French Presidency of the European Union - Conference of Presidents of Supreme Courts of Member States of the European Union

21 February 2022

Workshop organized by the Council of State:

"Judge and time: judge of the moment and judge of the long term"

The question of the judge's relationship with time and the complex relations between them is an old and perhaps consubstantial question of the action of judging. It has several dimensions: the traditional but always delicate and evolving one of reconciling the need to take the time necessary to judge properly with the imperative of judging in a timely manner; the more recent one, which is undergoing new developments, relating to the ability to manage short time, i.e. urgency, when necessary; and finally, the newer one, which leads the judge to give a ruling with regard to objectives aimed at the medium or even the long term, as in cases concerning environmental issues, and in particular the climate.

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The conciliation between the need to take the necessary time to judge properly and the need to judge in a timely manner is undoubtedly as old as the judge himself, but the balance to be found remains evolving and must be adapted, in particular, to the requirements of the society.

On the one hand, it is certain that time has always been an indispensable ally for the judge: it is even necessary for him to accomplish his mission as well as possible.

The passage of time in fact makes it possible to put a certain distance between the judge and the dispute itself. It also contributes to the solemnisation of the judge's intervention, which, in a way, imposes its own tempo, particularly through the procedure over which the judge has, at least to a certain extent, control.

Above all, the judge needs time to carry out his task as well as possible, which requires him to ensure that he has a good knowledge of the facts of the dispute, to hear the parties and weigh up their arguments, to seek out the legal rules that will enable him to render his judgement and, if necessary, to seek conciliation, and to prepare his decision with all the necessary care. This is all the more necessary given the legal, but also often technical or even scientific, complexity of the disputes that are often referred to the judge today, and the political, economic, social or environmental consequences that his decisions are likely to entail, all the more so when the judge rules as a last instance.

On the other hand, time is also, for the judge, if not an adversary or even an enemy, at least a challenge, at a minimum a constant concern.

First of all, obviously, because the litigants who refer cases to the judge expect him to give a ruling, if not immediately, then at least quickly, and in any case within a period of time that ensures that his response is relevant and effective. The best of judgements, the most legally sound and best supported, will remain without impact on the concrete dispute it is supposed to resolve if it comes too late.

The respect of a reasonable time limit for the judge's intervention has become a component of the fundamental right to an effective judge, notably under the effect of the case law of the European Court of Human Rights. Beyond this requirement, the concern for the efficiency and effectiveness of the judge's action has only increased in recent years: it requires the judge to be constantly concerned about the effectiveness of his intervention and, therefore, in particular, the time within which he intervenes.

The challenge is all the greater for the supreme courts because of the particular demands placed on them: as courts of last resort, they have no right to make mistakes and must, on the contrary, be extremely demanding in terms of the quality and clarity of their decisions. This is in a context in which disputes tend to become more legally complex and often raise technical issues that are difficult for the judge to master, while social expectations of the judge have never been so great and at the same time contradictory, with our societies tending to be more divided and organised actors not hesitating to try to use the judge to advance a particular cause.

The obligation in principle of the supreme court when applying Union law to refer the matter to the Court of Justice of the Union raises a particular difficulty in this respect, given the time needed for the Luxembourg court to give its opinion, which can be explained quite easily by the importance and difficulty of its mission of uniform interpretation of Union law which must nevertheless be examined lucidly in the light of the demands of promptness. It is true that accelerated procedures have been put in place but their scope is still very limited. The dialogue between judges is necessary but it takes time: how can we ensure that it is as effective as possible?

The necessary conciliation between all these conflicting concerns is not new, but it must be adjusted to take account of the requirements of each epoch. The current years are marked by growing expectations in this respect which the supreme courts cannot ignore and which they must seek to address, if possible in a coordinated manner.

The February meeting could thus be the occasion for an initial exchange on this aspect of the question, both by exchanging figures (average length of cases, age of the 'stock' of cases still pending) and also on the tools that have been implemented to reduce the time taken to reach a decision while maintaining a sufficient level of quality (sorting of cases according to their complexity, measures to reduce the length of investigation procedures, use of the potential of decision assistance, including automated assistance, but to what extent?) and on how to reconcile efficient time management with the assessment of particularly technically complex cases or cases where the judge's decision is likely to have a major economic, social, environmental or other impact (use of experts, specific procedures to examine certain aspects in greater depth) and to ensure that the dialogue between judges is as effective as possible.

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The question of how to deal with proceedings of particular urgency is also becoming increasingly important.

The development of crises of various kinds (health, security) makes it increasingly necessary for the judge to provide rapid responses in certain situations.

