

PART II

**ORGANIZATION OF THE CIVIL JUSTICE SYSTEM AND JUDICIAL
 INDEPENDENCE**

CHAPTER 4

LEGITIMACY OF THE JUDICIARY AND COMMUNICATION WITH SOCIETY

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1 LEGITIMACY OF THE JUDICIARY AND COMMUNICATION WITH SOCIETY

- 1 Political structures, whether legislative, executive or judicial, require legitimacy.¹ Judicial legitimacy, whether viewed descriptively as society's willingness to give effect to court judgments and orders or viewed normatively by reference to the basic conditions that must be in place to justify compliance with those judgments or orders,² is a function of a number of factors. Those factors are explored throughout this chapter, whether they be judicial independence, both institutional and decisional, public and appellate accountability, effective judicial appointment processes, and judicial expertise and integrity. Legitimacy is also a function of effective communication by the courts and judiciary with the public. On one level such communication could be viewed as a form of public accountability; a means by which explanatory accountability is given effect and through which the public can use the political process to ensure there is effective democratic accountability of the courts and judiciary as a branch of government or of the State. On another level, such communication is a means by which the courts and judiciary can create what can be termed social legitimacy; public understanding of, and confidence in, the judiciary, which in turn helps to secure the rule of law.
- 2 Traditional approaches to communication with society are, most obviously, through the provision of open courts, consistent with the publicity principle, and the requirement that judges provide publicly available reasoned decisions justifying the orders they make within and to resolve proceedings. These matters, guaranteed and required by fair trial rights,³ are considered in sections 1.3 and 1.4, below. Outside of these traditional routes by which legitimacy, and for that matter appellate and public accountability, are created, other forms of communication have developed and are developing. These methods can be categorized as: civic; political; and technological.

1.1 Civic Engagement

- 3 The most obvious way in which judiciaries can and do communicate with society outside of their judgments is through various forms of civic engagement. Historically, the most popular form of such engagement was through individual judges delivering lectures or writing articles on legal topics. That this is well-established is evident from the fact that it is one of the few specific forms of engagement that is expressly acknowledged as permissible within

¹ For a summary see, F Peter, 'Political Legitimacy' in E N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2017 Edition, Metaphysics Research Lab, Center for the Study of Language and Information, Stanford University) <https://plato.stanford.edu/archives/sum2017/entries/legitimacy/> accessed 17 February 2025.

² Ibid.

³ European Convention on Human Rights, Art 6.

soft law instruments, like the Bangalore Principles of Judicial Conduct 2002.⁴ It is identified as a form of engagement that does not, in principle, call into question judicial independence. Historically, such lectures or articles focused on technical legal subjects to both specialist⁵ and non-specialist audiences,⁶ however since the turn of the 21st century there has been a distinct shift. Senior judges in England and Wales have, for instance, engaged in a concerted effort to present lectures to a wide range of civic audiences, not least by making them available via the judiciary's website⁷ and by visiting schools to explain the role of the courts and judiciaries via dedicated school engagement programmes⁸. They have moved beyond technical legal areas, to discussions of judicial independence, the rule of law, how the courts work, how criminal sentencing is carried out. The focus has been broadly educative and explanatory. Similar approaches can be seen in other common law jurisdictions, such as Australia and Singapore⁹ as, well as (albeit to a lesser extent) in civilian jurisdictions, such as Croatia¹⁰ and France¹¹. Moreover, other judiciaries now organise colloquia to enable them to discuss and disseminate information concerning developments in dispute resolution. Thus, helping to build awareness of, and the basis for developing confidence in, for instance, alternative forms of dispute resolution as they are incorporated into justice systems.¹²

⁴ The Bangalore Principles Of Judicial Conduct 2002 (United Nations) 4.1.11.

⁵ Eg, A T Denning, 'Quantum Meruit: The Case of Craven-Ellis v Canons Ltd' (1939) 55 Law Quarterly Review 54.

⁶ Eg, T E Scrutton, 'War and the Law' (1918) 34 LQR 116.

⁷ A collection of such lectures is published in J Cooper (ed), *Being a Judge in the Modern World* (Oxford University Press 2017). Various lectures are also published at: <https://www.judiciary.uk/announcement-type/speeches/> accessed 17 February 2025 and <https://webarchive.nationalarchives.gov.uk/ukgwa/20131202173829/http://www.judiciary.gov.uk/media/speeches/2011> accessed 17 February 2025. Also, see, for instance, in New Zealand: S Elias, 'Transition, Stability and the New Zealand Legal System' (2004) 10 Otago Law Review 475; H Winkleman, 'The power of narrative – shaping Aotearoa New Zealand's public law', Dublin 2022 <https://www.courtsfnz.govt.nz/assets/speechpapers/The-power-of-narrative-shaping-Aotearoa-new-Zealands-public-law.pdf> accessed 17 February 2025.

⁸ See Judiciary of England and Wales, 'Schools and University Engagement' <https://www.judiciary.uk/diversity/schools-engagement/> accessed 17 February 2025.

