COUNCIL OF EUROPE CONSEIL DE L'EUROPE

CONSULTATIVE COUNCIL OF EUROPEAN JUDGES
(CCJE)

"How to better organise the relations between judges and lawyers in order to improve the provision of justice"

Paris, 7 November 2012

« Maison du Barreau », 2 rue de Harley, 75001 Paris: (Auditorium, 9h-18h)

European conference organised
by the Consultative Council of European Judges and the Paris Bar

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1. Introduction

I thank the organisers of this European Conference to have invited me to discuss with you the topic of the relations between judges and lawyers, focusing more in particular on the question whether lawyers and judges have "a shared responsibility for the efficiency of the judicial system", as it is written down in the programme of the conference.

As you may know, the CCJE worked, together with its sister-organisation the CCPE (Consultative Council of European Prosecutors) in 2009 on a joint Opinion on the relations between judges and prosecutors. At that time we were aware that we should soon turn to the topic of the relations between judges and lawyers, the other principal professional actors in the field of justice, more in particular in judicial proceedings.

The programme of this conference informs us that we will address issues like "the development of systems of communication between judges and lawyers", and "common management of procedures" etc. I will, however, slightly deviate from that programme. I hope that you have no objections to that. I think it is important to see these rather technical topics also in the wider and more fundamental perspective of the rule of law.

A brief overview of my speech: I will first have a short look into the deontologie of judges and lawyers. From that starting point, I will analyse if judges and lawyers have a shared responsibility. In my opinion, they have, on a general level as well as on the level of each individual case in which they act. I will then go on to give some fruitful examples of dialogues between judges and lawyers, taken from my experiences. I end by showing how important it is to have an oral hearing in an early stage of every procedure. At the oral hearing, the shared responsibility becomes particularly relevant.

2. A shared responsibility

Starting point for my speech is the notion that lawyers and judges are, so to say, "look alikes". They have both studied law, ("read law" as our colleagues from the UK say so elegantly), they speak the same (sometimes hermetic) language, they both wear (in many countries) a gown/ a robe, they are both bound by an oath in which respect for the rule of law is central. However, their roles in the judicial systems and in each individual case differ in an essential way: the lawyer must act in the interest of the party he or she represents, the lawyer holds a partial position. The judge has no client and is bound to be impartial. Perhaps we can say that the lawyer is a more "hybrid" person, serving the interests of the client, and at the same time promoting the fair administration of justice, by serving the interests of the client, within certain limits.

In this respect, it is interesting to study the existing deontological documents for judges and for lawyers and to identify the similarities as well as the differences in their respective ethical principles, or "core principles".

To give just one example: In the "Charter of Core Principles of the European Legal Profession" of the CCBE (the Council of Bars and Law Societies in Europe), adopted in 2006, one of the core principles of the lawyer is called: "*respect for the rule of law and the fair administration of justice"*. In paragraph 6 of the Commentary on the Charter, the role of the lawyer is described as follows:

"The lawyer's role, whether retained by an individual, a corporation or the state, is as the client's trusted adviser and representative, as a professional respected by third parties, and as an indispensable participant in the fair administration of justice. By embodying all these elements, the lawyer, who faithfully serves his or her own client's interests and protects the client's rights, also fulfils the functions of the lawyer in Society - which are to forestall] *and prevent conflicts, to ensure that conflicts are resolved in accordance with recognised principles of civil, public or criminal law and with due account of rights and interests, to further the development of the law, and to defend liberty, justice and the rule of law."*

I think this description illustrates very well the "hybrid" character of the role of the lawyer: to represent the interests of the client, and to further the rule of law.

If the previous considerations are correct, they imply that judges and lawyers indeed have a shared responsibility. A shared responsibility in the functioning of the judicial system on a general level, but also, quite simply, in each individual trial, in every single judicial procedure in which they act. For both professions, it is important to reflect on the principles that underlie their daily practice. Both judges and lawyers can forget what is at stake in daily practice, the daily grind ("le train-train quotidien") can distract us from that perspective. Lawyers and judges act, as "professionals", in the course of their career, in thousands of cases and proceedings. But we may not forget that, for the parties, their case at hand is unique and, generally, of great importance. One of our first shared responsibilities is to make sure that the interest of the parties is central. The litigants expect that we listen to them and that we strive at a fair resolution of the case within a reasonable time. In practice, however, we are often perceived, not without reason, as being "les gens de justice", as characterised in the lithographs by Honoré Daumier in the middle of the 19th Century. A trial is, also in the year 2012, often perceived as a "separate" reality, in which the human being easily gets lost. The judicial trial "alienates", as in Kafka's novel "Der Prozess"/ "The Trial".

