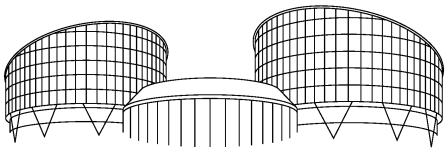

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

**Opening of the Judicial Year**

**Seminar**

# THE AUTHORITY OF THE JUDICIARY
# CHALLENGES TO THE AUTHORITY OF THE JUDICIARY
# RESPONSIBILITY AND ACCOUNTABILITY OF COURTS AND JUDGES

*Friday 26 January 2018*

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President of the European Court of Human Rights, Judges of the Court,
President of the Court of Justice of the European Union,
Secretary General of the Council of Europe,
First Presidents and Presidents of Supreme Courts and Constitutional Courts,
Dear colleagues,
Ladies and gentlemen,

Without neglecting first of all to express my heartiest thanks to President Guido Raimondi and the organisers of this seminar, especially Judge Paul Lemmens, I now have the task, confined to some twenty minutes, of offering to this eminent gathering a few brief observations and questions relating to the theme – which is as profuse as it is elastic – of the responsibility and accountability of courts and judges.

In view of the time constraint I will dwell only on the few aspects which I have found to be the most fundamental. I am sure you will not mind, aware as you are of Voltaire's wise words, "the secret of being a bore is to tell everything".

**INTRODUCTORY EXPLANATIONS**

Since our event today – our gathering – extends to the entire continent in which we live, I have deliberately refrained from giving any examples from the domestic law of my own country, or any other, and have purely relied, where necessary, on texts with a European origin and/or scope.

Those texts are as follows – and I will list them now rather than burdening my talk with citations later:
- Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe of 17 November 2010 on judges: independence, efficiency and responsibilities;
- the European Charter (Council of Europe) on the Statute for Judges, 10 July 1998;
- Opinion no. 3 of 19 November 2002 of the Consultative Council of European Judges, for the Council of Europe's Committee of Ministers, on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality;
- the *Magna Carta of Judges* of the Consultative Council of European Judges, 17 November 2010;
- the Sofia Declaration on "Judicial independence and accountability", General Assembly of the European Network of Councils for the Judiciary, 5 and 7 June 2013;
- the Report of that Network for 2016-2017, "Independence, Responsibility and Quality of the Judiciary";
- the "Judicial Training Principles" set out by the European Judicial Training Network at its General Assembly on 10 June 2016;
- the "Declaration of Judicial Training Principles" adopted by the International Organisation for Judicial Training on 8 November 2017;
- lastly, the proceedings of the conference concerning "the Contribution of Inspection Services to the Improvement of European Judicial Systems" held in Paris on 16 March 2017.

The responsibility at issue here is, all at the same time, ethical (to be bound to; to have a duty to), legal (to be answerable for; to have an obligation to) or indeed "public" (to be held to account for). These different meanings were gradually given to the French term (*responsabilité*) in the fourteenth and eighteenth centuries, mainly in the latter and in respect of public authority. The meaning was then influenced by British constitutionalists, conveyed through the speeches, it is said, of British Prime Minister William Pitt. In English there are three related terms: responsibility, liability and accountability. The latter notion refers to the attribution of the underlying substance or conscience of responsibility to the person in whom it is vested.

**I. THE JUDGE'S RESPONSIBILITY IS AN INTERACTIVE, OVERARCHING FACTOR WHICH CANNOT BE CONSIDERED ON ITS OWN**

All the texts mentioned above – or almost all – present the responsibility of the judge as a "corollary of the powers and trust conferred by society upon judges" or as one of the essential conditions, together with their independence, impartiality and competence, of an "efficient and effective system of justice".

On that basis, the responsibility of the judge and the courts – a national paradigm but also a European standard – is part and parcel of the quality of the judicial decision and accordingly of the mutual trust which – as we all know – goes to the heart of the implementation of the principle of mutual recognition, cornerstone of the judicial pillar of the European construction.

It follows that the independence and responsibility of the judge, as of the judiciary, can be regarded as two sides of the same coin. Accordingly, the principle of independence – the bedrock of impartiality – whether it be that of the judge, of the court, or of the justice system as a whole, and whether it is objective or subjective, statutory or functional, circumscribes the scope and the exercise of judicial responsibility. In turn, the judge's responsibility prevents or curbs the potential repercussions of independence for the legitimate demands of a democratic State or society.

Lastly, as mentioned above, the judge's responsibility at issue here goes beyond and by far – and quite rightly – the contours of his or her legal responsibility, which will be dealt with in a few lines at the end of this presentation.

In other words, it encompasses everything for which the judge is accountable, even in matters which the judge is not compelled to answer for by the sanction of the law itself. It is precisely in this spirit that the *Magna Carta of Judges* adopted on 17 November 2010 by the Consultative Council of European Judges states: "Deontological principles, distinguished from disciplinary rules, shall guide the actions of judges. They shall be drafted by the judges themselves and be included in their training."