⁹ For Australia a wide range of articles are published on AUSTLII (Australasian Legal Scholarship Library) at <http://www.austlii.edu.au/au/special/journals/#> accessed 17 February 2025; In Singapore they are published on the judiciary's website 'News and speeches' at: <https://www.judiciary.gov.sg/news-and-resources/news/> accessed 17 February 2025.

¹⁰ See the website of the Supreme Court of Croatia <http://www.vsrh.hr/EasyWeb.asp?pcpid=298> accessed 17 February 2025.

¹¹ See the website of the Cours de Cassation in France <https://www.courdecassation.fr> accessed 17 February 2025. Also see, B. Hess, 'Judicial Communication in the Digital Age' in S Amrani-Mekki et al (ed), *Liber Amicorum Loïc Cadiet* (Lexis Nexis 2023).

¹² See, 'Qatar International Court and Dispute Resolution Centre Leads Discussion on Mediating in Qatar and the Middle East' (31 May 2022) <https://www.qicdrc.gov.qa/media-center/news/qatar-international-court-and-dispute-resolution-centre-leads-discussion> accessed 17 February 2025.

- 4 A broader approach to such civic engagement has developed in the United States, where it has been argued that *'it is long past time for judges to reimagine how they participate in their communities. They can (and we think should) engage and educate the people they serve on a regular basis.'*¹³ (emphasis added) Such engagement and education goes further than that developed in England and Wales etc. It encompasses the idea that judges should engage widely with the public via social media platforms as 'robed tweeters' or, more broadly, robed social media users.¹⁴ The rationale underpinning such direct engagement by members of the judiciary includes challenging views of the judiciary as an elite apart from the general public. Thus tweeting or its equivalent on other social media platforms enables, it has been argued, judges to demonstrate how they are similar and not apart from the general public.¹⁵ As Curry & Fox have noted, research shows that *'[...] individuals who engage with elected officials on social media experience greater feelings of intimacy towards the official, though these feelings can be mitigated by ideological congruence and gender'* (emphasis added)¹⁶, ie, judicial social media use leads to greater confidence in the judiciary, and hence judicial legitimacy, because it enables the public to identify closer with individual members of the public. One obvious distinction between the US and other jurisdictions, which may explain why there is little evidence or examination of judicial tweeting or similar to the same degree in other countries is that it appears to play a role in promoting the individual judge to the electorate; an advantage in the US where a number of States operate judicial appointment via democratic election.¹⁷ A similar incentive does not exist in jurisdictions where appointment is by appointment commission or by way of a career judiciary. Additionally, care does, however, have to be taken by judicial social media users. As with greater engagement in the common law jurisdictions, such US judges must however ensure that the light they throw upon the courts and judiciary does not conflict with compliance with judicial ethical codes,¹⁸ an issue that has caused some judges in England and Wales to be subject to disciplinary sanction.¹⁹ Engagement and education cannot,

¹³ S L A Dillard & B M McCormack, 'The Robed Tweeter: Two Judges' Views on Public Engagement' (2021) 20(2) *The Journal of Appellate Practice and Process* 179, 180 and see, T A Curry & M P Fix, 'May it please the twitterverse: The use of Twitter by state high court judges' (2019) 16(4) *Journal of Information Technology & Politics* 379.

¹⁴ *Ibid.*

¹⁵ *Ibid.* 383.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ Dillard & McCormack (n **Fehler! Textmarke nicht definiert.**) 192; see The Bangalore Principles Of Judicial Conduct 2002 (UN) 4.1.11; 'Guide to Judicial Conduct' (England and Wales, 2020) 15 <https://www.judiciary.uk/wp-content/uploads/2023/06/Guide-to-Judicial-Conduct-2023.pdf> accessed 17 February 2025.

¹⁹ See, for instance, JCIO Statement 88/24 (England and Wales), 'Statement from the Judicial Complaints and Investigations Office – Kirk Masters JP', where a Magistrate was found to have posted material on social

therefore, see the judge enter into the world of political critique or controversy. Equally, they should avoid legal controversies,²⁰ not least because they may be called upon to adjudicate upon them. A controversial legal tweet or social media post could, in such circumstances, raise questions of judicial bias.²¹ Such activity, if it is not to itself undermine judicial legitimacy, will likely be increasingly made subject to regulation.²²

