, ya que las personas que (o cuando) desconfían de una autoridad, también tienden a no percibir esta autoridad como legítima (lo que, a su vez, tiene consecuencias para su conformidad y cooperación con esta autoridad y sus decisiones). La legitimidad del poder judicial, concebida de forma objetiva, tiene diversos elementos, algunos de los cuales están relacionados con las preocupaciones de la justicia procesal. Este artículo se centra en estos elementos. En la segunda parte, además, el artículo aborda algunos de los posibles

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desafíos de la justicia de procesal, basándose en observaciones sociológicas y sociojurídicas relacionadas con las instituciones legales en el mundo moderno reciente, donde, por ejemplo, los objetivos orientados a la eficiencia se mezclan con objetivos orientados a la justicia y el bien público, creando, a menudo, presiones internas que pueden afectar a la legitimidad de la institución en cuestión.

**Palabras clave**

Justicia procesal; legitimidad; tribunales; efectividad; poder judicial; instituciones

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## 1. Introduction: Trust in the judiciary

According to the procedural justice paradigm, when people distrust an authority, they also tend not to perceive it as legitimate or justified (which, in turn, has consequences for their compliance and cooperation with this authority and its decisions). Procedural justice or procedural fairness comprises fairness of decision-making (being neutral, unbiased, providing people with the opportunity to have their voice heard) and the quality of interpersonal treatment (treating people fairly and respectfully in the proceedings). The latter of the two components has particularly been highlighted as the most important, central factor in determining people's satisfaction, their trust and the perceived legitimacy of the relevant authority (Tyler 2009, 2013). Low trust in courts has been recorded in many EU and other countries<sup>1</sup> and this undesirable phenomenon has therefore negative repercussions for the perceived judicial legitimacy, impacting on compliance, functioning of judiciary.

Public trust in judiciary is important in various ways. As emphasised by procedural justice studies, trust, first, affects compliance (Tyler 1990, 2006, 2009, Fagan 2008). Citizens who believe that institutions will, on average, prove to be "trustworthy, i.e. will be fair, competent and bring about desirable outcomes" (Levi cited in Letki 2006, p. 309) and therefore fulfil their obligations are significantly less likely to break the rules or cheat (Letki 2006, p. 309). A good image of an institution therefore affects citizens' (law-abiding) behaviour, as well-performing institutions are likely to elicit support, confidence and compliance from citizens (Lind and Tyler 1988).

Second, from the perspective of judges themselves, the public acceptance or trust in courts or good public opinion about their work is important for their self-image or self-esteem<sup>2</sup> and can impact their work efficiency. Self-esteem has been found to have a significant impact on the orientations and behaviour of judges; it "affects the process by which role expectations are translated into role orientations and role behaviour" (Gibson 1981, p. 123). External expectations by the public may of course be justified or not. When the process concludes with an acquittal of the defendant because of the lack of evidence, which the public perceives as ill-functioning of the court, the public unmet expectations and their chastisement of judges is clearly unjustified. However, when serious problems, such as increasing backlogs or misplacement of court files, are brought to public attention, this can more understandably tarnish the image of the whole profession in the eyes of the public and the media. While a good public opinion (and media image) of one's work is often stimulating, the negative opinion of others or disapprobation can negatively affect the motivation and performance of one's duties. Considering that "self-esteem can be thought of as a form of intrinsic motivation" and that judicial reputation "fosters esteem for the profession and for the individual judge, both self-

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<sup>1</sup> Although its reasons have not been so clearly presented. In fact, while many instruments at present measure public trust in various legal institutions, including courts (e.g. Eurobarometer, European Social Survey, various national opinion polls), most, however, use large-sample surveys to achieve this. The latter give a good, representative overall picture of what they are measuring; however, owing to the lack of in-depth, qualitative data to supplement it, they often fail to explain the reasons behind the observed phenomena. Speculations about underlying reasons for public (dis)trust in the legal and judicial system in post-communist, post-socialist or transitional states, in particular, often reveal a certain lack of insight on the part of those researching it from outside. To a large extent, this is due to the scarcity of readily available qualitative data that would fill in the gaps in this respect, exacerbated by researchers' linguistic limitations and lack of contextual knowledge of the society in question.

<sup>2</sup> Measuring the self-esteem of California judges, Gibson formulated one item (out of nine) around their perceptions of the respect from others. The question measuring this asked judges to reply to the following: "How confident do you feel that some day the people you know will look up to you and respect you?" (Gibson 1981, p. 113). Based on the responses to all items, two indices were created through factor analysis; the first of which indicated the degree of importance ascribed to the expectations of external role alters (including also the public and the media), while the second indicated the importance of expectations of internal role alters (fellow judges, legal organisations). Gibson observed some tendency towards rating both types of expectations, external and internal, similarly ( $r = .35$ ).

esteem and esteem in the eyes of others” (Garoupa and Ginsburg 2009, p. 229), bad reputation can conversely reduce esteem, including self-esteem, and therefore reduce intrinsic motivation. In the case of backlogs, the decreased work motivation, may present a further obstacle in the decreasing of backlogs – when less, rather than more, effort is put into getting cases closed (Peršak 2005).

Unfavourable public opinion may, third, also stimulate political leaders (who are electorally dependent on people’s views) to put pressure on the courts, which may endanger judicial independence through becoming exposed to pressures from the other two branches of the government, which are more sensitive to the public opinion.

Fourth, courts are just a species of public institutions and as such the importance of trust for public institutions in general is applicable to them as well. From the viewpoint of the society (and democracy, in particular), at least a minimum of trust in public institutions is required to enable their functioning. Trust, it is further argued, serves as a “creator of collective power” (Mishler and Rose 1997, p. 418, citing Gamson) and as such enables governments to function properly without having to seek approval from citizens for every decision or resort to coercion. In this respect it is, of course, particularly important for democratic governments, as they cannot rely on coercion at all if they want to maintain the image of democratic representativeness (Mishler and Rose 1997).

