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Judicial timing and the quality of the decisions

Efficiency of the system and efficiency of the decision

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Efficiency of the system and efficiency of the decision

- Introduction by Nils A. Engstad, judge, Hålogaland Court of Appeal, Member of the Consultative Council of European Judges, Norway
 - At the Conference organised by the Supreme Court of Justice and the High Council for the Judiciary of Portugal, in collaboration with the Consultative Council of European Judges (CCJE), Lisbon (Portugal), 24 April 2008 on Judicial timing and the quality of the decisions
1. **The length of judicial proceedings** has been recognised as a priority within the objectives of the Council of Europe relating to human rights and the rule of law. As stated by the Consultative Council of European Judges (CCJE) in its Opinion No. 6 from 2004: “when dealing with the justice system, citizens should know they are dealing with an efficient institution.”¹
 2. **Under Article 6 of the European Convention on Human Rights**, everyone is entitled to justice within a reasonable time. As reiterated by the European Court of Human Rights, the Contracting States accordingly have the obligation to organise their legal systems so as to allow the courts to comply with this requirement. Efficiency of justice is partly a consequence of resources allocated to the courts system, including the number of judges, court staff, premises and court houses adequately in shape and equipped, etc. The efficiency of justice is thus not merely a task for judges and courts to cope with. It is a structural challenge involving *inter alia* the question of adequate funding of the justice system as such.
 3. **The European Court of Human Rights** has developed a universally applied normative framework to assess whether the time used by the national courts to bring a case to an end, is reasonable or not. The “reasonableness” of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: (1) the *complexity* of the case, (2) the *conduct* of the applicant and of the relevant authorities and (3) *what was at stake* for the applicant in the dispute².
 4. **Execution of judgments** must be regarded as an integral part of the “trial” for the purposes of Article 6. A delay in the execution of a judgment may be justified in particular circumstances, but the delay may not be such as to impair the essence of the right protected under Article 6 § 1.³
 5. **The length of proceedings is measured** from the time when the authorities first have a legal responsibility towards the citizen: in *civil*

¹ Opinion No. 6 (2004) of the Consultative Council of European Judges (CCJE) on fair trial within a reasonable time and judges’ role in trials taking into account alternative means of dispute settlement.

² See for example *Marini v. Albania*, 18 December 2007, Application no. 3738/02,

³ *Marini v. Albania*, 18 December 2007, Application no. 3738/02

cases when the citizen *files a proceeding* at the court, and in *criminal proceedings* from the moment a person is *charged* with a criminal offence, which might be the date the suspect was arrested. Consequently, it's not only the time of court proceedings that counts, standstill time in police investigation or within the prosecution authorities may be of significance when measuring the length of proceedings.

6. **How long is too long?** A study of case law of the European Court of Human Rights, adopted by the European Commission for the Efficiency of Justice (CEPEJ)⁴, shows that the *procedural phases* of a case deemed to comply with the requirement of reasonable time, generally lasts less than two years. When proceedings have lasted more than two years, the Court examines the case closely to determine whether the national authorities have shown due diligence in the process. In *priority cases*, the court may depart from the general approach, and find violation even if the case lasted less than two years. In *complex cases*, the Court may allow longer time, but pays special attention to periods of inactivity being clearly excessive. The longer time allowed is however rarely more than five years and almost never more than eight years of total duration. The only cases in which the Court did not find violation in spite of manifestly excessive duration of proceedings were the cases in which the applicant's behaviour had contributed to the delay.
7. **Is non-violation of the Convention good enough?** The standard "reasonable time" draws the line between *violation* and *non-violation* of the Convention. In this respect I agree with the European Commission for the Efficiency of Justice (CEPEJ) who has stated that the concept of "reasonable time" should not be considered as an adequate outcome where it is achieved⁵. The CEPEJ advocates that we should rather focus on "*optimum and foreseeable time frames*", which is a more demanding standard than "reasonable time", and entails providing accurate information to court users on acceptable time frames for each case, depending on the procedure adopted. I agree to that. I'm a believer in time frames, in time limits in procedure, and in active judges performing active case management.
8. **Compilation of examples** A lot of work has been done in Europe within this field at a national level, but also within international bodies such as the Council of Europe, especially with reference to Recommendations of the Council of Europe, work done within the Consultative Council of European Judges (CCJE), the Venice Commission and the European Commission for the Efficiency of Justice (CEPEJ). Based on work carried out within these international bodies, mixed with some national level input, I would like to mention a few means recommended and implemented designed to speed up the court procedures.
9. **(1) Active case management** implies that the court shall actively and systematically manage the preparation of the case to ensure that it is