1.2 Public Legal Education

- 5 Judicial social media use may represent a developing form of judicial civic engagement in some jurisdictions, there are other, well-established and traditional forms of such engagement in other jurisdictions. The most widely used form of engagement comes through public legal education (PLE). Underpinning the majority of current means to promote legitimacy is technology, and more specifically the growth of digital technology. The first port of call in the 21st century for litigants, members of the public, and civic bodies where courts are concerned is their website. While this has enabled greater accessibility of traditional methods of engagement, such as those referred to earlier, it has also enabled the judiciary to engage with its audience, to use a broad term, in novel ways. Where open justice is concerned, hearings can now be broadcast on the Internet.²³ Where legitimacy is concerned the most common vector for public engagement is via court and judiciary websites; another example of technology forming the basis on which 21st century judiciaries help to secure confidence and legitimacy. This approach is common place and is not confined to any specific legal traditions or jurisdictions. They do so through PLE in two distinct ways. First, it could provide general information to the public about the court and how it operates.²⁴ It could, in this sense, provide information on matters such as court statistics concerning the time taken to resolve proceedings.²⁵ With respect to court statistics, one of the most well-developed such approaches is evident in Croatia, where a variety of statistics are available for each level of court within the judicial system as well as

media on a 'politically sensitive matter' <https://www.complaints.judicialconduct.gov.uk/disciplinary-statements/Statement8824/> accessed 17 February 2025. Given the political nature of some social media platforms judicial posting on them may pose particular concerns.

²⁰ *Ibid* 192-193.

²¹ See, for instance, JCIO Statement 29/24 (England and Wales), 'Statement from the Judicial Complaints and Investigations Office – Deputy Senior District Judge Tanweer Ikram', where the possible perception of bias was considered following social media posts by a judge <https://www.complaints.judicialconduct.gov.uk/disciplinary-statements/Statement2924/> accessed 17 February 2025.

²² Courts and Tribunals Judiciary (England and Wales), 'Guide to Judicial Conduct (2023)' 16 <https://www.judiciary.uk/wp-content/uploads/2023/06/Guide-to-Judicial-Conduct-2023.pdf> accessed 17 February 2025.

²³ See Publicity of the Judiciary.

²⁴ Courts of New Zealand <https://www.courtsofnz.govt.nz/going-to-court/> accessed 17 February 2025.

²⁵ Supreme Court of Japan, 'Statistical Tables' https://www.courts.go.jp/english/vc-files/courts-en/file/2021_STATISTICAL_TABLES.pdf accessed 17 February 2025.

links to international mechanisms for the comparative assessment of court efficiency, eg, CEPEJ and the EU Justice Scoreboard.²⁶ Secondly, it could help to promote legal literacy amongst the public, and particularly amongst individuals who wish to commence litigation or are engaged in it. It might in this way, as in Brazil the development of remote court assistants to help guide litigants without lawyers through new digital court processes.²⁷ It might provide access to relevant court forms for proceedings,²⁸ information on access to legal aid,²⁹ information on court and hearing listings and case progress, and in some cases access to legislation.³⁰ Some common and civilian law jurisdictions also provide access to important case law authorities³¹ and, as explanatory aids to such judgments, official summaries of cases³² or, as in the case of the German Constitutional Court,³³ overviews of legal developments and the law in specific areas. Such information, while of assistance to litigants, may also be of interest to members of the public general and its provision could also form part of the provision of general information to the public.

1.3 Annual Reports

- 6 Other typical means by which PLE is carried out is through the publication of Annual Reports. Examples of such reports, which are found the world over, can be seen in the Czech

²⁶ Supreme Court of Croatia, 'Court Performance Overview ' <https://sudovi.hr/index.php/en/statistics/court-performance-overview> accessed 17 February 2025. On the EU Scoreboard, see, for instance, A Dori, 'The EU Justice Scoreboard – Judicial Evaluation as a New Governance Tool' (2015) 2 MPI Luxembourg Working Paper Series https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2752571 accessed 17 February 2025.

²⁷ See 'Virtual assistant Raira' <https://portal.trt14.jus.br/portal/noticias/trt-14-lanca-assistente-virtual-raira-para-atendimento-usuarios> accessed 17 February 2025.

²⁸ Courts of New Zealand.

²⁹ Courts of the Republic of Croatia.

³⁰ Supreme Court of the Republic of Croatia; Constitutional Court of South Africa; Supreme Court of the Republic of Kazakhstan.

³¹ See, the German Constitutional Court; the UK Supreme Court; the Supreme Court of Japan; Constitutional Court of South Africa; Courts of New Zealand.

³² See, German Constitutional Court: Press Release No 12/2022 of 11 February 2022 in respect of BVerfG, Order of the First Senate of 10 February 2022 - 1 BvR 2649/21 -, para 1-23; *R v Maughan (Northern Ireland)* (Supreme Court, UK) [2022] UKSC 13 – Judgment Summary <https://www.supremecourt.uk/press-summary/uksc-2020-0103.html> accessed 17 February 2025.

³³ See, for instance, its series, Decisions of the Federal Constitutional Court, in which it presents an analysis and thematic study of its case law on specific legal areas, such as the general right to personality: 'Federal Constitutional Court publishes a thematic collection of leading cases on the general right of personality in English translation' Press Release No 66/2022 of 02 August 2022 <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2022/bvg22-066.html> accessed 17 February 2025.

