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Judicial Transparency: a Model

This paper contains a *model of an ideal situation of judicial transparency*. The model is based on studies of two West European countries of different legal traditions (France and Sweden) and takes into consideration conditions in Latvia. The ideal situation described does not necessarily exist in any European state but the model reflects, in general, good West European standards of judicial transparency.

The model is limited, in principle, to transparency aspects within a time period, starting when a petition has been filed with the court and ending with an adjudication and subsequent enforcement. Unless the opposite is indicated, the model does not differentiate between different legal areas (civil, criminal, administrative law) or various levels (district court, appellate court, supreme court)

1. Composition of courts and distribution of cases

The participation of lay judges in the courts increases transparency, adds knowledge to the court and, hence, reinforces public confidence in the court system. In particular, lay participation in the first instance fills a function of this kind.

Cases should be distributed randomly, but regard could also be paid to judges' workload and qualifications.

2. Identification of court proceedings

It shall be easy to for the general public and mass media to find out which proceedings have been initiated, are ongoing and/or have been concluded in a court. For this reason the court shall keep a register of all cases. During the proceedings concerning a given case, all incoming documents shall continuously be registered. The register shall indicate for each case the time of receipt, the steps taken in the case, the date of its decision and whether there was an appeal, the time when the appeal was filed and the steps taken. The enforcement of judgements should also be made easy for follow-up by bailiffs and prison authorities. Processing may make the registration. Such a register is permissible under the Directive 95/46/EC provided that the processing of personal data is performed in accordance with the provisions of the Directive.

3. Public attendance at court proceedings

3.1 Hearings

The concept of hearings includes inter alia: detention (preliminary) hearings in criminal cases, oral preparations in civil cases, main hearings (trial proceedings) in civil and criminal cases and views (inspections). An oral hearing shall be held if an individual requests so, provided that such hearing is not unnecessary and there are no particular reasons against it (Article 6 of the European Convention on Human Rights).

3.2 The right to attend

The principle is that court hearings shall be public. The right to attend hearings implies that the public shall have the possibility of following the hearings. For this reason larger courtrooms shall preferably be equipped with technical aids such as microphones and hearing loops. Since persons shall be able to enter and leave unhindered, the courtroom doors as well as the doors to the courthouse shall be kept open during the hearings.

Courts shall draw up a list of cases containing information about coming cases. The list must show when a hearing is expected to start and specify the identities of the parties. This also applies to hearings held behind closed doors.

3.3 Detention hearings (preliminary hearings)

If the prosecutor presents an application for a detention in a criminal case, the court shall hold a *detention (preliminary) hearing*. In principle, also this hearing shall be public but since the preliminary investigation has not been usually concluded by the time of a detention hearing, a public hearing could be counteractive to the continuing investigation if the information was to be made public. The court may therefore decide that the hearing be held in-camera.

3.4 Restrictions on public attendance at court hearings

The right to attend can be, in principle, restricted in two ways; by partial exclusion of the public, i.e. expulsion or limitation of the number of people allowed in a courtroom, or by total exclusion when hearings are held in-camera. Further, there are provisions restricting attendance indirectly, such as restrictions on the use of certain equipment or concerning the use of security controls.

3.4.1 Limitation and expulsion of audience

The judge responsible for maintaining order in the court may expel any person who disturbs the hearing. When limitation on the number of spectators is necessary due to overcrowding, a quota system may be used, by which the spectators are divided into groups, for example relatives, journalists and the general public. Journalists are often given priority over the general public.

When the chairperson of the court considers it justified, persons who are or appear to be under a certain age may be denied admission to a public hearing. If this is the case, such persons may need to identify themselves in doubtful cases.

3.4.2 Hearings behind closed doors

Hearings behind closed doors shall be rare. However, if it can be assumed that certain information will be presented the disclosure of which would damage legitimate interests of secrecy, the court may order that the hearing be held behind closed doors *insofar* as it relates to the information. Such interests may be *inter alia*: national security or relations with a foreign power, e.g. espionage cases; inspection, control or other supervision of a public authority; preventing or prosecuting a crime, e.g. detention (preliminary) hearings; protection of the personal integrity or economic circumstances of private subjects, e.g. cases concerning

certain sexual offences, information about an individual's state of health or cases regarding business conditions.