At the level of EU, trust in judiciary (and in Member States in general) is, fifth, crucial also for the functioning of legal instruments based on the principle of so-called mutual recognition that is being progressively used in the area of judicial cooperation in criminal matters. The notion of mutual recognition of judicial decisions in criminal matters has been based on the assumption that there exist mutual trust among EU Member States and that therefore an executing Member State would not have any problems with a rather automatic executing of a judgment that was passed in another Member State. Yet, as some observe (e.g. Vermeulen 2014), this assumption was perhaps too bold, too fictitious to enable smooth sailing (or provide justification for the existence) of mutual recognition-based instruments. Mutual trust has now been named as one of the three priority areas that EU Justice Policy is planning to focus upon in the future (Reding 2014).

The aim of this article is to look specifically at the procedural justice elements of judicial legitimacy, even though legitimacy of judiciary, objectively or normatively construed, goes beyond mere procedural concerns. In view of the importance of trust in the procedural justice paradigm of judicial legitimacy, we shall first look at the factors that can influence trust in the judiciary. Next, we inspect some of the elements of judicial legitimacy that lie beyond procedural justice or trust-based model of legitimacy, before focussing (in section 2) on those that are closely linked to procedural justice, namely: access to justice, perception of independence and of impartiality, and judicial communication. In the second part (section 3), the article addresses some of the possible challenges to the judicial procedural justice, drawing on sociological and socio-legal observations regarding legal institutions in the late modern society. The challenges discussed are linked to the (i) bureaucratisation of judiciary, (ii) efficiency mandates, which can clash with justice- and other public good-oriented goals, and (iii) political correctness. These challenges, it will be argued, can create internal pressures that may impact on the legitimacy of the institution in question.

While the importance and impact of procedural justice on the legitimacy of an authority could be assessed in relation to any number of reference points, significant agents or audiences, we will be here interested in the public as a whole, undivided into different segments. These various segments acquire information on procedural justice through different channels. For court users (e.g. victims, defendants, plaintiffs, attorneys), the assessment of procedural justice is often linked to their own experience in court proceedings. For the general public,

information on procedural justice tends to be mediated through channels, such as the media, friends and so forth. The involvement of judiciary in public relations, political parties campaigning for or against courts, or media supporting or criticizing courts for various reasons can be thus more important for this group than for court users. It is precisely for this reason that all channels or possibilities of enhancing procedural justice and trust in courts should be taken into account, and I am here interested in all of them – those that influence the public via media and others as well as those that directly influence court users. No preference or priority among various elements of procedural justice will therefore be made nor will we focus on any specific group or audience, such as court users. Similarly to surveys, such as Eurobarometer, asking people in general to assess their trust in courts, we are interested in (procedural justice concerns that affect) the unsegmented public or any part of the public.

### 1.1. Factors of trust

What affects trust can be attributed to several factors. Tyler (2006) has asserted that fairness of the process or procedural justice is the most crucial factor in establishing trust; fair and respectful processes are said to be the best ways for attaining trust in justice and consequent institutional legitimacy. This thesis has been confirmed in several studies, most of which were carried out in the police context (Tyler 1990, 2003, Tyler and Wakslak 2004, Reisig 2007, Hough *et al.* 2010). The length of proceedings matters as well. In fact, as captured in the old adage, justice delayed can be considered as justice denied. A fair trial within a reasonable time is not only a fundamental right but also provides a basis for one's assessment of the courts' functioning.

Fairness and expeditiousness in the sense of the reasonable length of trial or of any court proceedings are, however, only two factors commonly flagged as important. Other non-exhaustive criteria, according to which people form their views on the functioning or performance of courts, may include efficiency and effectiveness, communication with clients, transparency, judicial outcomes and so forth. Some people may be, for example, satisfied with the court performance only insofar the outcome (the judgment) is in line with their expectations or, if personally involved, is in their favour. They may be even inclined to interpret something as "fair" only insofar they are happy with the end result (Turner and Stets 2005).<sup>3</sup> Trust may, however, also be affected by other, extra-judicial criteria, such as personal traits (some people have more trusting personalities than others), media representations of judiciary,<sup>4</sup> one's general outlook on life, knowledge and other personal experiences.<sup>5</sup> Trust can also be affected by the legal culture, or rather the degree of normative integration (integration of norms) within a society. Igličar (2012) thus believes that legal culture or degree of normative integration is reflected in people's reported degree of trust in courts, as the trust in courts is connected to the values that are prevailing in a certain global society.<sup>6</sup>

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<sup>3</sup> The "fairness" here has more to do with the perceived fairness of decision outcomes, rather than the fairness of decision-making processes though (Colquitt *et al.* 2012). On the topic of whether it is the process or the outcome that matters more, some meta-analyses suggest that procedural and distributive justice judgments are moderately correlated and that the one becomes more important when the ratings on the other are low (MacCoun 2005). Since we all have a need to reduce uncertainty about future, we seek information to do so either from the process or outcome. Both types of information can reduce our uncertainty about others' motives and can therefore substitute each other (MacCoun 2005, van den Bos and Lind 2002).

<sup>4</sup> Opinions about the courts are often received and moderated through the media (Dimitrijević 2006). In today's environment this means that not only "regular" media but digital media (social networking sites, Twitter, forum discussions and so forth) as well represent an important source of information – and not only for those who participate but also for others who merely visit the site.

<sup>5</sup> On the other hand, it should be noted that the general public is sometimes not very well informed about the organisation of the judiciary, which also influences their perceptions about the judiciary.