Procedures enabling judges to deal with particularly urgent cases in a matter of weeks, and sometimes even days or even hours, have developed and have become particularly important in recent years, even before the supreme courts. The Conseil d’Etat, like other supreme courts, was confronted with this in a particularly acute manner during the health crisis, in view of the many appeals for provisional

judicial emergency order lodged against the exceptional measures taken by the executive. It had also been confronted with this, although less spectacularly, with the measures taken following the terrorist attacks in 2015-2017.

Emergency procedures also exist before the European courts.

These emergency procedures require the judge to take very rapid decisions which, although they are supposed to be provisional and not to rule on the merits of the dispute, have a very great practical impact and receive considerable media and political attention.

The February meeting may also be an opportunity to discuss the best use of these emergency procedures, the prospects they offer but also the difficulties they raise for the judge, particularly the supreme judge.

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Finally, the question of the relationship between the judge and time is undergoing new and delicate developments with the appearance of new public action mechanisms, organised around the setting of quantified objectives in the medium or even long term, objectives that the public authorities must ensure the respect through progressive action.

This is particularly the case in the field of the environment and, in particular, the battle against climate change, its causes and effects.

These objectives, at least in the area of climate change, implement principles laid down at international level and correspond to a major, even existential, challenge for the future of our civilisations and even of humanity itself. Respecting them also implements fundamental principles guaranteed by national constitutions and European treaties, including the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Several supreme courts have been called upon to rule on these issues in recent months, and others will certainly do so, including at European level, in response to actions brought by public or private individuals, associations or groups of citizens involved in these matters.

These actions pose new difficulties for the judge in assessing, at the time he makes his decision, the sufficiency or insufficiency of public actions with regard to the achievement of objectives that are relatively distant in time but whose effective achievement implies immediate action by the competent public authorities.

For the first time perhaps, the judge is thus led to leave the retrospective approach that is normally his, since, in principle a dispute is situated in the past or even in the present: he is thus led to make a prospective assessment in order to rule on the dispute before him hic et nunc.

The Conseil d'Etat was thus called upon to rule on the legality of the Government's refusal to take additional measures to combat greenhouse gas emissions by examining the legality of this decision with regard to the trajectory set by decree to achieve the objective assigned to France for 2030, both by French law and by the regulation adopted in 2018 by the Union to implement the Paris agreements. The Irish Supreme Court followed the same direction, invalidating the plan outlining the policies the Irish state intended to implement in 2017-2022 to reduce greenhouse gas emissions based on the Irish Climate Change Act 2015, which sets out the general framework for Ireland to combat climate change. The German Constitutional Court has also been called upon to rule, this time invalidating a law passed by the German parliament itself to implement climate change targets: it ruled that the insufficient level of effort planned for the medium term placed an excessive obligation on future generations by

infringing their rights. The Dutch Supreme Court was the first to invalidate the government's action plan, this time based on a failure to respect the rights guaranteed by Articles 2 and 8 of the European Convention on Human Rights.

These decisions lead the supreme courts to rule not only on new questions, but to do so in an unprecedented way, since they assess the legality of an act today in the light of general objectives set for tomorrow, or even the day after tomorrow, but for which it is not seriously disputed that effective compliance requires immediate action on the part of the authorities responsible.

The fact remains that these new disputes lead the judge to assess the question of time in a new perspective that raises questions in terms of technical capacity, legal assessment and democratic legitimacy. The question of the follow-up to its decisions also arises in a new way for the judge, given this new temporal dimension but also the very large content of the public policies concerned.

The February meeting may provide an opportunity for very valuable exchanges on these new and largely unprecedented issues, firstly to take an assessment of the procedures underway and the follow-up to decisions already taken, to examine together the appreciation of this issue of prospective control, its consequences for the judge in terms of his role, powers and assessment, and, where appropriate, on the new prospects opened up by this development, in the climate field in particular, but also perhaps beyond.

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European societies in this first quarter of the 21st century are undergoing profound disruptions that tend to invest the courts, and in particular the supreme courts, with new expectations and even new missions. This jurisdictionalization of our societies is a reality, with more and more people not hesitating to bring cases before the courts on matters that have long been absent from the courtroom, or even to put judges in the same country or continent in competition with one another. These realities cannot be ignored, nor can the high and often contradictory expectations they place on the judge, in particular his ability to respond quickly, or even very quickly, and, on the other hand, to assess the long term. An exchange between supreme courts on these issues, both traditional and new, seems all the more necessary since, beyond the differences linked to each system and each legal tradition, the challenges are common and thus call for a response that is, if not common, at least coordinated.