SOME PROCEDURAL ASPECTS AS INDICATORS OF QUALITY OF JUSTICE

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To my mind, quality of justice to a large extent, if not exclusively, is about due process. This is, I would argue, true with regard to the work of public authorities as well as to the proceedings at all levels of the administrative justice system. It is equally true concerning all stages or elements of administrative justice, from the reception of a complaint to the deliverance of ”the final judgment”.

The essential procedural requirements are well summarized in Article 6 of the European Convention on Human Rights, where it is stated that ”everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” What, more precisely, is meant by a fair hearing, an impartial tribunal and so on has been developed, sometimes in great detail, by the Court of Human Rights.

I will not say much about the reasonable time requirement, even if it of course is one of the most essential aspects of a qualitative procedure. Let me just briefly share with you some of my own experiences of this issue. A few years ago, my court was struggling with a heavy back-log. The situation has now improved considerably. To achieve this, we regrouped the legal secretaries preparing the cases into a more professional organization. It now consists of three rather specialized units, each led by a highly qualified first or second instance judge. Furthermore, we appointed a number of highly qualified, experienced legal secretaries to study each new case immediately upon its arrival to the court. Their mission is primarily to identify whether a new appeal seems to be a rather clear-cut case, which may be handled within a simplified procedure, or if it involves important or difficult points of law which will need the full attention of the court. With the overview of incoming cases that these key-persons acquire, they are also in a position to identify all cases which raises identical or similar questions of law and thus preferably should be handled together. Lastly, we have a sort of task-force of legal secretaries who may be used to reinforce the preparatory work wherever problems occur.

Now, I would like to concentrate my intervention on a specific stage of the procedure: the drafting of judgments.

It is almost self-evident that a judicial decision must state the reasons on which it is based. As far as I have seen, the European Court on Human Rights, has expressed itself on this issue from one perspective only. The Court has stated that the detail into which the statement of reasons must go is determined by what an effective remedy against the decision requires in each particular case. If, however, a court of appeal agrees with the reasons given by a lower court, it does not have to explain this by restating the reasons. (The Firestone Tire and Rubber Co v. United Kingdom, X. v. Federal Republic of Germany and X. v. Italy).

This is of course true and certainly an important aspect. Nevertheless, I would argue that to state reasons is of wider importance, not least with regard to supreme administrative jurisdictions. Most of our judgments constitute precedents. They do not only interpret the law; they also develop the law and to some extent establish what the law is on a specific issue. They provide guidelines, not only for lower courts but for other state organs, public institutions and citizens. In modern society, we cannot expect others to let themselves be guided exclusively out of respect for our institutions. They need to be persuaded by coherent, well founded, convincing legal argument. Or, at least, if not fully persuaded, they need to at least understand why the court has come to a certain conclusion.

One special aspect of the obligation to state reasons may be mentioned. In the case of Ullens de Schooten and Rezabek v. Belgium the Court of Human Rights dealt with the issue of whether or not a decision to refuse to refer a case to the Court of Justice in Luxembourg for a preliminary ruling was sufficiently reasoned.

The obligation to state reasons is closely connected to another aspect of the drafting of judgments.

We agree that the law must be accessible and so far as possible intelligible, clear and predictable. Judges are quite ready to criticize the obscurity and complexity of legislation. In our part of the world, we often have cause to be critical of how European Union legislation is drafted. And, of course, in this area the problem of poor legal drafting is multiplied by the fact that directives or regulations are supposed to have the same legal value in each of the 23 languages in which they appear. But what about our own judgments?

The possible problem of intelligibility and clarity may not be of the same magnitude in different legal traditions. Some of us, I think, strive to provide minimal reasoning, some allow for each member of the bench to

dissent or concur in sometimes lengthy personal statements. Lord Bingham, in his short work entitled "The rule of law" illustrates the problem by reference to a question which the House of Lords addressed on three separate occasions in the space of three years.

A local authority was seeking possession of premises which a person had occupied as his home, but which under national law he had no right to continue to occupy. The legal question was whether he could seek to resist eviction by relying on the right to respect for his home protected by Article 8 of the European Convention on Human Rights. "The detached observer might suppose", Lord Bingham writes, "that the answer to the question would be 'yes' or 'no' or 'sometimes', and, if 'sometimes', would expect guidance to be given on when Article 8 could be relied on and when it could not." In the event, answering this question provoked marked differences of opinion between the Court of Appeal and the House of Lords, and between the members of the House of Lords themselves. In the House alone, the question was addressed in fifteen separate reasoned judgments, running to more than 500 paragraphs and more than 180 pages of printed law report. "Even after this immense outpouring of effort it may be doubted", Lord Bingham concludes, "whether the relevant law is entirely clear, or for that matter finally settled."

I assume that we all can think of similar examples from our own legal sphere.

And I suppose one could say that excessive reasoning in the worst case scenario may result in the same ambiguity or darkness as insufficient or non-existent reasoning.

First of all, to my mind we owe it to society in general to draft our judgments in as clear and simple language as possible. Maybe, just maybe, the temptation to use complicated, supposedly scientific, language is especially present in administrative justice. We address ourselves to a large extent to public authorities which themselves may be inclined to use, and to be more easily impressed by, such vocabulary than ordinary citizens. We are not there, however, to impress civil servants but to make the law known to society at large.

Not only do we need to use simple language; we also need to strive to make our judgments accessible in other ways. In my country, the tradition is to annex the judgment of a lower court to the judgment of a higher court. Until recently, the interested citizen needed to start reading from the end – the judgments of the lower courts – to be able to understand

our ruling. This is, of course, not consumer friendly. Nowadays, the ambition is that anybody should be able to read and understand our judgments as stand-alone products. The first part of the judgment thus should explain the background of the case: the facts at the origin of the case explaining why this was brought to court in the first place as well as the adjudications of the lower courts.

We also strive to guide our readers through the judgments by the use of subheadings, stating which of the subsequent issues is being dealt with.

I will not suggest that all our judgments are easily readable, but we are getting better at it.

Finally, another aspect of procedural quality, I think, is to avoid excessive formalism. To what extent this may be a problem may vary between countries depending on whether you have to be represented by counsel or not. In my country you do not. Many citizens refrain from turning to a lawyer, not least because of the costs involved. And still, their case may be of the outmost importance to them, even financially, for example within the area of social security.

In those circumstances, the court need to assist the citizens – not, of course, to win the case against the State, but at least to present their case to the court and have it tried. I would say that in Sweden the courts normally make an effort to understand what the complainant wants even if he has not been successful to do so in legal terms. If somebody writes to us without formally stating that it is an appeal, we will treat it as such when he express discontent with the ruling of the court of appeal.

To be fair, I should mention that the Court of Human Rights in Guillard v. France stated that a court needs to avoid *both* excessive formalism *and* excessive suppleness.

Let me conclude by quoting Sir Matthew Hale, Chief Justice of the King´s Bench from 1671 to 1676, who wrote a list of eighteen points, composed by himself to guide his own conduct as a judge ("Things Necessary to be Continually had in Remembrance"). Among the things he found it necessary to remember we find the following:

"That popular or court applause or distaste, have no influence into any thing I do in point of distribution of justice."

Of course, Sir Matthew was right. We should not be influenced by popular applause or distaste when adjudicating any given case before us.

However, we need to be conscious of whether the proceedings we conduct are perceived by the citizens to be just, fair and reasonably fast and whether the judgments we write are understood *and* respected.