3. Dialogues between judges and lawyers in the interest of justice

Seen from this perspective, it is of utmost importance that dialogues take place between the Bar and the Bench, - not excluding other actors and other interested parties (e.g. prosecutors, consumer-organisations, administrative authorities) - , in which the functioning of the judicial system is evaluated and in which measures are developed to overcome the barriers that exist to a fair trial within a reasonable time.

I can give you some examples of these dialogues, taken from my own experiences in the country where I work, the Netherlands. They are just examples, not necessarily relevant for other countries with different legal cultures and different problems in the functioning of the judicial system.

A first example of a successful dialogue between judges and lawyers that I witnessed took place about twenty years ago and was aimed at making the proceedings in the - often very discordant - matters of family law (divorce, alimony, children) less adversarial. In this long-lasting project, nationwide and on local levels, the judges and lawyers have, assisted by psychologists and other experts, found other, "softer" ways to deal with these delicate cases. A "harmony-model" has been developed, which was a great improvement. Unnecessary polarisation disappeared from the courtrooms.

About ten years ago, in the Netherlands, judges and lawyers discussed the creation of more simple proceedings in civil and commercial matters in first instance. These discussions led to new legislation, in which the number of written conclusions and the possibilities to invoke "procedural incidents" were substantially reduced and in which an oral hearing before the judge was introduced in an early stage of the proceedings. I will come back to this topic. The experiences were very positive and the findings are now expanded to procedures in appeal and to proceedings in administrative matters.

Recently, a nation-wide project has been set up to find new solutions for the effective working of the proceedings in administrative matters. As you may know, a judgment in an administrative procedure often consists of the annulment of an administrative act, after which the administration is to issue a new act, that can again be subject to judicial review. This can go one for a long time and is very unsatisfactory for the citizens. The "new approach" in administrative matters strives at a final decision of the case at hand, by enabling the administration to repair

deficiencies in the administrative act within the framework of the pending procedure and under supervision of the judge. ("*administrative loop", "noeud administratif*").

The findings of the dialogues between judges and lawyers can lead, depending on their nature, to new procedural rules laid down in different levels of legislation (a formal act, or a lower regulation), laid down in rules of procedure of all the courts or of some of the courts, or again laid down in guidelines from the courts to the parties, or even from guidelines from the Bar Association to its members (e.g. the document of the CCBE (2012): "Practical Guidance for Advocates before the Court of Justice in Preliminary Reference Cases").

All these initiatives are orientated towards the creation of better procedures, in the interest of the parties and in the interest of justice. One of the most pertaining problems, in almost all the member-states, is of course the length of proceedings. Here, it is particularly valuable to learn from "best practices", from all over Europe and elsewhere. The examples of innovation from other countries are inspiring, even if they can not be implemented in the same way elsewhere, because of the differences in the legal and judicial cultures of the various countries. In this respect, the work of the CEPEJ, the European Commission for the Efficiency of Justice, is very important. I refer to the biannual reports on European Judicial Systems, and to studies like the "Time Management Checklist" (2005) and the "Checklist for Promoting the Quality of Justice and the Courts" (2008).

A dialogue is also valuable on the level of each individual case. Depending on the nature and the complexity of the case, it is in the interest of the parties and in the interest of a fair trial within a reasonable time that the judge and the parties discuss and determine the procedural steps to be taken in the trial: how many written documents, time-frames, the points to be addressed, the hearing of witnesses, and all other issues under the heading "case-management". In an "ideal" trial, the procedural orders are tailor-made for the case at hand and the parties have a say in the organisation of the trial. I think it is important that the rules for procedures, as set out in the relevant regulations, are sufficiently flexible and leave room for individual frameworks. In this respect, we can learn a lot from the world of arbitration, in which the parties and the arbitral tribunal design in concert the course of the proceedings. I am not saying that every trial before a state court can or should be tailored as a complex and costly international arbitration; but the approach is: to listen to the parties, to be flexible. (The rules of arbitration of international arbitration institutes are also inspiring, because they reflect approaches from different legal cultures).

4. Oral hearings in an early stage of the proceedings

The dialogue on the level of each individual case brings me to a next topic. I think it is important that in each case, an oral hearing takes places in an early stage, e.g. after one round of written submissions /conclusions of the parties. The oral hearing serves different aims.