<sup>6</sup> When trust has more to do with internalised values or beliefs that courts ought to be trusted (and an expectation that they will do what they are supposed to do) than with actual experience with courts,

Additionally, economic factors may play an important role as well. While it is well known that economic insecurities affect trust in political and economic institutions (Jacobs 2007, Wang *et al.* 2013); the link between the economic situation and social trust in other state actors, such as the judiciary, is perhaps less apparent. However, even if the courts are not directly blamed for economic recession, the fear and insecurities the economic hardship generates clearly surface in discussions about judiciary.<sup>7</sup> It is not only economic insecurities, however, that affect public trust in judiciary (and administration of justice in general) but general public perceptions of safety and security. The EU-funded JUSTIS project even starts from the assumption that "the effectiveness of justice systems depends significantly on the legitimacy that they command from the public, and that the drivers of institutional legitimacy include public beliefs about the quality of justice and public perceptions of safety and security" (JUSTIS 2008).

### 1.2. Trust-independent legitimacy

Public acceptance or trust people may or may not experience vis-à-vis judiciary is, however, not all there is to the legitimacy of courts. First of all, as seen above not all factors affecting trust are directly related to the actual courts' performance and are therefore not necessarily equally worthy of consideration when deciding about actions to take in order to improve the judicial system. Furthermore, courts are in many senses different from public institutions that are dependent on popular support. While democratic government and political leaders are much higher on the dependence scale, the judiciary follows a different set of goals and values and therefore much less relies on public support.<sup>8</sup> Moreover, while the public perception of the courts as functioning well is of course important, what is more important is that they do, in fact, function well. In this light, it becomes particularly worrisome if the perception of the public and people's trust is based on actual non-functioning of the justice system, which may relate, for example, to the quality or independence of the justice system.

The question of legitimacy of the judiciary should therefore primarily be defined on normative or moral grounds, i.e. as relating to a morally justified functioning as well as output of a justice system (Peršak 2014). This normative conception of legitimacy (as opposed to more external, empirically-measured, public opinion-based one) derives the content of legitimacy from the internal characteristics of the object studied (in our case, the judiciary). Assessing such legitimacy of judiciary therefore proceeds from the viewpoint of legal standards, rule of law requirements and established substantive criteria that judiciary is supposed to meet, follow or implement. The public has a vested interest in ensuring that the justice system delivers judgments and decisions that are independent of outside pressures, achieve a certain quality (i.e. are legally correct), are delivered in an efficient

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however, the trust thus conceived seems to be rather identification-based or affect-based trust (Colquitt *et al.* 2012). The latter is in psychology contrasted with knowledge- or cognition-based trust, which is based on our past experiences and "reflects a confidence rooted in someone's track record and reputation for dependability, reliability, and professionalism" (Colquitt *et al.* 2012, p. 2).

<sup>7</sup> This was clearly seen in a study, carried out in 2009, which analysed the forum discussions, posted on the Slovene national radio and TV (RTV SLO) website in February 2009 (22 online forums, addressing the topic of judiciary). In the aftermath of economic challenges, many criticisms were then increasingly being directed towards the public sector – the main resentment being that the latter is funded from state budget (i.e. from "our", tax-payers' pockets) and is thus economically secure (unlike the rest of "us"). With judiciary being part of the public sector, the negative attitudes towards judges were, at least to some extent, linked to the financial or economic difficulties of taxpayers (Peršak 2011).

<sup>8</sup> The case may be different, for example, in US states, which know the so-called judicial retention elections, where a judge may be removed from office if the majority of voters cast their vote against retention. On the other hand, it can be argued that while courts may not be as directly dependent on people's views as Parliaments are, they still are structurally dependent on it. Since the judgments are usually (or in many countries) pronounced "in the name of the people", the idea of representation of people on the part of the judiciary is deeply embedded in the concept of administering justice and therefore linked to the issue of judicial legitimacy. (I am grateful to the two anonymous reviewers for pointing out these two caveats, respectively.)

manner (mainly as regards to the costs and timeliness) and respect fundamental rights as guaranteed in national constitutions, the EU and international documents.

The distinction between empirical and normative conceptions of legitimacy highlights also the question of who or what should the reference point be in terms of legitimation. What or who (which group) is the one whose opinion on whether some authority is legitimate or not matters? According to Bialer (1984 "consent" or vision of legitimacy matters. What is crucial, in his view, is the legitimacy of "the other centres of power" not citizens or people (Bialer 1984, p. 422). The "popular dimension of legitimisation" is not unimportant, but it is secondary to the "elite dimension" of legitimisation of power, which is central, and this is, according to Bialer, confirmed by the experience of Communist as well as democratic societies. Although Weber (1978) conceived legitimacy as a belief in the acceptability and binding nature of a political or social order, as an acceptance of this right to govern by the subordinated, he was in his concrete analyses of power phenomena concerned more with analysing the reactions of other centres of power than with estimating the public opinion, i.e. the opinion of subordinates and subjects (Bialer 1984). Habermas, on the other hand, brings out the popular dimension as crucial in the establishing of legitimacy. In his opinions, laws – even if formally enacted by political authority and enforced – still need popular legitimation in order to be recognised as valid (Habermas 1981, Deflem 2008). The public or people as the "audience" therefore count.

It is precisely this citizen-conferred legitimacy model that seems to inform most of the current psychological and criminological studies on procedural justice. The procedural justice model, which emphasises the importance of factors such as respect, neutrality and fairness for the allocation of trust and consequent bestowal of legitimacy on the authority, need not, however, be applicable to the lay citizen alone. As mentioned before, procedural justice and its importance for the legitimacy of an authority could be assessed in relation to any and all reference point(s) or significant agent(s), which is relevant in terms of their legitimation of, i.e. bestowing legitimacy upon, an authority or power-holder.<sup>9</sup>

## **2. Procedural justice elements of the legitimacy of judiciary**

In what follows we shall limit ourselves to only those legitimacy-building dimensions of judiciary that can be linked to procedural justice concerns, i.e. concerns of procedure and treatment, where people's views and opinions, their perception and trust play (and should play) a significant role in attributions of legitimacy to judiciary.