Republic³⁴, the UK³⁵, Dubai³⁶, or, at the regional level, the Court of Justice of the European Union³⁷. These typically provide an overview of the relevant court, and its judiciaries' activities over the course of a year, whether that concerns their court-based activities (ie, number of cases or appeals filed, judgments delivered, details of significant judgments) or other official activities such as visits to courts outside their jurisdiction, meetings with foreign judges both at home and abroad, attendance at conferences and colloquia, as well as details of court staff, administration and expenditure, and other statistical information concerned the court. Public awareness of each of these various forms of activity and information is a fundamental aspect of transparency, which again provides a basis for legitimacy and accountability. The public, and other branches of government, can through such reports consider the nature of such activities and take a view on whether they are appropriate, eg, in the absence of transparency about meetings with foreign courts, and particularly supra-national courts it might be, mistakenly, thought that a state's judiciary may have discussed cases before their courts and done so in ways that might run counter to judicial independence and impartiality. Transparency provides a means to counter such misconceptions. Equally, the publication of annual reports, or in other cases separate information,³⁸ that set out a court's and the judiciaries' annual expenditure is a key mechanism through which the public and legislatures can determine whether funds allocated to the judiciary are being properly managed and allocated for legitimate purposes. If, for instance, it was to be thought that the judiciary were spending their budget allocation on foreign trips that had scant relation to their work, that would plainly undermine confidence in judicial integrity. Transparency as a wider aspect of the principle of open justice, is a means to ensure that legitimacy is not undermined in such ways. As a necessary concomitant, it is also a means by which judicial accountability can be given effect, ie, such reports can form a vehicle for explanatory accountability.

1.4 Websites and Social Media

- 7 More broadly, websites are also the means through which judiciaries can engage in more innovative means of public engagement. Court websites enable judiciaries to provide information about their history and development. Such histories could, for instance, draw

³⁴ Eg, Yearbook of the Czech Constitutional Court, published annually by the court.

³⁵ Eg, the UK Supreme Court Annual Review, published annually by the court; The Lord Chief Justice's Annual Review, published annually by the Judicial Office of England and Wales.

³⁶ Eg, Dubai Courts Annual Review 2020 https://dc.gov.ae/PublicServices/websitefiles/Publications/Annual_Report_2020_En.pdf accessed 17 February 2025.

³⁷ The annual reports of the Court of Justice of the European Union are available on its website, see https://curia.europa.eu/jcms/jcms/Jo2_7000/en/ accessed 17 February 2025.

³⁸ The Supreme Court of Japan, for instance, issues budget details on an annual basis: <https://www.courts.go.jp/english/publications/index.html> accessed 17 February 2025.

specific attention to historic continuity where the courts and judiciary are concerned, helping to place it clearly within a State's constitutional development. It may equally draw attention to specific issues, such as the rationale for the court's existence, as is the case where South Africa's Constitutional Court is concerned, built as it is near a former prison of the Apartheid era of South Africa's history and symbolising the reasons why a constitutional court and one capable of protecting human rights, was needed.³⁹

- 8 Judicial websites could also enable members of the public to gain an understanding of how judges make decisions; thus, helping to debunk myths concerning judiciaries. While the example of this type of PLE via websites tends to focus on criminal justice, eg, programmes that enable members of the public to put themselves in the shoes of a judge deciding on an appropriate sentence of imprisonment following a criminal conviction,⁴⁰ there is no reason why they cannot be used for civil cases. Such programmes could quite properly explain the nature and application of areas of substantive law, such as contract or tort. Hence, they could – as PLE tries to do generally – improve public awareness of their rights and responsibilities. Through this the courts could help promote preventive justice: increased engagement in this way could lead to increased legitimacy through increasingly facilitating how courts help secure the shadow of the law.⁴¹
- 9 More generally, as part of their broader civic engagement judiciaries across the world have their own social media accounts as a means to disseminate information about courts, judgments, and judicial outreach programmes.⁴² Use of such social media is one, important, way in which judiciaries can reach the public directly and with a level of immediacy not previously available. It means, in this regard, that they do not have to rely upon information being filtered through the formal media, which may either not have the resources or interest in doing so or, where it does, will not necessarily present any such information in a neutral way. The use of such platforms in their own right helps to lend legitimacy to judiciaries and courts. In a technological society, there is an expectation that organizations, just as much as individuals, are available via the internet to any and all members of society. Were judiciaries to eschew the use of social media, there would be a clear risk that they would begin to be viewed as 'elites' that were out of touch with society, that saw themselves as apart from and above civic society rather than as a tangible part of it. Such risks have always existed where judiciaries are concerned given the steps they need to take to ensure that they

³⁹ See, for instance, the website of the Constitutional Court of South Africa <https://www.concourt.org.za/index.php/about-us/history> accessed 17 February 2025.

⁴⁰ Eg, Ministry of Justice, 'You be the Judge' <https://webarchive.nationalarchives.gov.uk/ukgwa/20210108100851/http://www.ybtj.justice.gov.uk/> accessed 17 February 2025.

⁴¹ R Mnookin & L Kornhauser, 'Bargaining in the shadow of the law' (1978-1979) 88 *The Yale Law Journal* 950.

