JUDICIAL INDEPENDENCE VERSUS JUDICIAL ACCOUNTABILITY?

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I. Introduction:

The topic I would like to address today is the relationship between judicial independence and accountability. At a first glance you will probably ask: independence and accountability, isn't this a contradiction in itself? How can someone be independent and at the same time accountable? Accountability seems to entail dependence. If someone can be held accountable he or she must be constrained by a binding regime? But if this is the case, what is left of the claimed independence in the first place?

Indeed there are voices, in particular among some judges associations, which are uncomfortable with the notion of judicial accountability in the first place. They worry that judges could be intimidated if they have to fear sanctions and thus might be led to adjust their adjudication in order to avoid difficulties. With this understanding accountability would come at the expense of substantive independent. In order to substantiate this position and to advance the claim for comprehensive judicial independent reference is made to the European Convention of Human Rights.

II. European Yardsticks:

So let's first have a look at the Convention, particularly at its Art. 6 which guarantees that everyone, in the determination of his civil rights and obligations or of any criminal charge against him, is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. In a second step I will then analyse current state practice in order to inquire whether judicial accountability in effect comes at the expense of independence.

* This presentation is based on comparative research published in A. Seibert-Fohr (ed.), Judicial Independence in Transition, 1378 p. (Springer 2012). See ibid. for further references. See also A. Seibert-Fohr, Judicial Independence and Judicial Accountability, in B. Hess (ed.), Judicial Reforms in Luxembourg and in Europe, S. 105-118 (Nomos 2014).

1. Safeguards for Judicial Independence

The former European Commission of Human Rights and the European Court of Human Rights have both explained that the guarantee of due process by an independent and impartial court requires that courts must be established by law and that adjudication may neither be influenced by the executive nor the legislative branch of government.[1] This requires guarantees designed to shield judges from outside pressures. Any duty for courts to ask for and abide by the interpretation of the executive branch is incompatible with the independence of the judiciary. The executive branch of government must not have the opportunity to revise court decisions or to decide that judgments should not be implemented. While there is no mandatory life tenure, judges must be irremovable by the executive during their term of office. Judges may not be discharged at will or on improper grounds by authorities. Although there is no strict rule for the competent authority for judicial selection, discrimination in judicial appointments is impermissible.

The impartiality of judges also demands that there is no appearance of impartiality. This requires structural impartiality, that is, a separation between members involved in the exercise of advisory functions and those involved in the exercise of judicial functions. In Procola v. Luxembourg the Court took issue with the impartiality of four members of a judicial body who had previously carried out both advisory and judicial functions in the same case since the plaintiff had legitimate grounds for fearing that the members of the Judicial Committee had felt themselves bound by the opinion previously given.

All requirements just outlined are primarily concerned with **personal** and **substantive** independence. So far, **structural** independence does not play a significant role in international jurisprudence. The requirements are rather general leaving considerable leeway for the implementation, especially with respect to judicial administration and judicial selection. Though the European Court of Human Rights in general terms considers the manner of appointment of judges and their term of office, guarantees against outside pressure and the appearance of independence, it is the combination of these elements which ultimately matters.

1 For an account of the Court's jurisprudence see A. Seibert-Fohr, Judicial Independence in European Union Accessions: The Emergence of a European Basic Principle, 52 German Yearbook of International Law (2009), 405, 418 *et seq;* L.F. Müller, Richterliche Unabhängigkeit und Unparteilichkeit nach Art. 6 EMRK.: Anforderungen der Europäischen Menschenrechtskonvention und spezifische Probleme in den östlichen Europaratstaaten (Duncker&Humblodt 2015).

The Court has been cautious not to interfere with traditional judicial systems which provide for limited terms of judicial office, with popular elections of judges such as in Switzerland or with executive models of court administration as in Austria and Germany. The Court does not set a strict rule for the institution entrusted with judicial selection. It acknowledges that in many systems it is the executive which appoints the judges. As long as there are formal guarantees protecting judges from interference with their adjudication this is not considered to be in violation of the Convention.