### *2.1. Access to justice*

Access to justice is a polyvalent concept with substantive as well as procedural dimensions.<sup>10</sup> It is a fundamental right, enshrined in Article 47 of the Charter of Fundamental Rights of the EU (hereafter: the Charter) (European Union 2000), which grants to everyone, whose rights and freedoms guaranteed by EU law are violated, the right to an effective remedy before a tribunal. It provides a right to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law, and to receiving legal aid, if lacking sufficient resources, to the extent necessary to ensure effective access to justice. Access to justice is also a human right, protected by Articles 6 and 13 of the European

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<sup>9</sup> For this reason, it makes sense to study not only audience perceptions but also power-holders' perceptions, their values and self-legitimation processes, and to study legitimacy as a relational, dialogic (Bottoms and Tankebe 2012) or triologic, poli-logic concept.

<sup>10</sup> Some describe its procedural element as "procedural access (having a fair hearing before a tribunal)", while the substantive element as "substantive justice (to receive a fair and just remedy for a violation of one's rights)" (GAATW 2014).



Convention on Human Rights (hereafter: ECHR) (Council of Europe 1950).<sup>11</sup> Article 6 of the ECHR also stipulates that the judgment shall be pronounced publicly but that the press and public may nevertheless be excluded from all or part of the trial in certain cases of interests (such as interests of morals, public order or national security, interests of juveniles, protection of private life), contains the presumption of innocence (para. 2) and lists minimum rights of a person charged with a criminal offence (para. 3). The Charter is, however, offering more extensive protection as it guarantees access to a "court" for any violation of a right under EU law, including the Charter itself (Praesidium of the European Convention 2007), while the ECHR in Art. 6 only guarantees the access to an "independent and impartial tribunal" concerning the determination of one's civil rights and obligations or of any criminal charge against him, and in Art. 13 only provides for an effective remedy "before a national authority" (not necessarily a court) against the violations of human rights and freedoms under the ECHR.

Access to justice, however, extends beyond mere existence of an independent tribunal one should have access to and a reasonable length of proceedings. It also encompasses concerns about people's awareness of their rights and the requirement that they be informed about the judicial body to which they could turn to in case of a violation of their rights. The fact that poor and marginalised groups are often highlighted as having problems with accessing justice, emphasises also another aspect of this right, namely the fact that access to justice is also very much connected to the issue of cost of justice. The latter is incidentally one of the top two concerns of EU citizens.<sup>12</sup> Having too high or disproportionate a court fee or court tax (the initial fee for instigating a proceeding) tends to impede poorer people from seeking justice through the court system. The rationale behind having a court fee is to dissuade trivial, unimportant complaints from reaching courts and from judges losing valuable time over trifles, as well as to fund the functioning of the justice system,<sup>13</sup> which can all be interpreted as reasonable goals. However, the fee should not be as high as to stop important, serious cases from reaching courts.

Moreover, groups with special needs should be taken into account. The CEPEJ (2010) study in this context emphasised the need to improve the so-called social efficiency of the access to justice such as the adaptation of proceedings to the needs of vulnerable people and victims. This can be done, for example, through hearing aids and designing special procedural rights (CEPEJ 2010, pp. 32-39).

The "procedural" aspect of access to justice comes out in particular with respect to concerns about the involvement of various actors in the judicial process. The party has to feel involved in the proceedings as a user, a citizen, as an active participant. This may go a long way to the democratisation of justice and generating trust in the judiciary. Being heard, having a voice in the matter, a voice that is actually heard, means granting the person proper "access" and represents a crucial element of the procedural justice paradigm, that is incredibly important also for the victims and their recovery. Listening to the injured party, not just seeing her as a bundle of potentially legally relevant information, shows her respect and prevents secondary victimisation she goes through when she has to describe in the courtroom what exactly happened, re-experiencing, reliving the original victimisation, while receiving inappropriate treatment from the criminal justice system (Maguire and Pointing 1988, Spalek 2006).

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<sup>11</sup> As interpreted by the European Court of Human Rights.

<sup>12</sup> According to a recent survey, most people in the 28 EU Member States consider judicial systems "to be bad" as regards costs (47-51%) and the length of proceedings (65-71%) (Eurobarometer 2013, p. 5).

<sup>13</sup> Also, it is understandable that while criminal law cases may be without tax, the same should not necessarily apply for civil law cases. As emphasised by CEPEJ (2010, p. 112), it may be considered unjust if the cost of disputes, based on private interests, was borne by taxpayers.

## 2.2. Perceived independence and perceived impartiality

The courts should not only be independent and impartial, but should also be seen from the outside as such. Impartial and independent justice should be seen to be done. It is one's perception of how things stand, whether a certain authority is trustworthy or not, that is important in one's formulation or experience of trust (or mistrust) towards the authority in question and, ultimately, for the citizen-conferral of legitimacy upon authority.

While there are various international laws and standards stipulating judicial independence and impartiality,<sup>14</sup> they focus on the normative value of the concept itself rather than on the perception or appearance thereof. Case law, on the other hand, shows ample awareness of the issue. In the case of *Findlay v. The United Kingdom* (App. No. 22107/93, 25 February 1997), the European Court of Human Rights (hereafter: the ECtHR) maintained that in order to establish whether a tribunal can be considered as independent, "regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence" (para. 76). The assessment whether an institution presents an appearance of independence is an objective test depending on the rules governing the organisation of the judiciary and the existence of safeguards protecting its independence. According to the ECtHR, the appearance of independence and impartiality is crucial in order to maintain confidence in the independence and impartiality of the court on the part of the public and, above all, within criminal proceedings, on the part of the accused.