⁴² Eg, Kenya (<https://twitter.com/Kenyajudiciary> accessed 17 February 2025).

maintain their integrity, independence and impartiality. Those risks can be understood to have multiplied as society becomes increasingly 'online', with public expectations mediated by the ubiquity of online engagement. The use of social media by judiciaries does, however, also carry the same risks as those that apply to individual judges. An inappropriate tweet or similar on social media concerning proceedings or otherwise could expose the judiciary, as an institution, to criticism. A 'Twitter' storm over something put out via a judiciary's social media account could well have a detrimental effect on public confidence in the judiciary. The operation of such accounts ought therefore to be subject to the same rules concerning judicial ethics and integrity as apply generally to individual judges. Those members of court administrations who operate such accounts on behalf of judiciaries should then be, at the least, familiar with such rules if not subject to them. Moreover, there is likely to be a question over whether, and if so how, such uses of social media by judiciaries should be regulated to minimise the risk of such detrimental effects. Such regulation may be considered and issued by Ministries of Justice, albeit that may raise questions concerning the institutional independence of judiciaries. It may, be issued by the judiciary itself or by Judicial Councils or, as in England and Wales, by the head of the judiciary. The key issue for such future regulation will, undoubtedly, be how to best balance the need for transparency and civic engagement against the need to maintain public confidence in the judiciary by minimising the risk of misuse of social media by judiciaries.

1.5 Court Listings

- 10 A particularly important area of broader public legal education, and one that is also inherent in the principle of open justice and thus provides another clear link between legitimacy and accountability, is the availability of details concerning upcoming cases. This is particularly the case where superior, appellate or apex courts in the judicial hierarchy are concerned.⁴³ The classic fictional account of a judicial system that lacks legitimacy is that of Kafka's Trial.⁴⁴ There the defendant was unaware, and had no means, of discovering the nature of the claim against him or the process through which it was to be adjudicated. There was a complete absence of the right to due notice. Due notice is not just, however, a means by which the fair trial right is given effect. Due notice to the public, as an aspect of the principle of open justice, is also a means by which a civil justice system as a whole is able to secure and maintain its legitimacy. That the public are able to understand the process, to know which cases are to be heard, who is taking part in those proceedings – hence no secret justice – and, particularly importantly in those jurisdictions where individuals via a civil process for

⁴³ Eg, Constitutional Court of South Africa <https://collections.concourt.org.za/handle/20.500.12144/1948>. Accessed 17 February 2025

⁴⁴ See further, M Villamarín López, 'Introduction' in B Hess, M Woo, L Cadiet, S Menétrey, & E Vallines García (ed), *Comparative Procedural Law and Justice*, Pt III ch 1, 1 and following cplj.org/a/3-1 accessed 17 February 2025.

contempt of court can be imprisoned, those who are defendants in proceedings, is an important aspect of judicial legitimacy.

- 11 Were courts to operate in secret, to determine cases in secret, from the perspective of descriptive normativity it would be difficult to see how civil courts could maintain their legitimacy: a basic condition for confidence in the courts and compliance with their rulings would be absent. Moreover, one important aspect of the civil courts' legitimacy is their ability, as Fiss cogently argued, to articulate the law in public, to reflect and develop the law in the light of civic norms and, particularly, evolving norms and, importantly, to spur civic and political debate concerning its judgments and those who litigate and are subject to litigation.⁴⁵ A court system that does not provide the public with the means to fully engage with the issues, and discuss the parties to litigation, is unable to achieve these ends. If, for instance, it was not possible for the public to know who was a defendant in proceedings, they would be unable to ascertain whether a single individual or corporation were systematically engaging in the same tortious or delictual conduct over a long period of time affecting multiple parties. Equally, routine anonymity would hinder the prospect that witnesses or additional parties may come forward to then take part in proceedings. Moreover, routine anonymity could hinder the public's ability to debate the issues raised in proceedings where they were not able to obtain advance notice of them. This, of course, has clear links with accountability via the open justice principle,⁴⁶ and may as a consequence be subject to limits that properly justify anonymity based on the need to protect and promote other public interests, eg, the rights of children, national security, or – increasingly

⁴⁵ O Fiss, 'Against Settlement' (1984) 93 Yale LJ 1073.

⁴⁶ For detailed discussion of the open justice principle, see particularly: B Hess & A Koprivica Harvey, 'Open Justice in Modern Societies – the Role of the Court'; C Chainais, 'Open Justice and the Principle of Public Access to Hearings in the Age of Information technology: Theoretical Perspectives and Comparative Law'; E Ryder, 'Securing Open Justice'; J Resnik, 'The Functions of Publicity and of Privatization in Courts and their Replacements (From Jeremy Bentham to MeToo and Google Spain)'; J Sorabji, 'Open Justice and the Privatisation of English Civil Justice' in B Hess & A Koprivica Harvey, *Open Justice – The Role of Courts in a Democratic Society* (Nomos 2019).

in some jurisdictions – data protection.⁴⁷ It does, however, also clearly go to legitimacy.⁴⁸ If the public were to gain an understanding that the courts were failing to enable them to take such steps, engagement with them would, in all likelihood, decline. The courts, as a form of government, would arguably tend to lose their social and political legitimacy as the public would look elsewhere for the means to secure these various aspects of substantive justice within society.