- At the oral hearing, the positions and interests of the parties, as well as the backgrounds of the dispute can become more clear than appears from the written submissions. Facts can be discussed; points of law can be clarified.

- Often, alternative ways of the resolution of the dispute can be pursued: a compromise between the parties that makes an end to the proceedings, or a suspension of the proceedings and referral to mediation. Of course, we are dealing with a wide variety of cases. Some call for a formal judgment after complex and lengthy proceedings. I take the example of a complex competition case, in which all kinds of technical legal points are discussed and referrals to the Court of Justice EU can be necessary. But in most cases between individuals or smaller companies, compromises between the parties are often a more adequate solution. I am thinking, e.g., about family law, labour law, disputes between neighbours, consumer-cases, but also about administrative cases (a building permit, a license to drive a taxi, etc).

- At the oral hearing, the management of the case can be discussed. What will be the procedural steps, what calendar will be followed, which points will be addressed first? This is an important instrument to reduce the length of proceedings. It is also important in the perspective of the parties' autonomy: the parties have a say in the proceedings and they do not get lost so easily. I talked about this before, referring to Kafka's "The Trial".

In sum, direct contact between the parties and the judge at an early stage of the proceedings furthers the interests of the parties and improves the quality of proceedings.

An effective oral hearing demands a lot from the judge. He or she must be active, responsive, listen ánd question, must be open to the needs of the parties, must be creative in discussing alternative solutions, all this combined with an excellent knowledge of the legal points. (pm delicate balancing between these activities). An effective oral hearing also demands a lot from the lawyers representing the parties. They must be clear and trustworthy in bringing forward the interests of their clients, they must put forward all the relevant facts and circumstances as well as the relevant points of law, they should also be creative in finding solutions between the parties. At the oral hearing, the judge and the lawyers share responsibility to create a genuine fair trial, in every single case. The aim

of a trial is to arrive at a fair resolution of the difference in a reasonable time. This is to be done in every single trial before us.

Some minutes ago, I talked about the project, in The Netherlands, to make proceedings in civil and commercial cases in first instance more simple. In this framework, the instrument of an oral hearing at an early stage of the proceedings is the central element. In almost all civil and commercial cases, an oral hearing takes place after two or three months after the introduction of a case (that is to say: after the writ of summons or the request of the Claimant and a written Response from the Respondent). After ten years experience with this instrument we can conclude that the results are very positive. In approximately 35 % of the cases, the parties settle their dispute. In any case, disputes become clearer and the length of proceedings can be shortened. The parties have communicated with the judge and the other parties involved. This instrument calls for an active judge. But I must add one proviso, one “warning”. Our experiences also show that a judge can become too active and that, sometimes, too much pressure is put on the parties to consent to a settlement. (probably there is a link with our court-financing system, in which a settlement of a case is equally valued as a final judgment). Recent research seems to indicate that approximately 40 % of the settlements are, afterwards, perceived by the parties themselves as concluded under the pressure of the court (so called “settlements by force”). As a judge, and as a former lawyer, I am not in favour of this practise. The judge is, nowadays, an active actor in proceedings, but excess is, here too, very wrong.

5. Conclusions

I will conclude my speech. I hope that I have been able to demonstrate that it is of utmost importance that judges and lawyers have dialogues, on a general level and on the level of every individual case. The underlying principles of this communication are the interests of the parties and the creation of genuine fair trials within a reasonable time. Judges and lawyers have a shared responsibility in this respect.

One more word about time. The length of judicial procedures is often excessive and unbearable. But this problem is not solved by hasty oral hearings. We have to take time for every individual case, to be patient and respectful, to have a human or humanistic approach. I refer to my earlier remark: judges and lawyers may not forget that, for the parties, their case at hand is unique and, generally, of great importance. One of our first shared responsibilities is to ensure that the interests of the parties are central in judicial proceedings.

I have seen courts functioning in several different countries. I think that sometimes judges lack these faculties and cases are treated as products on a production-line in a factory. We judges are sometimes sceptical about the professional competences of certain lawyers. But I am sure that the lawyers, as well as their clients, can say the same of certain judges. This is not always a personal matter; it can be the result of more structural problems like a lack of means of the courts to deal adequately with their workload. There is a difference between the ideal world and reality, for lawyers and for judges too. Training, where relevant joint training, and interaction, also at an international level, can help to make that difference smaller.