The report on judicial ethics by the European Network of Councils for the Judiciary (hereafter: ENCJ) includes several principles, values and qualities judges should possess, one among which highlights also the importance of the perception of impartiality. It states that "[i]mpartiality and people's perception of impartiality are, with independence, essential to a fair trial" (ENCJ 2010, p. 4). The provisions particularly relating to the perception issues of impartiality stipulate that judges ought to adopt, both in the exercise of their functions and in their personal life, a conduct which sustains confidence in judicial impartiality and minimises the situations which might lead to a recusal, as well as recuse themselves from cases when they cannot judge the case in an impartial manner in the eyes of an objective observer. Further, a judge should ensure "that his private life does not affect the public image of the impartiality of his judicial work" (ENCJ 2010, p. 5).

That appearance or perception by the public is important for an "effective justice system" and its key components, namely "quality, independence and efficiency" (European Commission 2013, p. 3), has been recognised also by the European Commission, DG Justice, who annually publishes the EU Justice Scoreboard. This document presents information on the functioning of justice systems in Member

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<sup>14</sup> For example, Art. 6 of ECHR (right to fair trial), Art. 47 of the Charter (right to an effective remedy and to a fair trial) and Art. 14 of the International Covenant on Civil and Political Rights include the right to independent and impartial tribunal. Art. 21 of ECHR (criteria for office) refers again to independence and impartiality of judges and Art. 10 (freedom of expression) in para. 2 specifically to impartiality of judiciary (Council of Europe 1950, European Union 2000). Independent and impartial tribunal is stipulated also in Art. 10 of the Universal Declaration of Human Rights (United Nations 1948). Various international standards addressing judicial independence include New Delhi Minimum Standards on Judicial independence (1982), Montréal Universal Declaration on the Independence of Justice (1983), UN Basic Principles of Judicial Independence (1985), the Burgh House Principles of Judicial Independence in International Law (for the international judiciary), Tokyo Law Asia Principles, Council of Europe Statements on judicial independence (particularly the Recommendation of the Committee of Ministers to Member States on the independence, efficiency and role of judges, the Bangalore Principles of Judicial Conduct (2002), Mt. Scopus International Standards of Judicial Independence (2007-2012) (International Association of Judicial Independence and World Peace 2008) etc.

States and includes the perception of judicial independence (using data, collected by the World Economic Forum) as one of its indicators.<sup>15</sup>

### 2.3. Quality of communication

The importance of existence and quality of communication – communication within courts, between courts, between courts and other agencies (e.g. social work agencies) as well as communication towards parties, the public and the media – cannot be overemphasised. It starts with the internal communication and treatment of employees. According to the human resource management, the employee is a resource as well as a holder of resources (skills, knowledge, competencies, personal characteristics). In order for the employee to tap into his or her resources, which benefits the organisation-employer as well as the employee in the sense of increasing employee motivation, self-realisation, organisational effectiveness and work quality (Berkeley HR n.d., APA n.d., Maslow 1970), he or she should be helped to discover these resources and allowed to use them. Some go as far as to state that it is the manager's job to help his or her staff be the best they can be (Berkeley HR n.d.) This, however, requires training of the leading personnel and proper communication with employees. Developing leadership skills, individual development plans and sensitivity trainings have become commonplace in many international corporations or larger institutions. Part of these legitimacy-building processes is also the establishment of grievance procedures (Johnson *et al.*, 2006) or channels through which employees can – without fear of retaliation – express their complaints and procedures that address these complaints adequately, seriously and respectfully. This does not mean complaints or criticisms must all be confirmed. They may, indeed, be rejected. However, arguments have to be provided, showing that voiced concerns have been taken seriously, with respect.

Next, communication between courts as well as between the judiciary and other agencies (e.g. social workers) are similarly crucial. Courts are not homogeneous entities, led by one-dimensional thinking and acting, but rather “multiple rationalities” that are “pursuing divergent goals and following different logical patterns” (Eicher and Schedler 2012, p. 20). The same applies to the various agents that come before the court, be they individual parties to the case or agencies called to testify. Different goals and expectations undoubtedly pose challenges in terms of communication, yet sustained (respectful) communication is crucial in the attribution of legitimacy to judiciary on the part of those involved.

The lack of communication often adds to the image of a distant judge. This image could in itself bear a positive connotation in the sense of presenting judge as independent and impartial, and therefore disinterested (i.e. not having any particular personal interest in the decision of the case). However, it may also give the impression that judge is possibly detached from reality and non-transparent in his or her work. For example, unwillingness to provide any information about the court process (that may be merely the explanation that no further information can be given at this point, as the case is still pending) could be perceived unfavourably by the individual or the public, casting a shadow over the institution, which is then projected on its employees.

Judicial communication is important for contextualising the information presented and for shaping public opinion on various matters. The enhanced communication between courts and the public could certainly improve the trust in courts and their personnel. By opening channels of communication, the judiciary may be perceived less distant or aloof<sup>16</sup> and along the way improve people's knowledge about the

<sup>15</sup> See more in Peršak and Štrus (2014, p. 102-104) and European Commission (2013, 2014).

<sup>16</sup> A recent report by the Group of States against Corruption (GRECO) emphasised this aspect, concretely in relation to the prosecutors, suggesting a public communication strategy be adopted and relevant training provided to tackle the problem of poor communication of the prosecutors with the public. “The public and the media often do not understand the reasons underlying decisions taken by prosecutors in

functioning of the legal (particularly justice) system and convey a more accurate portrayal of the judges' work to the public. Proactive media approach, respectful communication and active engagement in public discussions on judicial matters add to a greater transparency and consequently to a higher trust in judiciary. According to Parmentier and Vervaeke (2011), one of the possible reasons for the sharp increase of the public confidence in the Belgian justice system (from 41 per cent in 2002 to 66 per cent in 2007) could lie in the efforts exhibited on the part of the Ministry of Justice to engage in more intensive communication with the public about concrete cases and the justice system in general. In France, the infamous Outreau case, which seriously tarnished the image of justice, led to the recognising of importance of communication and, in 2003, to the creation of "a judge specialised in communication" (magistrat délégué à la communication or MDC), whose function was to improve "the image and the credibility of judiciary", in each Court of Appeal (Jeuland and Sotiropoulou 2012, p. 132, 133). The ENCJ report on justice, society and media include several other useful recommendations, including the setting up of websites with freely accessible database of judgments and the development of strategies for the use of (each) social media (ENCJ 2012).