1.6 English Language Use

- 12 One novel aspect of civic engagement comes through the use of the English language in judicial websites. Increasing numbers of courts across the world provide information to the public via their websites in both their official language and in English. Examples include, for instance, the Cour de Cassation in France,⁴⁹ the German Constitutional Court,⁵⁰ the Czech Supreme Court,⁵¹ the Courts of Japan,⁵² the Courts of Dubai,⁵³ the Supreme Court of the Republic of Kazakhstan.⁵⁴ The undoubted intention behind these developments is to increase, via the internet, general, international, access to, and understanding of, national courts. This access may serve a number of purposes. Where disputes could be brought within a number of jurisdictions, they help to promote the justice system within the relevant country. This is likely to be of particular importance for international commercial courts, given the increasing promotion of those as a means to attract litigation into particular

⁴⁷ See, for instance, the developments of derogations from open justice to protect data protection rights in the Netherlands, where judgments are anonymised routinely, see de Rechtspraak, 'Anonymization Guidelines' <https://www.rechtspraak.nl/English/Pages/anonymization-guidelines.aspx> accessed 17 February 2025. This approach can be contrasted with common law jurisdictions, such as England and Wales where the open justice principle takes precedence over data protection rights, see Judiciary of England and Wales 'Judiciary and Data Protection: privacy notice' <https://www.judiciary.uk/about-the-judiciary/judiciary-and-data-protection-privacy-notice/> accessed 17 February 2025. For a general summary see, CJEU Directorate-General for Library, Research and Documentation, 'Research Note, Anonymity of the parties on the publication of court decisions' (March 2017) https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-02/ndr_2017-002_neutralisee-en.pdf accessed 17 February 2025.

⁴⁸ Publicity concerning the judiciary is, in this respect, equally important. Anonymization of judges who hear cases or the prohibition of reporting their identity while it may in exceptional circumstances, where for instance their right to life is engaged because publication of their identity would place them at such risk, being permitted is very much the exception to the rule; a point recently stressed in England and Wales: see *Tickle v The BBC*, Case FD23P00425 (Court of Appeal, UK) [2025] EWCA Civ 42.

⁴⁹ Cour De Cassation <https://www.courdecassation.fr/en> accessed 17 February 2025.

⁵⁰ Bundesverfassungsgericht (Federal Constitutional Court) https://www.bundesverfassungsgericht.de/EN/Homepage/home_node.html accessed 17 February 2025. Its website is also available in French.

⁵¹ Ústavní Soud <https://www.usoud.cz/en/> accessed 17 February 2025.

⁵² Courts in Japan <https://www.courts.go.jp/english/index.html> accessed 17 February 2025.

⁵³ Dubai Courts <https://dc.gov.ae/PublicServices/Home.aspx?lang=en> accessed 17 February 2025.

⁵⁴ Supreme Court of the Republic of Kazakhstan <https://sud.gov.kz/eng> accessed 17 February 2025.

states.⁵⁵ Examples here are, the Commercial Court in England and Wales, the Singapore International Commercial Court and the various commercial courts in the Middle East. They also help to increase broader, international, understanding of the nature and operation of courts. Thus, they can play a role in developing an international understanding of how different states give effect to the rule of law through their courts.

- 13 Widespread use of English, as a secondary language for judicial websites also plays – to a degree – a role, albeit unstated, in the promotion of legitimacy. By providing broad access via the English language to a court, its processes, case law, etc, a court website is a means through which broad international comparisons can be conducted by international organizations, academics, NGOs, as well as other governments. It could, for instance, be a tool to help promote the entry of memorandums of understanding between different countries' judiciaries. It could form a means by which information can be obtained to facilitate the conduct of studies, like those on efficiency carried out by CEPJ, or by indexes such as the World Bank rule of law index. Through the publication of English language case summaries or judgments, such websites also provide the means by which a country's judgments are able to, potentially, be taken into account by other countries' courts in their development of their own domestic case law. Thus, they provide a soft law influence beyond national borders, which itself could help to promote judicial legitimacy through enabling national judiciaries to demonstrate the international influence of their case law.

1.7 Comity

- 14 Finally, judiciaries not only seek to promote their legitimacy through engagement with the public and civic society generally, they also seek to do so through engagement with the other branches of government and courts from other jurisdictions. This could be defined as legitimacy via comity. Comity between the judiciary and the other branches of government can arise in a number of ways. It can, for instance, be the product of judiciaries issuing written, official reports to governments⁵⁶ and legislatures or attending before legislative select committees to give evidence on the administration of justice or, as appropriate, the effects of proposed legal developments on the courts. This type of engagement has developed particularly in England and Wales as a consequence of reforms to its constitution in 2005 via the Constitutional Reform Act. Such engagement requires, as might reasonably be expected, steps to be taken to ensure that it does not undermine judicial

⁵⁵ X E Kramer & J Sorabji, *International Business Courts – A European and Global Perspective* (Eleven International Publishing 2019).