2. Limits for Accountability

a) Judicial Discipline

The picture is similar with respect to judicial discipline: This issue has come up in particular in Croatian, Ukrainian and Turkish Cases. I will spare you the details and names of these cases and instead give you a summary of this jurisprudence.2 While the Court does not rule out judicial discipline, it has elaborated a set of basic guarantees: It recognizes the impact that judicial discipline may have on the independence of judges and thus requires a firm procedure and criteria for disciplinary measures which shall be specified in statutory law. It may not be in the hands of a single institution, such as the court president, but disciplinary competences should be shared. The accused judge has a right to be heard. Early on he or she must be informed about the charges and must have access to the evidence against him or her. The procedure shall be adversarial in nature. Disciplinary sanctions must be proportionate to the misconduct of a judge. Those deciding on judicial measures must be impartial and the disciplinary organ must be independent.

This was confirmed by the Court in *Volkov v Ukraine.* The case was about a Supreme Court judge who had been dismissed on the very general grounds of an alleged breach of oath. In Ukraine the removal of judges is considered the *actus contrarius* of appointment which therefore requires a decision of parliament if a Supreme Court judge shall be removed. The procedure is initiated by the High Council of Judges. In this case the European Court of Human Rights considered the entire procedure to be in violation of the right to an independent tribunal. It held that the appointment and consequently the overall composition of the Council had been too politicized. The Council members are derived from all branches of government. The President of

2 For further detail see L.F. Müller, Richterliche Unabhängigkeit und Unparteilichkeit nach Art. 6 EMRK.: Anforderungen der Europäischen Menschenrechtskonvention und spezifische Probleme in den östlichen Europaratstaaten (Duncker&Humblodt 2015)

the Supreme Court, the Minister of Justice and the Prosecutor General are *ex officio* members of the Council.
The Court stressed the importance of reducing the influence of the political organs of the government on the composition of the High Council of Justice and the necessity to ensure the requisite level of judicial independence.

The Court also criticized the proceedings before the Council to be structurally deficient giving rise to doubts as to the impartiality of its members involved. The two members initiating the investigation against Mr Volkov had been involved later in the decision on his removal. According to the Court parliamentary involvement in the decision only increased the politicization of the judicial process and violated the principles of separation of powers and the guarantee of an independent and impartial judiciary. The Court therefore called upon Ukraine to reinstate Mr. Volkov as a Supreme Court judge. More generally the Court criticized the Ukrainian disciplinary law for its arbitrariness and the lack of legal consistency, certainty and proportionality. It therefore suggested to restructure the system institutionally and place it in a principled, consistent and coherent legal framework. The decision is a prominent example of those cases which have challenged political interference with judicial independence in Eastern Europe and the Balkans.

So far for the European Court of Human Rights jurisprudence on judicial discipline and removal. Unfortunately I do not have the time to go into the jurisprudence of the European Court of Justice which has considered the basic guarantees of judicial independence in the context of preliminary rulings. Suffice to point out here that according to the ECJ there must be adequate safeguards in law against the removal of judges. The conditions for disciplinary action and removal must be limited and codified by law.

b) Judicial evaluations

Another matter which is relevant for accountability is judicial evaluation. Here again, though the European Court of Human Rights has recognized that evaluations may compromise the independence of judges, they are not ruled out entirely. The Court recognizes that such risks for judicial independence are inherent in any court system. There are, however, some basic rules which must be observed:
Among theme is the requirement that there may not be unfettered discretion for the evaluations of judges. There is a need for clear evaluation criteria which are specified in a statute. The

European Court of Human Rights categorically rules out that evaluations and thus promotions are based on the substance of a judge's decision-making. Like with respect to disciplinary measures judges shall have access to judicial review to challenge unfavourable evaluations.

c) Summary

I think with this overview the picture is clear:

The Court recognizes the detrimental effects that accountability mechanisms, such as judicial discipline and evaluations may have on the independence of judges. But instead of ruling them out, it recognizes the need for some degree of accountability which is inherent in every judicial system. In order to protect substantive independence the Court has elaborated some minimum standards which are binding on all Council of Europe states. Among them procedural safeguards play an important role: There is a need for clear criteria which are pre-established in statutory law and judges must have access to judicial review to challenge disciplinary measures and unfavourable evaluations.

