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

Opening of the Judicial Year
Seminar
The Authority of the Judiciary

Accountability of the judiciary: shared responsibility of judges and the State

Friday 26 January 2018

Intervention by Pere Pastor Vilanova
ECHR

Presidents,

Excellencies, Dear Colleagues, Ladies and Gentlemen,

The task of adjudicating cases usually constitutes a State monopoly. This public-service mission pursues an undoubted aim in the general interest, with citizens as the main stakeholders. They are entitled to demand a fair trial, at the very least, under Article 6 § 1 of the European Convention. Justice therefore represents a true "duty" towards the public.

Acting in the interests of the public, that is to say, contributing to the proper administration of justice, thus becomes one of the key elements of judicial proceedings.

Given that judges are not usually elected by citizens, they may be tempted to look elsewhere for some form of legitimacy or social acceptability. This will be enhanced if their decisions have the support of the majority of people and of the public institutions.

This concern for recognition and accountability of judges underlies the so-called Bangalore principles, which were approved by the United Nations Economic and Social Council in 2006 and advocate ethical standards for judges. Even in the Preamble, it is stated that "… public confidence … in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society … it is essential that judges … respect and honour judicial office as a public trust …"

A number of questions may thus arise:
- How do we improve the acceptability of judicial decisions?
- What factors contribute to judges' accountability and how can they be put into effect?
- What efforts can be made to ensure that judges have a sense of responsibility in the performance of their duties?
- What are the possible limits of this quest for judicial accountability?

My talk will focus mainly on judges' accountability. While it seems to me indisputable, and frequently a matter of public order, that judges should have criminal and disciplinary responsibility, I have grave reservations when it comes to their civil liability, which I regard as seriously undermining judges' independence.

It is impossible to adjudicate cases in a calm manner with the constant threat of being the subject of a tort action. Any errors made by judges need to be rectified, to my mind, by means of the available judicial remedies and, in the alternative, by means of redress from the State budget for the damage caused.

Moreover, are poor judicial decisions not the consequence of a poor choice of judge (*culpa in eligendo*), or of having judges who have been poorly trained throughout their careers, or who are under-resourced or poorly appraised by the State (*culpa in vigilando*)? We might also ask whether an approach based on upstream judicial accountability might not be preferable to a response *ex post facto*, sometimes of a populist nature, designed to punish judges across the board. According to such an approach, making judges accountable entails first and foremost preventing dysfunctions in the judicial system. It is the result of a rigorous ethical system and a complementary legal framework that requires judges to demonstrate at all times the qualities expected of them. An exemplary justice system is most likely to be achieved by strengthening judicial ethics.

In order to address these issues, I have organised my analysis around two ideas: (A) judges must inspire public confidence (or how they must be perceived); and (B) judges must establish their legitimacy in the eyes of the public (or how they must conduct themselves).

(A) Judges must inspire public confidence (or how they must be perceived)

The accountability of judges can be achieved through their selection, the transparency of judicial procedure and the guarantees of their independence.

1. The right to a good judge:

- *Technical qualities* (initial and ongoing training)

High standards for the training and recruitment of judges are vital if they are to have a keen sense of responsibility in performing their professional duties. A very demanding selection process may arguably motivate successful candidates to demonstrate subsequently that the decision to appoint them was not just fortuitous but was wholly justified. Not only should judges demonstrate a high level of legal expertise outside the classroom; there should also be no possibility for judges to invoke a lack of professional competence in order to avoid any form of responsibility.

In numerous countries, ongoing training is not just a right but a duty. Hence, all judges are required to maintain a high degree of professional competence throughout their careers. This requirement sometimes comes into conflict with judges' heavy workload. A balance must then be struck between the need to hear cases within a reasonable time and the essential task of updating and building on knowledge.

- *Human qualities*

While the process of selecting judges tends to focus on their legal competences, some countries have, by means of domestic legislation or practice, introduced assessments relating to the human qualities of candidates for judicial office, including willingness to listen, common sense, sensitivity, courage, tact and an ability to take decisions with authority. I am willing to bet, Ms Cartabia, that the President of the Italian Constitutional Court would have added imagination to the list! In any event,

a failure to demonstrate these qualities may result purely and simply in the elimination of the candidates concerned.

« *Science sans conscience n'est que ruine de l'âme* » ("Science without conscience ruins the soul") said Rabelais. In my view, this applies perfectly to the legal sciences.

While the right to have one's case heard by a good judge is a legitimate aim, it is also necessary to know the judge's identity in order to assess him or her.

2. The right to know the judge's identity

There are two conflicting positions as regards the need to protect the identity of the judges who deliver a judgment.

Some argue that disclosing judges' names helps to make them accountable and to make the justice system transparent. The President of the French Court of Cassation supports this view. In an article written last year, he stressed that "judges should not be embarrassed by the rulings they give".