⁵⁶ Judiciary of England and Wales, 'Lord Chief Justice's Annual Report 2021' <https://www.judiciary.uk/wp-content/uploads/2022/07/Lord-Chief-Justice-Annual-Report-2021.pdf> accessed 17 February 2025.

independence.⁵⁷ It can also arise through judiciaries and governments working together to administer the courts in those jurisdictions where a partnership model for court administration is in place.⁵⁸

- 15 Comity between judiciaries arises widely across jurisdictions. It can take the form of judicial exchanges and judicial colloquia, such as those organized by the Franco-British and Irish Cooperation Committee⁵⁹, on important issues of common interest with other courts and judiciaries, both national and international.⁶⁰ It can also take the form of membership of broad-based international organizations, such as SIFoCC – the Standard International Forum for Commercial Courts whose membership encompasses jurisdictions from across the world⁶¹, the ENCJ – the European Network of Councils of the Judiciaries⁶², or worldwide organizations, such as the World Conference on Constitutional Justice, which draws its membership from over 100 countries⁶³. The broad aim of such forms of engagement is best summed up by the latter organization, which stresses that its aim of facilitating judicial dialogue is to ‘*promote the basic goals inherent in national constitutions*’ (emphasis added). It thus serves to promote issues such as judicial independence and adherence to the rule of law and constitutional and human rights norms. It does so by providing a forum for discussion, exchange and development of ideas. Thus, it plays the same role as other exchanges do in respect of the development and exchange of ideas on matters of substantive law, private and public international law. Such organizations also provide a basis for judiciaries across the world to support each other where they come under pressure from external actors, whether they be governments, legislatures or private bodies; a point made explicit by the World Conference on Constitutional Justice given its aim of facilitating the provision of ‘moral support’ by judiciaries for judiciaries.
- 16 Support for judicial legitimacy via such forms of engagement arises in a number of ways. Indirectly it promotes legitimacy by helping to improve the quality of judicial decision-

⁵⁷ Judicial Executive Board, ‘Guidance to Judges on Appearances before Select Committees’ (October 2012) https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/select_committee_guidance.pdf accessed 17 February 2025.

⁵⁸ As in Ireland, see T Bunjevac, *Judicial Self-Governance in the New Millennium* (Springer 2020).

⁵⁹ Eg, Franco-British Irish Judicial Cooperation Committee Colloque, ‘The Art of Judging in the 21st Century’ (2022) <https://www.courdecassation.fr/en/print/pdf/node/10855> accessed 17 February 2025.

⁶⁰ For instance, exchanges between courts of those states that are members of the European Convention on Human Rights and the European Court of Human Rights: see European Court of Human Rights, ‘Superior Courts Network’ Superior Courts’ Network - ECHR - ECHR - ECHR / CEDH accessed 17 February 2025.

⁶¹ See Standing International Forum of Commercial Courts <https://sifocc.org> accessed 17 February 2025.

⁶² See European Network of Councils for the Judiciary (ENCJ) <https://www.encj.eu> accessed 17 February 2025.

⁶³ See Council of Europe, ‘World Conference on Constitutional Justice (WCCJ)’ https://www.venice.coe.int/WebForms/pages/?p=02_WCCJ&lang=EN accessed 17 February 2025.

making. Cross-fertilization of ideas enables civil law to develop, particularly where civil procedure and private law are concerned. Courts, for instance, draw on experience in other jurisdictions to permit service of process via digital technology, eg, the English and Welsh courts following the US courts in permitting service via NFT⁶⁴ or through the provision, by SIFoCC, of guidance on best practice for case management, the use of remote technology in hearings, or the use of AI to improve the delivery of justice in B.⁶⁵ In such ways, civil courts can keep pace with social developments and ensure that they are able to deliver justice as efficiently and economically as technology allows. Improvements to the delivery of justice can be seen as a basic condition of maintaining the legitimacy of justice systems. On the contrary, the maintenance of antiquated systems that lead to slow and expensive justice, cannot but undermine judicial legitimacy. It also arises more directly through helping to promote the social legitimacy of the judiciary. This can be said to arise through civil society gaining an understanding of how their own judiciary is understood by other judiciaries around the world to be of good standing. Memoranda of Understanding between courts that demonstrate confidence by each participant in the standards of justice applied by others, such as those entered into by courts in the Middle East and other jurisdictions, such as Singapore⁶⁶ provide examples of this type of legitimacy-enhancing engagement. Such engagement is also a way in which judiciaries from different jurisdictions can provide mutual support for each other, while also providing benchmarks to each other of best practice. Thus, they are a means to promote best practice and via that social legitimacy.

- 17 Ultimately the promotion and maintenance of the legitimacy of the judiciary is a product of a number of factors. Social, civic, political and international engagement is one of the means by which it is achieved. At the heart of such engagement is transparency and openness. It can, in this way, be seen as a wider element of the general principle that justice needs not

⁶⁴ *LCX AG v John Does Nos. 1-25*, Index No 154644/2022 (New York Supreme Court, US); *D'Aloia v Binance Holdings* (High Court, UK) [2022] EWHC 1723 (Ch).