⁴ Length of court proceedings in the member states of the Council of Europe based on the case-law of the European Court of Human Rights, CEPEJ(2006)15

⁵ A new objective for judicial systems: the processing of each case within an optimum and foreseeable timeframe, Framework programme, CEPEJ(2004)19REV2.

dealt with in a swift, cost effective and sound manner⁶. In order to allow the judge to perform active case management, the procedural rules must empower him or her with means required to play the leading role in managing the case, as done *inter alia* in England and Wales in 1999 implementing the Woolf Rules⁷, exchanging the principle of “party control” with “judicial case management” and transferring the responsibility for the management of civil litigation from litigants and their legal advisers to the court.

10. (2) Timeframes for the main stages of the procedure should be fixed.

A case management meeting at an early stage to fix timetables for the proceeding has been recognised as an effective tool to promote the early settlement of disputes, avoid adjournments, focus and concentrate hearings, and maintain timeframes, as implemented *inter alia* in the Norwegian Code of Civil Procedure. Pursuant to the Norwegian Dispute Act, which entered into force at 1 January 2008, the court shall at an early stage summon the parties to a meeting to discuss the further proceedings. The court shall also set the date of the main hearing, which as a main rule shall fall within six months of the submission of the writ of summons⁸.

11. (3) The court must have an option for reaction or sanction against breaches of procedural requirements, e.g. by striking out part or all of the claim or defence, or by preclusion of evidence if the parties fail to observe the time limits for presentation of evidence. This creates indeed a strong incitement for the parties to stay loyal to time limits and other procedural requirements.

12. (4) The main hearing should be focused. Trials should be as concentrated as possible to be effective. The Council of Europe Recommendation Rec. 84 (5)⁹ advises the establishment of a typical procedure based on “not more than two hearings”. The court should ensure that the main hearing takes place in a focused and proper manner and have the powers to refuse proceedings concerning issues of no relevance to the case, unnecessary repetition, unnecessarily comprehensive proceedings and proceedings on issues which have been sufficiently discussed previously.

13. (5) Alternative dispute resolution and mediation should be promoted. The Consultative Council of European Judges (CCJE) has emphasised the importance of alternative dispute resolution and mediation. The Norwegian Dispute Act has a strong focus on mediation, both prior to court proceedings, but also during proceedings, and thus broadening the role of the judge as mediator. The extensive use of

⁶ See e.g. the Norwegian Dispute Act section 9-4 (1)

⁷ Civil Procedure Rules 1998 (CPR) named after Lord Woolf

⁸ The Norwegian Dispute Act section 9-4 (2)

⁹ Recommendation No. R (84) 5 of the Committee of Ministers to Member States on the Principles of Civil Procedure designed to improve the functioning of justice (Adopted by the Committee of Ministers on 28 February 1984 at the 367th meeting of the Ministers' Deputies)

mediation has turned out to be quite successful, often leading to an amicable and early settlement of disputes.