Additionally, and especially vis-à-vis the parties to the case, the communication is reflected in the providing of reasons for judgment, which is considered "a basic tenet of rationality in decision-making" (Roberts 2011, p. 215). If a judgment is well argued, this goes a long way to showing the respect towards the parties, and in particular towards the party who lost the case or the defendant who was convicted. It provides the meaning to the judgment and indicates that time was taken and careful consideration given to the facts of the case. Giving reasons for decisions can be seen as a "constituent feature of the quality of human relations" (Roberts 2011, p. 215) that respects the dignity of the other. As such, it is not surprising to be seen as a legal requirement. For example, in *Taxquet v Belgium* (App. No. 926/05, 16 November 2010), ECtHR found that a verdict that enables the accused to understand the reasons for his conviction is a requirement of a fair trial under Art. 6 of the ECHR (Council of Europe 1950).

Jeuland and Sotiropoulou (2012, p. 134) explain that the traditional structure of French judgments does not provide much room for the argument and explanation, so the judgments tend to be "very elliptical and brief". While this could be explained by pre-revolution times when judgments had no motivation at all as judges, representatives of the King, could not know what the King had thought of the case, the authors stress that this situation cannot remain as it is in current times and it is no longer tolerated by public opinion. To respond to this challenge, the French supreme courts (the Court of Cassation, the Council of State and the Constitutional Council) have published a special report, which explains the meaning of their judgments. However, this solution may not be the best, as this report (*communiqué*) then becomes a new source of law that adds to the confusion and difficulties in the interpretation of the judgment. Although the report serves as a substitute for the reasons of a judgment, it would be much better to improve the judgments themselves (Jeuland and Sotiropoulou 2012).

### **3. Late modernity and legal institutions: challenges to procedural justice**

Procedural justice imperatives can be, however, mediated through the context and situational determinants of the contemporary organisations, driven by e.g. efficiency mandates and other concerns, typical for (legal) organisations and late-modern practices of law. In other words, where efficiency-oriented goals mix with

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some cases, especially as regards case dismissals. This poor communication gives the prosecution service the image of a closed and non-transparent body, and observers agree that this perception is one of the main explanations for the negative public image of prosecutors" (GRECO 2012, p. 52). Furthermore, while acknowledging the importance of confidentiality of information, it stated that confidentiality has to be balanced with the requirements of transparency, which is crucial for confidence in the justice system.

justice- and other public-good-oriented ones, internal pressures and conflicts that impact on the legitimacy of the institution in question may arise. Further “filters” may be imposed by the specific characteristics of legal profession (Parsons 1954) and organisational culture. Some of the factors that should be taken into account will be addressed next.

### *3.1. Contemporary legal institutions: bureaucratisation (of judiciary)*

Bureaucratic organisations have always interested scholars of sociology of law. Weber (1978) saw the development of bureaucracies as a sign of rationalisation of society, as an advancement therefore, an evolution of society. Rule number one of bureaucratic institutions is, however, to maintain their own stability. The institution’s main goal, according to the neo-institutionalists, is to survive. Although courts are a somewhat different animal than a typical bureaucratic organisation, such as a government or municipal office, isomorphism across organisations explains how organisations have grown to become similar despite the differences in their evolution (DiMaggio and Powell 1983). This is in no small part due to economic imperatives, underlying the rationality of organisations and bureaucratic approaches. In Selznick’s (1948) view, organisations can be viewed as an economy or as an adaptive social structure. As an economy, “organization is a system of relationships which define the availability of scarce resources and which may be manipulated in terms of efficiency and effectiveness” (Selznick 1948, p. 25, 26).

Some courts have thus developed their own system of keeping track of the court files as they are being processed, enabling one to see also how many cases are allocated to a certain judge. Procedures have been developed to manage caseload and save time and so forth. Courts, like other modern juridical organisations, have to meander between delivering justice, responding to popular appeals for justice (which may be different from the first) and deal with the market dynamics that shape its functioning as well. Although their primary goal is to deliver justice, they, too, deal with administrative burdens and are thus not entirely immune to bureaucratisation or professionalisation. It is precisely these “organisational changes wrought in the courts as a response to growing caseloads” that some see as “bureaucratisation” of courts and of the judicial process (Fix Fierro 2003, p. 151). Case management, as one of such responses, has been interpreted as giving rise to new form of judicial activism and problematic by-products that may mean fewer procedural safeguards and less justice (Fix Fierro 2003, p. 152).

### *3.2. Efficiency mandates impacting on justice-oriented goals*

Modern organisations have to yield to the imperatives of efficiency, which presuppose making choices on the basis of a cost-benefit analysis. Such choices, although financially warranted, may sometimes be problematic on other grounds, e.g. ethics. Reports have revealed many international corporations that placed their unsafe product (such as drugs or cars, insufficiently tested or their impact insufficiently examined) on the market, knowing the risks to humans, but calculating that risk (including the risk of potential, successful lawsuits against them) against their profits from selling the (unsafe) product.<sup>17</sup> Where the profit was expected (after discounting potential losses – lawsuits from the sales numbers), the corporations went ahead with launching the product.