⁶⁵ 'Report of First SIFoCC International Working Group: International Best Practice in Case Management' <https://sifocc.org/app/uploads/2020/05/SIFoCC-Presumptions-of-Best-Practice-in-Case-Management-May-2020.pdf> accessed 17 February 2025. SIFoCC, 'Delivering justice during the Covid-19 pandemic and the future use of technology' and 'Second SIFoCC Covid-19 Memorandum' <https://sifocc.org/app/uploads/2020/05/SIFoCC-Covid-19-memorandum-29-May-2020.pdf> accessed 17 February 2025 and https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/25/2024/03/6.7119_JO_Second_SIFoCC_COVID-19_memorandum_WEB.pdf accessed 17 February 2025.

D Becker & I Ferrari, 'VICTOR, the Brazilian Supreme Court's Artificial Intelligence: a beauty or a beast?' <https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/25/2024/03/Victor-Beauty-or-the-Beast.pdf> accessed 17 February 2025.

⁶⁶ See, for instance, the Memorandum of Understanding between the Qatar International Court and Dispute Resolution Centre and the Courts of Singapore (October 2017) <https://www.qicdrc.gov.qa/about-us/partnerships-and-agreements> accessed 17 February 2025. Also see the various such Memoranda agreed between the Dubai International Financial Court and courts in, for instance, Australia, England and Wales, Kazakhstan, Singapore, the United States, and Zambia <https://www.difccourts.ae/about/protocols-memoranda> accessed 17 February 2025.

only to be done but must be seen to be done.⁶⁷ It is to that general principle that consideration does not turn.

⁶⁷ *R v Sussex Justices Ex p. McCarthy* (High Court, UK) [1924] 1 K.B. 256 at 259.

ABBREVIATIONS AND ACRONYMS

ACCP	Code of Civil Procedure (Argentina)
ACHPR	African Court on Human and Peoples' Rights
ADR	Alternative Dispute Resolution
ALI	American Law Institute
ANCCPC	Argentine National Civil and Commercial Procedural Code (Argentina)
Art	Article/Articles
ATCCP	Code of Civil Procedure (Austria)
BGH	<i>Bundesgerichtshof</i> (Federal Court of Justice) [Germany]
BID	<i>Banco Interamericano de Desarrollo</i> (Inter-American Development Bank)
CEPEJ	<i>Conseil de l'Europe Commission européenne pour l'efficacité de la justice</i> (Council of Europe European Commission for the efficiency of justice)
cf	<i>confer</i> (compare)
ch	chapter
CIDH	<i>Corte Interamericana de Derechos Humanos</i> (Interamerican Court of Human Rights)
CJEU	Court of Justice of the European Union
EBRD	European Bank for Reconstruction and Development
ECLI	European Case Law Identifier
ECtHR	European Court of Human Rights
ed	editor/editors
edn	edition/editions
eg	<i>exempli gratia</i> (for example)
ELI	European Law Institute
etc	et cetera
EU	European Union
EUR	Euro
ff	following
fn	footnote (external, ie, in other chapters or in citations)
GCCP	Code of Civil Procedure (Germany)
GDPR	General Data Protection Regulation (EU)
ibid	<i>ibidem</i> (in the same place)
ICPR	Civil Procedure Regulations (Israel)

ICT	Information and Communication Technologies
ie	<i>id est</i> (that is)
IIDP	<i>Instituto Iberoamericano de Derecho Procesal</i> (Iberoamerican Institute of Procedural Law)
JCCP	Code of Civil Procedure (Japan)
JPY	Japanese Yen
n	footnote (internal, ie, within the same chapter)
no	number/numbers
para	paragraph/paragraphs
PD	Practice Direction
PDPACP	Pre-Action Conduct and Protocols
pt	part
RSC Order	Rules of the Supreme Court (UK)
SCC	Supreme Court Canada
Sec	Section/Sections
supp	supplement/supplements
TCCP	Code of Civil Procedure (Turkey)
trans/tr	translated, translation/translator
UK	United Kingdom
UKCPR	Civil Procedure Rules (UK)
UNIDROIT	<i>Institut international pour l'unification du droit privé</i> (International Institute for the Unification of Private Law)
UP	University Press
US / USA	United States of America
USD	United States Dollar
USFRCP	Federal Rules of Civil Procedure (US)
v	versus
vol	volume/volumes
WB	World Bank
***	***

CASES

National

England and Wales

R v Sussex Justices Ex p. McCarthy (High Court, UK) [1924] 1 K.B. 256

D'Aloia v Binance Holdings (High Court, UK) [2022] EWHC 1723 (Ch)

R v Maughan (Northern Ireland) (Supreme Court, UK) [2022] UKSC 13

United States of America

LCX AG v John Does Nos. 1-25, Index No 154644/2022 (New York Supreme Court, US)

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