Those who advocate anonymity stress that identifying judges could make it possible to compile judicial statistics giving names and hence to identify the predominant line taken by individual judges. They argue that access to such data could be a sensitive issue, especially in legal systems where the management of judges' careers depends on the executive. To my knowledge, as far as the Council of Europe member States are concerned, only one Supreme Court preserves the anonymity of the judges who have taken part in a judgment.

Despite the existence of a broad European consensus, a balance remains to be found between the rights of persons coming before the courts to know the identity of the judges and the protection of judges against any attempts at destabilisation that might result from large-scale publicity via the Internet.

But let us take a few moments to look at the example of the European Court. The concern for transparency is near-absolute, although some would argue that there is one slight downside to this, as the separate opinions mechanism often reveals, or makes it possible to deduce, which judges voted which way in Chamber and Grand Chamber judgments.

However, the situation is different when it comes to inadmissibility decisions adopted by a Chamber. According to long-standing practice, the operative provisions of the decision merely state that it was adopted by a majority or unanimously. The fact that it is not possible to issue separate opinions means that there is no way of knowing how the majority was formed and which point or points were most keenly debated. This lack of traceability may be open to criticism, especially in sensitive cases where there is only a slim majority, as we all know that inadmissibility decisions cannot be referred to the Grand Chamber.

Disclosing the identity of the judges who voted for or against finding an application inadmissible would not necessarily breach the secrecy of the deliberations. It would not undermine the independence of the other judges or the authority of the decision, in particular because confidentiality concerns the position of the other judges rather than one's own. I realise that this idea has advantages and drawbacks, but they are similar to those raised in the debate about separate opinions.

I would now like to examine the role of the State in guaranteeing judges' independence.

3. The right to have one's case heard by an independent judge

True independence for judges is crucial to the manner in which they approach their duties. For that reason I would like now to address the issue of political interference with judicial authority. It is clearly difficult for a judge who is under State control to show due professional care.

It should be stressed at the outset that the Convention does not impose a strict separation of powers. Consequently, it does not rule out the possibility that the executive may play some role in the appointment, career development and even dismissal of judges.

- *Appointment of judges by the executive*

In the case of *Majorana v. Italy* ((dec.), no. 75117/01, 26 May 2005), the Court did not call into question the role of a regional authority in the appointment of some judges, once it was clear from the rules governing judges that they must not be subjected to pressure or receive instructions from anyone, and must perform their duties in a fully independent manner. Hence, the Court attaches great importance to all the safeguards that serve to counterbalance the absence of a clear separation between the executive and the judiciary (see *Campbell and Fell v. the United Kingdom*, 28 June 1984, § 78, Series A no. 80; *Lithgow and Others v. the United Kingdom*, 8 July 1986, § 202, Series A no. 102; and *Maktouf and Damjanović v. Bosnia and Herzegovina*, [GC], nos. 2312/08 and 34179/08, § 51, ECHR 2013 (extracts)).

- *Dismissal of judges by the executive*

Here, the Court takes into consideration the written guarantees but also the way in which the rules are interpreted and the practices followed. The issue that will prompt the Court to find a violation is not the possibility as such of dismissing judges, but the potential use of that power to encroach on their independence (see *Morris v. the United Kingdom*, no. 38784/97, § 68, ECHR 2002-I; *Sacilor Lormines v. France*, no. 65411/01, § 65, ECHR 2006-XIII; and *Eccles and Others v. Ireland*, no. 12839/87, Commission decision of 9 December 1988).

- *The disciplinary body for judges should be separate from the executive and the legislature*

The corollary to the guarantee of judges' independence is the independence of the body responsible for disciplinary review. A recent report by the Consultative Council of European Judges (CCJE) (3 November 2017) is worth citing in that regard, even though it is still provisional. It stresses one fundamental point, namely that judges should have security of tenure until retirement age (paragraph 17). This implies that a judge's tenure cannot be terminated other than for personal reasons or as a result of disciplinary proceedings. The second of these exceptions (disciplinary sanctions) inevitably raises the issue of the body responsible for disciplinary matters in relation to judges. The CCJE report states that "[o]nly an independent Council for the Judiciary can secure the independence of judges by rendering decisions which fulfil the requirements of 'an independent and impartial tribunal' according to Article 6 of the ECHR" (paragraph 19).

This report does not overlook the case-law of the European Court, and in particular the Court's judgments in *Oleksandr Volkov v. Ukraine* (no. 21722/11, §§ 112 and 113, ECHR 2013); *Mitrinovski v. the former Yugoslav Republic of Macedonia* (no. 6899/12, § 45, 30 April 2015); *Gerovska Popčevska v. the former Yugoslav Republic of Macedonia* (no. 48783/07, 7 January 2016); and *Baka v. Hungary* ([GC], no. 20261/12, §121, ECHR 2016).

Although depoliticisation of the judges' disciplinary body appears desirable, it has its limits in the possible corporatism stemming from the presence of a large number of former judges within the ranks. A subtle balance is therefore needed in order to avoid these two pitfalls.

Let me move on now to the second part of my address.