Habermas (1996) observed that law can be colonised by the system’s imperatives; the latter may be linked to efficiency, reduction of backlogs, reaching certain goals

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<sup>17</sup> Recently, news was released that the executives of GM (General Motors) car company had known for 13 years that their cars had a defective ignition switch, which would lead to deaths. However, on the cost-benefit analysis performed, they reached a decision that paying off the deceased’s relatives would be cheaper than having to install a \$10 part per car. They covered up their findings, did not recall any cars and let millions drive around with the defective part in their cars (Moore 2014). Similar has been uncovered earlier in the case of Ford Pinto (Leggett 1999).

in a certain amount of time or similar. In some countries, judges have targets, which designate the amount of work (processed cases) the judge has to work through or conclude per month (Peršak 2005). Such efficiency mandates may affect the quality of judicial decisions if the judge has too limited amount of time to spend on a case. Rushing through work that requires certain time and attention to detail carries a high risk of overlooking important facts that, in the case of a court judgment, may have a big impact on the lives of parties involved. Judges have less time to study the case, they argue less or worse, thereby making their judgment susceptible to successful appeal. These efficiency requirements can, however, also negatively impact the pre-decision stage. Cases have been observed when a judge, upon receiving a thick file, decided (before opening the file) that she would find (or at least try to find) some procedural issue (mistake or question to raise) in order for the case to be dismissed, closed or sent off to the appellate court, and thus effectively gotten rid of (for her not to run the danger of slowing her down in reaching her monthly targets). When reaching the targets becomes the first criterion in assessing the employee's productivity or work success, such temptations increase.

Efficiency imperatives also naturally lead to formulas or formulaic responses (to save time or even reduce the chances of complaint), which may have detrimental effect on the quality of communication (or even on the quality of a decision). Let us look at some examples where this can matter.

European citizens write to the European Commission with enquiries in tens of thousands every year.<sup>18</sup> Each of the citizens' letters needs to be replied to (which can perhaps in itself be a sign of procedural justice). The replies are not, however, written by secretaries, interns or assistants, but by qualified EC staff (often holding a master or even doctoral degree). In light of their workload, and EU official (or a public servant, at the national level), replying to the letter of an EU citizen, only has a very limited amount of time to do so. Many of such letters are, moreover, just channels to release frustration and do not justify an intervention by an authority. In this context, certain formulaic responses have been formed over time to deal with such complaints. While certainly expedient, it is possible that a formulaic response (possibly preceded by "formulaic", selective reading and categorising of complaints into predetermined categories) misses some important nuance or information, which distinguishes one letter from another.

The European Court of Human Rights has also recently introduced formulaic, laconic rejection letters (letters of inadmissibility) in order to save time. According to the new rules, a Single Judge examines the application (which may encompass several hundred pages of documentation) and when found inadmissible, rejects it with a simple one-sentence explanation that, in light of the submitted material and the Court's competence, "the Court found that the admissibility criteria set out in Articles 34 and 35 of the Convention have not been met". The Court does not elaborate on it further in the sense of giving any reasons, substantiating this decision on grounds of merit. It only adds that this decision is final, that no appeal is possible against it and that the file will be destroyed one year after the decision taken. While such a system has helped to reduce the number of pending cases, it raises concerns regarding the quality and transparency of judicial reasoning (Gerards 2014), considering no reasons are provided and therefore the decision cannot be examined on merit. Commenting on the case *María Cruz Achabal Puertas v Spain* (UN Doc CCPR/C/107/D/1945/2010, IHRL 3809 (UNHRC 2013)), the Human Rights Committee has, for example, found that the ECtHR has rejected as inadmissible and ill-founded a case that was in their own opinion well-founded.<sup>19</sup> While the lack of lengthy reasoning in admissibility decisions is understandable from

<sup>18</sup> In 2012, for example, the Europe Direct Contact Centre in Brussels received 97,440 enquiries from citizens and businesses (European Commission 2012, p. 11).

<sup>19</sup> See more in Gerards (2014, pp. 149-151).

the perspective of the efficiency of the Court, the lack of any reasoning, coupled with the lack of appropriate standards for an assessment whether a case is manifestly ill-founded, may present a serious concern for the requirement of a fair trial, reduces possibilities of internal and external control, and may reduce the sense of fairness to both parties and ultimately the authority and legitimacy of the Court decisions (Gerards 2014).

Another example involves replies by the funding bodies to those whose project proposals have been rejected for funding similarly. These replies also tend to adopt a formulaic structure. The more or less standard replies or feedback do not have expediency as its only goal, though. The aim of such replies is to provide a feedback (when legally required and catering to the procedural justice idea), while reducing the likelihood of a (successful) appeal against the decision taken. A successful appeal would attack something concrete (e.g. some fact) mentioned in the evaluation feedback as the basis for the proposal's rejection, hence anything too concrete, too factual, too absolute should be avoided or, if inserted in the feedback, double-checked. As the latter requires additional time, the first option is often preferred. While making feedback/rejection letters thus appeal-proof, they are not very helpful to those who have submitted the proposal and may consider re-submitting it at a later date. Having no concrete criticisms to consider, the candidate is left in the dark as to what exactly needs changing, which may reduce his or her chances for a successful re-submission.

While this may be an efficient way of handling certain matters, it can reduce the overall effectiveness of the system in the long run. Effectiveness, to be distinguished from efficiency, is about using the right tool to reach a desired goal. If a desired goal is justice done or just distribution of resources, the above-described system, albeit efficient, may be flawed. While efficiency may run counter to the mandates of justice, effectiveness has been recently highlighted as crucial for justice. According to the EU Justice Scoreboard, effectiveness and justice are inextricably linked: effective EU law is not possible without effective justice, effective justice, on the other hand, means quality, efficiency and independence of justice systems. Quality is therefore just as (if not more) important as efficiency for the "effectiveness", in the European Commission's view, of justice systems or legitimacy of judiciary, in general. This notwithstanding, it seems that efficiency is progressively welcomed as a criterion of some sort of quality in its own right, for it is something that is easily measured and in this sense seen as required in these times of a pronounced need to assess the functioning and productivity of justice systems (even at European level).<sup>20</sup>