If a hearing is held behind closed doors, the reasons for it shall be noted down in the court records. If a hearing is held behind closed doors and secret information has been presented, the court may direct that the information shall not be disclosed.

3.4.3 Prohibition of certain equipment and security controls

There is no general norm in Europe on whether photographs, including film and TV recordings and live broadcasts, should be permitted in court hearings and the delivery of judgments, but the trend is in favour of increased openness.

Usually phonetic recordings are permitted at public hearings. However, during examination of persons, the court may prohibit recording if it will so embarrass the person being heard so as to be detrimental to the inquiry. It should be noted that the court always has the option of making its own recordings. Such recordings may be regarded as documents and may consequently be made available to the public, provided they are official and that no secrecy provisions apply to the information in question.

It must be permitted for the judge to order that a security control be performed if there is risk of a crime being committed during the hearing.

3.5 Public attendance at deliberations and the delivery of the judgment

Deliberations on judgments and decisions are not public. In principle, judgments shall be delivered in open court. If the judgment is served upon the party by mail the judgment shall be accessible in the courthouse.

4. Public access to court opinions and court information

4.1 Courts' duty to provide documents

The general public - national citizens as well as aliens – shall be entitled to access documents (opinions and other court information) held by courts if the document is regarded to be official and not secret. The reasons for secrecy should be laid down by law and be given a narrow interpretation.

Official, non-secret documents shall be made available on request as soon as possible, at the place where it is held, and free of charge, to any person wishing to examine it, in such a form that it can be read, listened to, or otherwise comprehended. A document may also be copied, reproduced, or used for sound transmission.

Any person shall be entitled to obtain a transcript or copy of the document, or such part thereof as may be released. Requests for copies of official documents shall be dealt with promptly. However, a certain delay may be allowed for the court to find the document or to examine it as to whether it contains secret information in some part.

A person wanting access to an official document needs not describe the document in detail. However, as the courts cannot be required to make extensive examinations, clarifications stipulating, e.g. the case number or the personal data of the persons involved are in practice necessary.

In principle, the court shall not be permitted to inquire into a person's identity or her or his purpose for examining an official document. However, insofar as such an inquiry is necessary for the court to decide whether there is any secrecy-related obstacle to make a public document available, the court may conduct such an inquiry. If part of a document contains secret information, this may still not be a sufficient reason for denying an applicant access to the rest of the document. If a full document cannot be made available without disclosing the secret part, the rest of the document shall be made available to the applicant in the form of a transcript or a copy.

4.2 Courts' duty to provide information

Courts shall make information contained in an official document available upon request, provided it is not secret, and does not constitute an impediment to the usual functioning of the court.

The courts shall provide information regarding their judging activities to a suitable degree, inter alia; courts ought to give information about the progress of a case and the composition of the court.

4.3 Right to appeal

If the court has rejected a request to make a document available or if it has supplied a document subject to certain reservations, the applicant is generally entitled to request that an appellate court review the matter. For the applicant to be able to appeal, the refusal has to be in writing. There shall always be a right to request that a written decision be supplied.

4.4 Procedure for providing information

There should be statutory provisions (law or decree) concerning the procedure of making documents (court opinions and information) available to the public. The provisions, which will ensure that the procedure is applied in a uniform way by all courts, shall not be given a restrictive interpretation.

Personal contact - Courts shall be open to the public during the weekdays and the court registry, where documents of adjudicated cases are kept, shall be open during regular office-hours. General questions of practical nature e.g. when a hearing will be initiated etc, shall generally be answered directly at the registry. More detailed requests and inquiries shall be directed to the officer handling the matter.

Telephone - Information on the telephone shall be obtainable to a certain degree during regular office hours. It shall be possible to order copies of documents relating to adjudicated cases as well as copies relating to ongoing cases on the phone and to have information of a practical nature relating to an ongoing case, e.g. whether an application has been filed with the court, when a hearing will be held etc.

E-mail – If courts can be contacted by e-mail such messages shall be handled in the same way as any other form of communication. Hence, questions shall be answered rapidly.

Facsimile – If courts can be contacted by fax, and information is requested this way it shall be handled in the same way as any other form of communication.

Oral information shall, in principle, always be free of charge. If the information is provided as copy of an official document the court has the right to charge for this.

