Questions for consideration
1) Please provide at least one example, which can be used as a case study, of an occasion in your jurisdiction where a judge, the judiciary or the courts have been unfairly criticized by:
   a) A politician or politicians;
   b) The mainstream media;
   c) Social media.

Please attach the actual examples to your response.

Answer:

In regards to the questions below, it is noted that the term “unfair criticism” is not only used in the sense of disrespectful and illegitimate personal characteristics and “hate speech” against judges, the judiciary or the courts, but also with regard to criticism without any seemingly reasonable basis, criticism based on misunderstandings etc.

In Norway, there is no tradition of politicians in formal positions of power going public and criticizing the judiciary or a court ruling. On the contrary, the general impression is that politicians, especially government ministers and members of parliament, exercise caution not to interfere with the work of the judiciary; If they are unhappy with the application of a rule, they rather argue for changing the law. (Another matter is that their unhappiness with the application may sometimes be based on misunderstandings of the case at hand.)

A good illustration of the traditional approach is the reaction to statements made by the leader of the Labour Party and leader of the opposition in Norway in 2017 in an interview concerning a plenary judgment by the Supreme Court. The case concerned a particular system for dock-work laid down by a collective agreement effectively establishing a monopoly for loading and unloading services at the port in question. The issue before the Supreme Court was whether this violated the rights of establishment under European law for a Danish-owned company wanting to set up its own unloading operation in the port. In a split decision, the Supreme Court found that it did. In the interview, the Labour Party leader said that he “deplored” this outcome, and that he was “surprised” and “critical of” the way the Supreme Court majority had balanced labour rights against European principles of free movement, but also that he “cautioned against” drawing far-reaching conclusions from the judgment. It is debatable whether this at all should count as unfair criticism, but his statements were nevertheless criticised by several commentators for overstepping the limits.
The interview (which also concerned other topics) may be found here:
http://www.klassekampen.no/article/20161229/ARTICLE/161229958

A couple of examples of criticism against the leader for overstepping the mark may be found here:
https://www.civita.no/2017/01/07/hva-er-egentlig-stores-problem-med-holship-dommen
https://www.aftenposten.no/meninger/debatt/i/4kMxo/Store-blander-seg-inn-i-Hoyesteretts-arbeid--Jan-Fougner

In general, judges, the courts or the judiciary are also seldom the target of unfair criticism by, or discussions in, the media themselves. There is no tradition of the mainstream media taking sides or making attempts to undermine a court judgment or judicial independence, even though some controversial judgments may be subject to debate. Such debates are usually kept at a factual and unbiased level. Further, there is no tradition for the Norwegian mainstream media to promote personal attacks or criticism against named judges.

As such, the platforms where a Norwegian judge, the judiciary or the courts are most likely to receive unfair criticism and attacks, are social media or different types of discussion forums on the internet. In these types of forums, both the justice system in general, judgments in a specific case, and sometimes even named judges may be subject to massive criticism and personal attacks. Different types of outlashes in social media have become more common over the years, both against judges and judgments in lower courts as well as the higher courts. Typical of such unfair criticism is
- Posting pictures along with offensive allegations against named judges and lay judges
- Allegations of corruption and crimes in the judiciary from people displeased with a ruling
- Threats against named judges

As an example that became the object of criminal investigation (which does not happen very often), we include a link to a translation into English of a judgment by the Supreme Court (HR-2016-1015-A, also mentioned below), where a man was sentenced to 7 months in prison for posting video clips on YouTube with offensive content directed against several participants in the justice system. In the videos, the convicted made several offensive statements about the involved persons, as well as posting photos and contact information, such as their addresses and phone numbers. The judgment is interesting also in that the court split on the right level of punishment:

2) What effect, if any, have those criticisms had:

a) On the independence of the judiciary;
b) On the separation of powers;

c) On public confidence in the judiciary.

Answer:

The public confidence in the Norwegian judiciary is in general high. Criticism that from time to time is raised against a judgment, the judiciary or the courts, whether justifiable or not, has not had any noticable effect on either the independence of the judiciary, the separation of powers or public confidence in the judiciary. On the contrary, studies show that public confidence in the Norwegian judiciary has grown the recent years. It should be added, however, that there have not been any separate studies on how the judiciary is perceived by “its clients” subsequent to their meeting with court proceedings.

3) a) What steps, if any, were taken to deal with the criticism?  
b) How effective were those steps?

Answer:

As mentioned above, the Norwegian judiciary is seldom the subject of public criticisms. Nevertheless, several steps have been taken in recent years to further increase public confidence and the transparency of the Norwegian courts:

- Focus on openness about the business of the courts: judgments are as a main rule made available to the public, annual reports with statistics are published by the courts.
- Focus on the language used in judgments and in correspondence with private individuals: the judiciary strives to use language that is simple and understandable for the average reader.
- Establishment of the Judges’ Media Group. This is a group of judges who undertake to make themselves available to journalists for questions about on-going cases and recent judgments in order to prevent misunderstandings about the work of their colleagues.

We would add that
- decision-making based on oral hearings open to the public rather than written procedure,
- judgments explaining in as plain language as possible both the legal reasoning and the factual assessments of the court,
- and not least, the use of lay judges deciding together with professional judges in criminal cases and some types of civil cases,
in our view serve to enhance public confidence in the courts.