## II. A NUANCED DISTINCTION: COLLECTIVE RESPONSIBILITY (INSTITUTIONAL) AND INDIVIDUAL RESPONSIBILITY (OF THE JUDGE)

The responsibility of the judge, taken separately, and that of the courts (or indeed the judicial authority), taken as a whole, have much in common. They can be seen as a mirror image of each other and are bound by strong ties, but nevertheless have quite distinct features. It was on the basis of this distinction that the European Network of Councils for the Judiciary elaborated its table of indicators as to "objective responsibility", clearly separating that "of the judiciary as a whole" from that "of the individual judge".

### *II.1. Responsibility in the person of the judge*

Responsibility is underpinned by knowledge and conscience – a word which warrants emphasis – of the (ethical) duties and the obligations (of professional competence, of deontological conformity) which the judge is bound to acquire and indeed to follow in his or her practice and conduct.

Three observations are called for by way of explanation.

II.1.1. While the judicial authority and the bodies dispensing judicial training must be responsible for the conception, content and implementation of judges' training, it falls within the rights of every judge, as well as within his or her (personal) responsibility, to "undergo such training", and "to acquire the knowledge and skills necessary for good-quality adjudication".

II.1.2. Among the rules that it is the judge's specific responsibility to observe, special mention must be made of those which guarantee his or her impartiality, in particular those which oblige the judge to foresee or remedy any conflict of interest.

While the judicial authority has a responsibility to adopt and ensure the effectiveness of the appropriate mechanisms in this regard (incompatibility of duties and activities, declarations of interests, procedural mechanisms providing for the abstention or withdrawal of a judge, reasonable suspicion of bias disqualifying a judge from hearing a case), the responsibility lies with the judge when it comes to actively and faithfully ensuring their strict implementation as soon as the judge's personal situation engages such rules.

II.1.3. In the technical exercise of his or her duties (applying legal rules in accordance with the requisite procedure and – to an extent that will increase over time – making use, where appropriate, of the good practices collectively elaborated by and with other judges), a particular prominence must be attributed, it is submitted, to the duty of judges to "make the discussions intelligible to the

parties", and to “give clear reasons for their judgments in language which is clear and comprehensible” so that “the application of the law is visible and the parties can decide whether or not to exercise their right of appeal and, if so, to prepare such an appeal”. In other words, judges have to be “conscious of their responsibilities”, stemming from the fact that “the confidence of litigants can only exist if the proceedings and the resulting decisions are clear and comprehensible".

We can thus gauge the extent to which this responsibility will be bolstered by the universal knowledge, as it were, of the corpus of judicial decisions to which open data will shortly give citizens access, at least those of the Member States of the European Union.

***II.2. Responsibility of the courts and of the judicial authority***

The subject will be examined under four of the most topical aspects.

II.2.1. It is the responsibility of the public authorities and more specifically of the judicial authority, in addition to the presidents of individual courts, to ensure that at the institutional and regulatory level, but also in terms of effectiveness, “the independence of each individual judge [must be guaranteed] in the exercise of adjudicating functions”.

II.2.2. Nevertheless – and I draw your attention to this – in its Recommendation of 17 November 2010 the Council of Europe’s Committee of Ministers was at pains to explain that “in order to facilitate an effective and efficient administration of justice” and “[w]ithout prejudice to their independence”, “judges and the judiciary should maintain constructive working relations with institutions and public authorities involved in the management and administration of the courts, as well as professionals whose tasks are related to the work of judges”.

This consideration, which is far from trivial, stems in my opinion from the fact that the courts, i.e. the judicial institution, are organs exercising governmental authority – not to be confused with the executive arm of the State – albeit performing a specific mission (justice), with a particular status (independence) and playing their own role in that authority (through the separation of powers). Therefore, cooperation with other public authorities, at the distance and in the appropriate manner imposed by both the separation of powers and the independence of the justice system, will be justified in so far as, in particular, it contributes to efficient adjudication.

That was precisely what Stephen Breyer, Judge on the US Supreme Court, wrote in his work of 2010, *Making Our Democracy Work: A Judge’s View*: “Part of my aim is to show how the Court can build the necessary productive working relationships with other institutions [he had referred to the Congress and the executive branch] without abdicating its own role as constitutional guardian”.

II.2.3. It is the State’s duty to provide judges with the necessary resources for the proper performance of their mission and in particular to ensure that cases are processed within a reasonable time. Indeed, its responsibility is to “allocate adequate resources, facilities and equipment to the courts to enable them to function in accordance with the standards laid down in Article 6 of the Convention and to enable judges to work efficiently”. The State should thus provide the “information [the judges] require to enable them to take pertinent procedural decisions”, “a sufficient number of judges and appropriately qualified support staff” and “electronic case management systems and information communication technologies”.

Nevertheless, a balance must be struck between "the right of judges to adequate working conditions and their responsibility for the use of the resources placed at their disposal".