4.5 Public accessibility to information relating to the progress of a case

4.5.1 Pre-proceedings information

The following information shall, in principle, be public:

- Decisions on whether or not to prosecute, whether or not to instigate a preliminary investigation or whether to discontinue a preliminary investigation
- Information relating to a preliminary investigation if and when prosecution proceedings have been instituted or when the prosecutor has decided not to prosecute.
- All documents submitted by the parties of a case, including applications.

4.5.2 Information about ongoing proceedings

The following information shall, in principle, be public:

- All court decisions served upon the parties and thereby considered as despatched and accessible to the public. This includes, inter alia, decisions concerning refusal to accept a summons application, leaving a summons application without examination or issuing a summons.
- Information about the composition of the court as soon as it is decided (which is often not the case until the session begins).
- Information about persons involved in a case. The case list shall show the identities of the parties. The identities of the counsels and the prosecutor shall also be part of official information.
- Information about the exact time of a hearing. It shall be clear from the case list.
- Decisions on whether judicial proceedings have been transferred to another court, whether a judgment of a court in a given case has been postponed, or whether judicial proceedings have been stayed.

4.5.3 Information about delivery of judgments

Judgments and final decisions shall be public when they have been pronounced or despatched and information about the outcome shall be accessible by this time.

4.5.4 Information regarding appeal

An appeal shall be accessible to the public.

4.5.5 Information regarding enforcement

All information about the progress of enforcement shall, in principle, be accessible at the Enforcement Authority.

4.6 Access to documents from court archives

Courts shall have means to make documents in their archives available not only relating to recently adjudicated cases but also older documents.

4.7 Accessible documents

The following documents, inter alia, shall be public and accessible:

- All documents submitted by the parties including summons applications and evidence.
- Interim court decisions after being despatched.
- Court records after the judgment has been pronounced or despatched.
- Court recordings of examination in the court.
- Judgments and final decisions when they have been pronounced or despatched. The documents are, in principle, accessible in the form of an exact copy of the original, including reasons, dissenting opinions, result of voting and identities of the participants.
- Writ of execution, whether a judgment or other type of title of execution

4.8 Ways of releasing copies

Irrespective of the way by which the court chooses to release a copy the request shall be dealt with promptly.

Personal contact - Handling copies 'over the counter' is the most common way of disseminating copies to the public in Europe. Documents shall if possible be made available immediately upon request. If a document is secret in part, the rest of the document shall be made available in the form of a copy. Regarding documents relating to ongoing cases, some delay may occur if the judge handling the case is using the requested documents, or if the document is being used in some other way. There shall be facilities for the applicant to read the original documents in the court.

If the document cannot be read or understood without using technical aids, e.g. tape recordings or other technical evidence, the court shall arrange for such equipment.

Postal service - The general public shall also have the possibility to receive copies by post.

Facsimile - If possible, fax is recommended unless documents are very comprehensive.

4.9 Costs of access to information and court opinions

Copies of documents (including documents released by fax) may be charged for. But it would be advisable that there be an upper limit for these charges. Otherwise, copies of extensive preliminary investigations, for example, could be very expensive. Nothing more than the copies themselves shall be charged for. Thus, the time spent on finding a document shall be free of charge. Also information delivered over the telephone or by e-mail shall be free of charge.

5. Training of judges and court staff

Judges and court staff shall receive training regarding transparency of their work, including the relationship to mass media. The training shall include the various aspects dealt with in this paper, such as public attendance at court proceedings, public access to information and court opinions etc. There shall also be guidelines for how contacts with the media shall be handled, e.g. interview situations and arrangements of press conferences. Judges and staff shall be familiar with these guidelines as well as with the situation in which the media organisations operate e.g. statutes and organisational issues.

6. Drafting of opinions

The language used by a court shall be intelligible to an average layman and the reasons for the judgment clearly structured and explained. In adjudication by the European Court of Human Rights (the Baldini case), the court stated the following:

“Article 6 paragraph 1 obliges the courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is moreover necessary to take into account, inter alia, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. That is why the question whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6 of the Convention, can only be determined in the light of the circumstances of the case.”