III. Comparative State Practice

Now that we have specified the European framework let us turn to state practice to see how European states have developed their systems of judicial accountability and how they have gone about its tension with judicial independence.

While there are different modes of judicial accountability, comparative analysis shows that European States have opted for at least one or several measures of accountability. Among them are reprimand or censure; withdrawal of cases from a judge; moving a judge to other judicial tasks within the court; economic sanctions such as a reduction in salary for a temporary period; suspension or removal.

Over the past five decades Western civil law countries have modernized their approach to accountability by way of lighter forms of bureaucratic accountability.[3] Disciplinary measures are usually restricted to serious neglect of judicial duties, including abuse of authority and status (e.g. corruption), and clear cases of partiality and severe infractions of the dignity of office (such as theft, perjury and drug abuse). Efforts have been made in several countries to specify judicial

3 For further details on this and references for the following observations see P. H. Jr. Solomon, The Accountability of Judges in Post-Communist States: From Bureaucratic to Professional Accountability, in A. Seibert-Fohr, (ed.), Judicial Independence in Transition (Springer 2012) 909, 915, 921.

misconduct and formalize disciplinary proceedings. At the same time judicial safeguards are in place to ensure due process guarantees for judges accused of misconduct.

Most established democracies agree that the interpretation and application of law (the content of judicial decisions) cannot be subject to any control except for appeal and judicial review. Thus **substantive accountability** is usually achieved by measures ensuring the publication of judgements and by giving the parties to a legal dispute a right to appeal.

Disciplinary oversight is usually restricted to the manner and form of judicial decision-making. For this kind of – let us call it: ***procedural accountability*** - formal criteria, such as timelines, are used to evaluate judicial performance and to identify misconduct. In Belgium, for example, judges can be held accountable in disciplinary proceedings for significant delays in the handling of files. This is to ensure that the accused is guaranteed the right to be tried within a reasonable time. Another example is the increasing focus on skills-based instead of content-based evaluations.

Apart from procedural accountability judges are accountable in their managerial capacities. This is a matter of ***administrative accountability*** which, too, is unrelated to substantive decision making. The fear that oversight may have a negative impact on the due process rights of litigants does not hold in this field of judicial conduct.

At any rate, removal and other disciplinary measures are rare in the practice of Western countries. There have even been complaints that court presidents are reluctant to use their powers to initiate disciplinary proceedings. In Belgium a decreasing faith in the capacity of the judiciary to hold judges accountable for misconduct has led to claims for more transparency and external participation in judicial discipline. England and Wales have introduced a formal complaints procedure open to the population at large in order to preserve the integrity and legitimacy of the judiciary.

While there have been recent efforts in some states to increase accountability to a certain degree, the role of hierarchical oversight within the judiciary and by the executive all in all has been reduced in Western civil law countries. ***Alternative means of accountability*** have become more relevant in established democracies which go beyond the traditional canon of evaluations, recusal, discipline and complaints procedures. While civil lawyers traditionally tend to think in terms of repressive means of accountability, lately means of accountability which "give account" by

disclosing information and justifying decisions have attracted increasing attention. These measures differ from *post hoc* means in that they are pro-active. Instead of sanctions and liability they focus on incentives for judges to fulfil their responsibilities. With this preventive role these measures are arguably less likely to conflict with judicial independence. Public access to judicial proceedings and judgments is particularly relevant in this context. The increasing concern about transparency in judicial decision-making and administration underlines the role played by society at large as the recipient of accountability.[4]

Finally, the legal profession itself plays a role in modern accountability mechanisms. Though accountability *vis-à-vis* other judges and the broader legal profession is usually associated with common law countries, means of ***professional accountability*** become increasingly relevant also in civil law countries.[5] Innovations are spreading across borders. Among the means which have attracted growing attention are judicial codes of conduct as an expression of a common professional ethos. Though codes of ethics can be used as a basis for discipline they also have a decisively preventive role.