4) What is regarded as the boundary between legitimate and unfair criticism?

Answer:

The boundary between legitimate and unfair criticism of judges or participants of the justice system has not been the subject of comprehensive public discussions in Norway. The reason for this may be as mentioned under question 1, that the justice system and/or judges, are seldom publically criticized by politicians or the mainstream media.

However, the boundary between lawful and unlawful (criminal) criticism of judges and other officers of the court has been subject to scrutiny in several criminal cases, as “violence, threats, vandalisms or other illegal conduct” against a participant in the justice system is made punishable in a separate penal provision in the Norwegian Penal Code.

In this respect, the Supreme Court stated in case HR-2016-1012-A that judges and other participants of the judiciary must accept to be subject to great deal of criticism before it leads to criminal liability. This applies both to the contents of court rulings and, in this respect, a judges' professional level and power of judgment, regardless of whether the criticism is irrational and groundless. Whether or not a conduct will be seen as unlawful and thereby punishable by law, depends not only on the contents of what has been said, but also largely on the time and place and the situation in general. Statements that would be lawful if made in an appeal or in a letter addressed to the relevant court, could be punishable if made in such a manner that they interfere with the privacy or work of the person being criticized. Intrusion in a judge’s private home, or – as was the case in HR-2016-1012-A – disturbance during his or her spare time or while on duty, are also acts that would be punishable. In this regard, it is a central concern for a well-functioning rule of law that judges and other participants in the justice system can perform their tasks being assured of the protection of the law against offensive conduct by persons who are displeased with their work. As an example of unlawful conduct, we refer to the above-mentioned Supreme Court case HR-2016-1015-A.

Clearly, illegal criticism is not the same as unfair criticism. Most would find irrational and groundless criticism of a judge's professional level and power of judgment to be unfair. That does not mean, however, that the full force of law should be employed against it.
We would add that defamation is no longer a criminal offence in Norway. Under civil law, one may still seek damages for injury of a non-pecuniary character for defamatory remarks, but to our knowledge, no judge has ever done so, and we doubt that it would ever happen.

5) What approaches have been adopted in your jurisdiction to improve the accuracy of reporting of court decisions and fair treatment of judges and the justice system?

Answer:

One of the main measures to improve the accuracy of reporting of court decisions is the establishment of the Judges’ Media Group, mentioned under question 3. They can help the media when statements or explanations are needed from a judge. The objective is a desire to contribute to openness and greater awareness of the courts amongst the general public. The members of the group do not express the opinions of the Norwegian courts, individual courts or other judges, but speak on their own behalf.

It is a strongly held view among Norwegian judges that they should not comment upon their own judgments even if subject to irrational or groundless criticism. Such comments would become a second set of grounds for the judgment and could create confusion as to what the ‘real reasons’ were.

The Supreme Court has its own press officer. A short press release accompanies all Supreme Court judgments and journalists may subscribe to a service where they automatically receive the press releases with a link to the judgments themselves. The press release is useful in directing to reader to what the core issue of the case before the Supreme Court was.

Other courts do not have their own press officers but the central Court Administration may lend assistance in handling the media in high profile cases.

The Supreme Court also has a meeting with the press at the beginning of each year where journalists can put questions to the chief justice and a number of the associate justices as well as the Court’s director. It is an opportunity to point out tendencies in case law and highlight certain cases, always taking care not to go too far in commenting upon the specific content of any single judgment.

6) What have been the benefits of and any problems caused by those procedures?

Answer:
The overall impression is that the Judge’s Media Group has been a success within its objective. The media seems to appreciate the opportunity to get a statement or explanation for a “media judge,” and have made use of the opportunity on several occasion.

The Supreme Court finds that having its own press officer is very useful.

7) What suggestions could you make for:

a) improving the accuracy of reporting of court decisions; and
b) the fair treatment of judges and the justice system
i) By politicians
ii) By the media;
iii) In social media?

Answer:

We would suggest the following:

- judgments containing detailed grounds for the outcome of the case, in a language as accessible as possible to the average reader
- Each court having its own website with information about the court and pending cases
- Court decisions are made public either on the court’s website, online legal resources websites, or upon contacting the relevant court
- A ‘Judges’ Media Group’
- The use of press releases
- Live streaming of proceedings can also be useful in demonstrating that they are fair and thorough. However, they pose their own problems concerning i.a. privacy, potential of distracting counsel, parties and witnesses, as well as the possible editorial responsibility of the court itself.

More generally, we would also like to emphasise the use of lay judges in ‘demystifying’ the workings of the courts and enhancing the public’s respect for the court system in general.

Proposal for topic 2019

We would suggest:
1) Disciplinary systems for the judiciary

Also judges must be subject to some kind of disciplinary system, including, in extreme situations, a procedure for removal. However, this has to be balanced against the independence of the judiciary. To get this balance right is not easy and may be achieved in several ways. It seems that in some countries, the disciplinary system is sometimes abused to get rid of ‘troublesome’ judges.

or

2) External review of the judiciary.

External review traditionally take the form of auditing the accounts, but modern audits often also seek to measure different aspects of performance, such as quality, efficiency and knowledge management. When/if applied to the judiciary, such review could potentially compromise the independence of courts.

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