7. Courts and Media relations

7.1 General issues

Court officials shall be able to inform the media about what is going on in their field of activity. However, Court officers may not, for instance, breach pertinent stipulations about secrecy. Neither may they make an official document, classified as secret, available to the public.

7.2 The judge and the media

A judge may not disclose any information regarding the content of any judgment or other decision, which has not yet been rendered. Nor may he or she disclose information regarding what has taken place in the course of deliberations. A judge commenting on an ongoing case may risk disqualification for having a preconceived opinion on the matter in hand.

Thus, a judge who wants to make comments on the cases he has participated in shall be barred from revealing anything more than what is evident from the court reasons. However, a judge shall be permitted to discuss a specific case as long as he does not reveal more than what can

be obtained from the reasons and it is not, morally or legally, wrong if a participating judge defends himself in public, in an appropriate way, when a certain ruling is criticized.

7.3 Working conditions for the media

Courts shall strive to meet the interests of the journalists. Working conditions must, however, differ from court to court. Some of the smaller courts can provide active service to the media by sending out case lists in advance, for instance, while others have a more passive policy. The different working-conditions of the courts and the different demands from media organisations explain the diversity. It shall be easy for journalists to find out whether any interesting applications have been filed with the court and simple items of information shall be provided promptly. However, if the journalist asks for material, that requires an extensive search in the court archives, the court will need some time to produce the requested material. Documents may be handed out free of charge to the media, particularly if they are short.

7.4 Responsiveness of courts to mass media

Each court ought to establish well-functioning contacts with the media organisations, even though the exact nature of these relations varies from court to court. In the end, it is always the head of the court that is responsible for information activities.

Shall a court have a permanent contact person responsible for facilitation of contacts with the media? It is difficult to give a general answer. Many journalists prefer to get in touch with the judges involved in a given case. A contact person would then not fulfil any meaningful function. But a temporary press secretary may be appointed for trials with great media coverage.

7.5 Ways of disseminating information

Various ways of disseminating information can be used.

Press conferences can be arranged in connection with trials evoking extensive media interest. The invitation to the conference should indicate, inter alia, the representatives of the courts and telephone numbers to a person who can answer questions posed by those who cannot attend. Press releases can also be used. Subscription services can enable subscribers, e.g. media or law firms, to get updated court opinions related to specific cases. Broadcasting facilities in courtrooms can also facilitate media coverage. Dissemination of case lists to media can also be helpful.

8. Publishing court opinions and court information

8.1 Statutory issues

Processing of personal data is restricted by the directive 95/46/EC, the purpose of which is to protect people against violation of their personal integrity by the processing. The Directive and, hence, national legislation implementing the Directive have a direct impact on processing of personal data in judgments and other court documents. The Directive is not easily understood. For an interpretation reference is made to the Swedish country report (section 8.1). This section demonstrates among other things that certain material must be edited or left out from publications of court opinions.

8.2 Publication of court opinions

Court opinions are published for various reasons. One is their judicial value; judgments of the higher courts are viewed in many jurisdictions as precedents, constituting a source of law. The publications of court opinions have come to be important working-tools of judges in their adjudications. Secondly, judgments not regarded as guiding are occasionally published due to their news value and public interest. Thirdly, some court opinions are published for educational purposes.

Whatever the reason for publishing court opinions a selection must be made. It would be administratively and economically impossible to publish all judgments due to the immense number of cases in the lower courts adjudicated. The selection must be based on various criteria, inter alia the purpose for publishing a judgment.

Judgments are generally published as full, edited reports, for instance reports from the highest courts.

Paper publications - Reported judgments are generally put together in booklets, which are combined into annual volumes.

Electronic publishing - The use of the Internet as a form of publishing is not yet widespread in Europe. Out of all the courts, it seems as though few possess a registered website. But it is quite feasible for courts to publish press releases and reports of judgments on their website.

8.3 Publication of court information

As described above, the reasons for publishing judicial material are the precedent value or the news value of a case. This is why court information, for instance evidentiary material and court records, is, in principle, not published.

8.4 Publication of court opinions in the media

Various media organisations have occasionally published full text copies of judgments on their websites. In these publications the judgments are available as exact copies of the original document, including personal data of all the participating persons. The publication of personal data is made possible by the exception applicable to journalists under the EC Directive. The topic of the media interest is generally the case itself, for example spectacular criminal trials.