(B) Judges must establish their legitimacy in the eyes of the public (or how they must conduct themselves)

Carefully reasoned judgments, personal independence and external scrutiny of judges' activity are all factors that help to create bonds of genuine trust between members of the public and their judges and, accordingly, the entire institution of the judiciary.

1. The essential requirement to give (adequate and comprehensible) reasons for judicial decisions

Stating the reasons for judicial decisions is the essential corollary to the principle of the proper administration of justice (see *García Ruiz v. Spain* [GC], no. 30544/96, § 26, ECHR 1999-I). It pursues several aims. Firstly, it obliges the person giving the decision to adopt rigorous reasoning founded on objective arguments and based exclusively on the rule of law. This duty of lawfulness is inseparable from the exercise of judicial office. For instance, in the Grand Chamber case of *Taxquet v. Belgium* ([GC], no. 926/05, § 97, ECHR 2010), the Court ruled that the applicant's inability to understand why he had been found guilty meant that the trial had been unfair.

Secondly, stating reasons is a means of demonstrating to the parties that they have been duly heard, which increases the likelihood that they will accept the decision. As Professor Michel Grimaldi puts it: "The right to be given reasons … is not just the right to know, it is also the jumping-off point for the right to appeal". Our Court reiterated this, for instance, in *Hadjianastassiou v. Greece* (16 December 1992, § 33, Series A no. 252). In that case the applicant was unable properly to prepare his appeal on points of law because the reasons for the Court of Appeal judgment convicting him had not been made clear to him.

Hence, giving reasons constitutes a genuine qualitative requirement. Reasoning that is standardised, skeletal or vague is therefore tantamount to a denial of justice (see *Georgiadis v. Greece*, 29 May 1997, §§ 42-43, *Reports of Judgments and Decisions* 1997-III, and *Higgins and Others v. France,* 19 February 1998, §§ 42-43, *Reports* 1998-I). One can logically argue that reasoning is one of the fundamental aspects that legitimise judicial intervention in the resolution of disputes. On that basis, should it not constitute a value in its own right within ethical standards, on a par with competence, propriety and equality of the parties to the dispute?

The same issue arises where the law exempts judges from giving reasons for their decisions. For instance, in some countries judges are not required to give reasons when granting leave to adopt a child. We might even add that the fact that no appeal is possible against certain decisions of the civil or administrative courts because there is little at stake is a factor that may discourage judges from taking responsibility.

The requirement to give reasons is one of the best guarantees against arbitrariness. However, the reasoning must be honest and be based on the judge's own analysis, that is to say, it must be free from any interference by third parties with an interest in the outcome of the dispute.

2. A heightened requirement of personal independence

Principle 1.4 of the Bangalore principles states as follows: "In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make …"

The CCJE report which I cited earlier stresses the importance of the role played by the presidents of courts and also by those who preside over their different judicial formations. It points out that court presidents are important spokespersons for the judiciary, especially in relation to the executive. The vast majority act completely independently while a few, in exceptional cases, are subject to influence from a political authority or *de facto* powers.

But problems in relation to judges can sometimes arise internally. The CCJE has pointed with concern to another threat resulting from courts' own internal hierarchies (paragraph 51). According to a wide-ranging survey of more than 11,000 European judges, the three main sources of pressure are: the "management" of their own court – including the president – (25%), the parties (24%) and the media (16%). The report reiterates that a court president should never execute his or her duties in a way that puts pressure on a judge or influences him or her to decide a case in a certain way (paragraph 20). This point should not be overlooked. The appointment of court presidents by their peers, for a fixed term, as at the European Court, is perhaps an avenue worth exploring.

Before finishing I must say a few words about the periodic supervision which judges must undergo. This should not be perceived as limiting their independence: on the contrary, it prevents problems from arising and at the same time inspires public confidence.

3. The need for external oversight

I will look at this issue from two completely different perspectives: on the one hand, the appraisal of judges, and on the other, the recording of interviews, witness examinations and hearings.

The issue of the appraisal of judges is a familiar one. The limits to it are well known. Some people argue that assessing the quality of judicial decisions may undermine judges' independence. Others contend that judges may be tempted to give decisions that will please their appraisers. Perhaps it is time to move beyond the system of unilateral rating towards a more interactive approach in which the primary aim of the appraisal would be to provide feedback on the work of the judge in question, so as to identify possible shortcomings and find lasting solutions.

But this external oversight should not be confined to judges' appraisals or internal "house-keeping" inspections. It may also relate to the way in which trials are conducted as a general rule. The recording of interviews and hearings strikes me as a worthwhile approach. Besides the probative value of each individual's statements and demeanour, it is a means of preventing abuse both on the part of the parties or witnesses and on the part of the members of the judiciary themselves.

In conclusion, it can be argued that judicial accountability is a shared responsibility. It results from the judge's "soft skills" and know-how, but also from the vital contribution of the State, whose task it is to create a coherent legal framework for this purpose.

It is when these two situations converge that judges feel fully responsible for their actions and the public believes in their legitimacy and authority.

Thank you.

Pere Pastor Vilanova
ECHR
Judge

26 January 2018