14. **(6) Procedures should be consistent with the complexity of cases.** Case management could be differentiated related to the financial amount in dispute or the legal issues involved. Summary proceedings could be established for the disposal of cases considered to have a low level of complexity. The Norwegian Dispute Act outlines a kind of “fast and cheap track” for “small claims” where less than 125 000 NOK is in dispute, which amounts to approximately 15 000 Euros. As the procedure is simplified for small claims, so is the requirement for grounds in the judgements.¹⁰
15. **(7) Use of electronic case management systems** has proved to be an important tool for increased efficiency, making it possible to recycle information in the courts system, simplifying routines, providing follow-up routines on time limits and time frames for the individual case, allowing constant monitoring of pending cases, and for processing of statistics and reports on an aggregated level for the individual court as well as for the courts’ system as such.
16. **(8) Use of information and communication technologies** could give substantial contributions to more swift and cost efficient procedures. Preliminary hearings could be held as distance meetings using telephone or videoconferencing. Such technologies could also be used to avoid the transfer of persons under custody, or to be used during main hearings to examine witnesses or experts.
17. **(9) Interaction and division of tasks between judges and court staff** should be promoted. The importance of highly qualified members of court staff should be recognized, enabling extensive delegation of administrative case management tasks to court staff members in order to increase time available for judges to their priority tasks, such as adjudication.
18. **(10) Court administration and leadership** should be a priority within the system. Increased efficiency presupposes that the leadership - the court presidents - are devoted to the idea and to the promotion of efficiency. According to Bob Dylan *the times they are a-changing*. It is for the leaders to set standards and a vision for change. Therefore, efficiency is also leadership, and building consensus within each court that efficiency is desired. A greater focus on court leadership and accountability for court management should be a priority task *inter alia* for the Councils for the Judiciary throughout Europe.
19. **More speedy procedures may entail risks that should be considered carefully.** Let me mention three of them:
20. **(1) Speed is not necessarily the same as quality.** Speed must not overrule the demand for overall quality of the judicial system. Speedy procedures must be reconciled with requirements for a fair trial, also

¹⁰ The Norwegian Dispute Act Chapter 10

taking into account *inter alia* procedural safeguards for the parties. After all, slow justice is better than speedy injustice.

21. **(2) More speedy procedures must not jeopardize judges' independence.** The demand for more efficient proceedings, and that court presidents should be accountable *inter alia* for more speedy procedures being carried out, may be an incentive for excessive intervention from the courts' leadership in the case management of the single judge in a way that might jeopardize the judges' independence. Therefore, there must be considered limitations on such intervention in order to safeguard the independence of the judiciary. On the other hand, the European Convention on Human Rights requires an effective remedy on undue delays of proceedings, and the option for the president of the court to intervene in order both to rectify or avoid possible violation of the Convention, should be admitted. The relation between the court leadership and the single judge - and limitations on leadership intervention - is a quite delicate issue, which could deserve some closer examination by the Consultative Council of European Judges (CCJE).

22. **(3) More speedy procedures may increase the risk of alleged misconduct.** The active judge setting time limits, precluding evidence not forwarded in time by the parties etc, may run the risk of being more exposed to dissatisfaction from the parties than the more passive judge. Though the judge in the management of each case of course is obliged to behave in accordance with the standards for judicial conduct, the standards must be reconciled with the demand for speedy procedures, and - even more important - the disciplinary authorities must acknowledge the judge some extent of discretion in this respect.

23. **To conclude: The demand for efficiency – what's in it for judges?** Delays in proceedings may have negative implications for the individuals involved as well as for the society at large. Court proceedings may concern the most precious and basic values in life, such as children or labour, occupying time and consuming strength of those involved. The demand for speedy justice is the image of a more speedy society where money runs fast in an increased internationalized economy in need for foreseeable, swift and enforceable justice. Being at service for justice and for the society, judges and the court system must cope with these demands. As judges we are concerned with the citizens' confidence in the judicial system, as well as we per se should be concerned with the citizens' confidence in the judiciary as profession. Perhaps one could conclude with Bob Dylan's message, proclaiming that the times they are a-changing:

24. You better start swimmin'
Or you'll sink like a stone
For the times they are a-changin'