### *3.3. Political correctness*

Organisations, moreover, adapt to times in which they operate. In the age of political correctness, the findings of procedural justice studies also run the risk of being taken into account too superficially. Procedural justice (its maxim of respectful treatment, in particular) would then run the risk of collapsing into PR or customer relations, where power-holders were trained and skilled in political correctness. They would apply soothing sentences to acknowledge the

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<sup>20</sup> Perhaps courts can here be likened to universities, which – despite their primary goal likewise not being profit or efficiency or anything that should first and foremost be measured through the cost-benefit analysis – progressively use "targets" and indicators for measuring the success of their staff. How many articles, chapters (in certain high-ranking journals or published by certain international scientific publishers) has one produced, how many doctoral students have defended their theses under one's supervision, how many conferences one organised, how many funded projects one has received in a certain period of time and so forth, has become a yardstick that not only determines the university's success, reputation and world ranking but also the promotion or even further employment of a tenure-track employee. Although it is clearly necessary to have some objective criteria for advancement and assessment of the status of things, this system, based primarily on quantification, can bear some negative consequences as well, consequences that may be, for example, detrimental to the quality of produced work.

complainant/other side/audience without actually truly considering their case, dealing with the issue or solving anything.

The intent of political correctness (or PC) – as a policy of avoiding forms of expression that are perceived to exclude or insult socially disadvantaged groups,<sup>21</sup> including the choosing (or inventing) the right, neutral words not to offend such a group – when developed may have been good in the sense of promoting egalitarianism, showing respect for those different from us, encouraging more conscious, sensitive and inclusive language, and reducing bias in our speech and thought (Edelstein 1992, Bennett 1995). Since we think in our language, changing the language should eventually change the thinking. However, the impact of PC may be detrimental when it is merely reduced to (often newly constructed and funny sounding) words and expressions that “feel foreign” because the underlying reasons for those words have not been internalised or accepted. Moreover, as PC is today more often than not ridiculed,<sup>22</sup> sometimes even (wrongly) linked to the reduction of free speech, labelling something as a PC can in itself engender resignation or even resistance and rejection.

Turning the results of procedural justice research into a development of a few empty phrases, employed for the pacification of dissatisfied customers (such as “We understand how you feel”, “Thank you for contacting us; we appreciate your input”), instead of, for example, into a proper skills training that would include the rationale and understanding of inherent, not merely instrumental, values behind it, would undermine the value of procedural justice. Such PC behaviour would most likely involve no real action nor aim at producing real action. Furthermore, when recognised as purely rhetorical, the legitimacy of the authority in question would suffer, similarly to the loss of legitimacy that happens when it is revealed that organisational adaptations to legal pressures are “merely ceremonial in nature” (Deflem 2008, p. 161, Selznick 1996, Stinchcombe 1997). The “punishment” that ensues for such behaviour is the withdrawal of legitimation or de-legitimation.

#### 4. Concluding thoughts

Procedural justice studies have a lot to offer in terms of lessons on how to achieve legitimacy and how legitimation is done. With respect to judiciary and justice systems, procedural justice elements (such as the access to justice, concretely the length and costs of proceedings) have been flagged as current concerns of citizens across the EU (Eurobarometer 2013). To tap into these concerns in more detail, what is needed is to broaden the scope of procedural justice research, by measuring not only perceptions of the public as a homogenous entity but also perceptions (trust and consequent attributions of legitimacy) of various segments of population, including various power-holders.<sup>23</sup>

Furthermore, it is important to branch out of one discipline and incorporate the knowledge generated on the topic of legitimacy (and justice) in various disciplines (criminology, political science, philosophy, psychology, sociology). Particularly relevant here is the knowledge generated by sociological and socio-legal studies regarding legal organisations and legal practices (Durkheim 1982), legal profession

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<sup>21</sup> One dictionary defines the term as “[t]he avoidance of forms of expression or action that are perceived to exclude, marginalize, or insult groups of people who are socially disadvantaged or discriminated against” (Oxford Dictionaries 2016).

<sup>22</sup> Wikipedia (2015) entry for political correctness, for example, states very early on that “[i]n modern usage, the terms *PC*, *politically correct*, and *political correctness* are generally pejorative descriptors, whereas the term *politically incorrect* is used by opponents of PC as an implicitly positive self-description, as in the cases of the conservative, topical book-series *The Politically Incorrect Guide*, and the liberal television talk-show program *Politically Incorrect*” (original emphases).

<sup>23</sup> Some interesting recent research includes, for example, examining the procedural justice of the European Court of Human Rights, more concretely, the way different procedural justice criteria (participation, neutrality, respect, and trust) are being applied in human rights adjudication (Brems and Lavrysen 2013).



(Parsons 1954), and the challenges posed by late modern efficiency-oriented organisational culture.

In terms of empirical research, interviews with personnel, employed in legal institutions (including courts), looking at their (self)legitimising narratives, situated within wider structural contexts, and paying attention to, both, hegemonic tales that reproduce existing power relations and those that challenge them (Ewick and Silbey 1995) should be undertaken. Observed possible conflicts between the procedural justice rhetoric and pursued policy objectives (or actual practices) may reveal pitfalls that future procedural justice research should take into account as well as provide a basis for the formulation of normative suggestions that may help to address such shortcomings.

Last but not least, organisations (including judicial ones) are also a product of their own specific context. They are deeply embedded in their own political, social and cultural setting, making their practices a response to laws, traditions and conventions of their environment (Powell 2007), including cultural definitions of legitimacy (Selznick 1996). Transitional justice (and transitional justice systems) in the sense of justice (justice systems) undergoing the transition may thus experience different social, economic and institutional pressures than justice systems belonging to an old democracy (Letki and Evans 2005, Peršak 2011). It would be sensible to have an understanding of these differences (but not overstate them either) when designing EU-wide solutions, as one-size-fits-all shoe tends to lead to blisters.

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