IV. Conclusion

Coming back to our initial question whether judicial independence contradicts accountability, my analysis leads me to the following findings. While there is undeniably a tension between them, neither concept may claim supremacy. Both can and need to be balanced. For this purpose I suggest a dual approach. For one thing the concept of accountability should be understood more broadly than traditionally, going beyond the traditional realms of repression and opening up for preventive instruments. For the other thing a literal interpretation of the term independent should be avoided. Judicial independence does not require absolute independence. This is neither possible nor desirable.

In order to reconcile independence and accountability it is important to recognize that judicial independence is not an end in itself but a means to an end, a means to guarantee due process. For this matter the notion of **substantive independence**, that is the protection against influence

4 M. Cappelletti, Who Watches the Watchmen?: A Comparative Study on Judicial Responsibility, in S. Shetreet & J. Deschênes (eds.), Judicial Independence: The Contemporary Debate (1985), 550, 575; A. Garapon, Une Justice "Coupable" de ses Décisions?, in G. Canivet *et al.* (eds.), Independence, Accountibility, and the Judiciary, London, British Institute of International and Comparative Law (2006), 241, 242, 249; H. M. Watt, Quelques Remarques d' Ordre Comparatif sur la Notion d'Accountability Appliquée à la Justice, in Independence, Accountability, and the Judiciary (2006), 235.

5 G. Di Federico, Judicial Accountability and Conduct: An Overview, in A. Seibert-Fohr (ed.), Judicial Independence in Transition (Springer 2012) 41, 87, 89

on adjudication, is central. It is in the interest of those whose rights and obligations are determined in a legal action and those who are subject to criminal charges that judgements are rendered on the basis of law. As a matter of substantive judicial independence judges may not be subject to coercion, pressure, threats, instructions, interferences, inducements (including corruption), or other indirect means of influence on their adjudication with respect to the interpretation of the law.

On the other hand it is in the interest of due process to ensure that judges faithfully fulfil their judicial mandate so that justice can be rendered on the basis of the law within reasonable time. Thus independence and accountability are functional concepts. They are instrumental principles deriving their normative force and content from the rule of law. Understood this way they represent two sides of the same medal.[6]

This functional concept of independence and accountability helps to distinguish between different forms of independence: substantive independence, personal independence and structural independence. Not all require the same degree of fulfilment. In order to preserve the rule of law they need to be matched with the appropriate form of accountability. Within the ambit of substantive independence we are left with non-repressive means of accountability- such as transparency and appellate jurisdiction. Thus substantive accountability is mainly concerned with the notion of giving account.
There is more room for ***administrative accountability*** since it is concerned with managerial not substantive performance. ***Procedural accountability*** is somewhat in the middle, because it is not concerned with the substance but is still related to adjudication. Thus its focus should be on formal criteria in order to avoid substantive influence on adjudication.

There is not a one size fits all model. The rule of law can be guaranteed in a multiplicity of judicial systems. But they all need to recognize that neither may accountability come at the expense of independence, nor vice versa. If the administration of the courts is transferred from the Ministry of Justice to the judiciary there is a need for alternative means of oversight and control. One option is to build alternative forms of vertical accountability, such as oversight

6 B. Burbank, The Architecture of Judicial Independence, 72 Southern California Law Review (1999), 315, 339. Jackson argues that both concepts can even be mutually reinforcing. V. C. Jackson, Judicial Independence: Structure, Context, Attitude, in A. Seibert-Fohr (ed.), Judicial Independence in Transition, 19, 61.

mechanism. Another one is to strengthen accountability towards society by way of the improved transparency of all court operations.[7]

Finally the broader legal profession can play a role in this undertaking as well as the judiciary itself. There is a need for a more active role to be taken by all judges to ensure judicial quality by means of peer accountability.8 In other words, professional accountability should be invigorated in such reforms.

On this backdrop I would like to conclude by pleading for judicial independence and accountability (instead of judicial independence versus accountability).
In the interest of the rule of law we have to ask for both, judicial independence *and* accountability. I hope that I was able to illustrate in my presentation how this can be achieved**.**

7 K. Malleson, The New Judiciary: The Effects of Expansion and Activism (1999), 235.
8 G. Di Federico, Judicial Accountability and Conduct, *supra* note 5, 91-98.