These imperatives thus naturally and necessarily entail the collective or individual responsibility of judges, as the case may be, to carry out or contribute to their evaluation, as required by the duty of public transparency which is incumbent on the judicial authority as a whole and delegated to each individual court. Thus the *Magna Carta of Judges* of 17 November 2010 proclaims that "[j]ustice shall be transparent and information shall be published on the operation of the judicial system".

It should not be overlooked that such evaluations must be carried out in conditions, relating to the choice both of the evaluator and of the process followed, which are compatible with the requirement of independence of judges and courts in the exercise of their judicial attributes.

II.3.4. A further area of collective responsibility of the judicial authority and individual courts – one that remains poorly identified and insufficiently explored – concerns the function of case-law, at least as it applies in continental law jurisdictions which, like my own, are not familiar with the common-law principle of *stare decisis*.

These judicial institutions, these courts, are they not responsible at least for promoting – if not for guaranteeing – through procedural rules, certain forms of organisation and good collective practices, a relative stability, and a sufficient convergence of case-law in the application of the same legal rule?

Without excluding the departures from precedent that may be required by the necessary development of the law, such foreseeability, as thus assumed, goes hand in hand with the principle of legal certainty and the protection of the legitimate expectation of citizens that the European Court of Human Rights, describing it as "implicit in the Convention", has come to regard as "one of the fundamental aspects of the rule of law".

In these situations too, the above-mentioned judicial "big data" will render these requirements more pressing, while at the same time highlighting the inconsistent solutions which will almost automatically stem from the large-scale dissemination of judicial decisions affecting the general public.

Paradoxically – but in the long run – this same trend towards open data will most probably constitute a powerful instrument for the harmonisation and convergence of legal solutions.

**III. THE HIGHLY REGULATED ISSUE OF LEGAL RESPONSIBILITY OF JUDGES AND COURTS**

As the relevant rules governing such matters are sufficiently known, I will merely reproduce the following basic principles:

"When not exercising judicial functions, judges are liable under civil, criminal [and administrative] law in the same way as any other citizen" ... "in ordinary law".

"Judges should not be personally accountable where their decision is overruled or modified on appeal".

"The remedy for judicial errors should lie in an appropriate system of appeals".

“Any remedy for other failings in the administration of justice lies only against the State.”

I will now apply these guidelines, broadly speaking, to the three legal forms of responsibility or liability that may be engaged by judges.

III.1. First, the criminal liability of judges

A judge cannot be found criminally liable for acts performed in the course of his duties in the event of an unintentional failing.

III.2. Second, the judge’s civil liability

“The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil [or even disciplinary] liability, except in cases of malice [intentional fault] and gross negligence”. The latter issue was addressed by Opinion no. 3 (19 November 2002) of the Consultative Council of European Judges, which set it aside on account of the lack of precision of this notion.

“Judicial failings which cannot be rectified through an appeal (including, for example, excessive delay) should, at most, lead to a claim by the dissatisfied litigant against the State”. It is for the State to “guarantee compensation for harm wrongfully suffered as a result of the decision or the behaviour of a judge in the exercise of his or her duties”.

In situations of this kind where the State has paid compensation, it may, if provided for by the domestic law, claim reimbursement from the judge, within a fixed limit, by way of legal proceedings, in the event of an intentional fault and – while this is a matter of debate, as already mentioned – in the case of a gross and inexcusable breach of the rules governing the performance of judicial duties.

Recourse proceedings of this nature must be brought before a court, with the safeguard that prior agreement should be obtained from an authority that is independent of the executive and the legislature and which has substantial judicial representation, at least half of its members being judges elected by their peers.

III.3. Lastly, the disciplinary liability of judges

Disciplinary proceedings may follow “where judges fail to carry out their duties in an efficient and proper manner”. “In each State, the ‘statute or the fundamental charter’ applicable to judges shall define – as precisely as possible – the misconduct which may lead to disciplinary sanctions as well as the disciplinary procedure”.

That procedure, which must be fully accompanied by the safeguards of a fair hearing, and in particular of defence rights, and must provide for the possibility of an appeal (before a court of law), should be conducted either before a tribunal or before another body (an independent authority) of which at least half should be made up of judges elected by their peers.

The legitimacy of the adjudicating disciplinary body is of central importance. From that perspective it appears natural and logical that the body in question should, both at first instance and on appeal, be made up of a sufficient proportion of elected judges.

Moreover, States "should envisage introducing a specific body or person with responsibility for receiving complaints, for obtaining the representations of the judge and for considering in their light whether or not there is a sufficient case against the judge to call for the initiation of such proceedings".

Lastly, the sanctions available to such authority in a case of proven misconduct should be defined, as far as possible in specific terms, by the "statute or fundamental charter" of judges, and should be applied in a proportionate manner.

**By way of conclusion** …

It is submitted that the tension – as intense as it is complex – between the independence and the responsibility of judges and courts, a tension which has pervaded this discussion, indeed goes to the heart of a question which is so topical in our twenty-first century democracies, that of the citizen's trust in the justice system.