

Newsletter n° 26/2014

What role for Justice in the European Union?

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Editorial



President Geert J.M. Corstens

The 'Assises de la Justice' was held in Brussels on Thursday 21 and Friday 22 November 2013. Organised by the European Commission and under the inspiring leadership of Commission Vice-President Viviane Reding, this gathering of hundreds of judges, lawyers, other legal professionals and European and national civil servants focused mainly on the role of the EU in our field. The topics covered were cooperation in the areas of civil, criminal and administrative law, as well as the rule of law and judicial independence.

On the latter subject, President of the Supreme Court of Finland Pauliine Koskelo explained that politicians must not be able to use the funding of the judiciary as a way of wrongfully exercising influence – a subject that we discussed at our General Assembly in Sofia in October 2011. She also asked for consideration to be given to a non-instrumental approach to human rights. Gradually the emphasis shifted, from Ms Reding's strong insistence on the EU's important role in the field of justice, to a more modest position, for instance as taken by President of the Federal Court of Justice of Germany Klaus Tolkdorf on Friday. The opposing positions had already been rhetorically framed at the start of the conference by former French justice minister Robert Badinter and British journalist Joshua Rozenberg. Mr Badinter spoke eloquently about the origins and importance of the EU, while Mr Rozenberg set out a more sceptical view. Gradually, support for the idea originating from Brussels to create a rule of law mechanism became thinner on the ground, with comments like *festina lente* (more haste, less speed) and *surtout, pas trop de zèle* (above all, not too much zeal, a quote from the French statesman Talleyrand), being heard from the audience.

What role for Justice in the European Union?



Pauliine Koskelo

President of the Supreme Court of Finland

Brussels 21-22 November 2013

Panel on the Independence of Justice

Ladies and Gentlemen,

I would like to make five points about judicial independence, raise three problems, and finish with a few remarks about safeguards. The views expressed are personal.

I. Some points about the independence of justice

1. The constitutional, legal and organizational guarantees and protections for judicial independence are the necessary "shell" for a justice system that, as we know, must operate impartially and objectively. This shell is crucial, but it cannot be an empty shell. Justice actually comes from what is inside the protective shell. This substantive capacity depends on ingredients such as intellectual independence, professional skills and material resources.

The quality of justice depends on the strength of the shell and the strength of the substance inside. If the shell is bad, the inside will go bad. But the inside is not good enough just because the shell is strong. If judges are structurally independent but professionally incompetent or intellectually weak, they will not be able to fulfil their role well. It is essential to ensure the quality of the shell as well as the quality of the elements inside.

2. Judicial independence has become more important because the role of courts has become more important. This in part is due to the changes that have taken place in our legal environment, not only but not least under EU law. The courts play a crucial role in the enforcement of EU law and the rights that individuals and economic operators derive from it. The courts are the ultimate guardians of rights arising under EU law, including primary law rules governing the fundamental freedoms and fundamental rights.

3. Judicial independence and the quality of justice are a European concern. The general requirement of effective judicial protection under EU law (Article 19.1 TEU, Article 47 of the Charter of Fundamental Rights) entails high demands on the independence and quality of justice at the national level. The principle of mutual recognition, especially with its extension to sensitive areas involving individual rights in the field of civil and criminal justice, makes it even more imperative that the national justice systems live up to the necessary standards of independence and quality, not only in theory but in actual reality.

4. Judicial independence is proclaimed by all, just like rule of law is proclaimed by all. As Joshua Rozenberg said this morning, the phrases are easy. What counts are the actual structures, practices and

cultures that uphold our principles. We must identify and correct the deficiencies that exist. These are not limited to any particular corner of the Union; I will speak of problems that I know from home and not just from rumours elsewhere.

5. Judges are bound by law only and may not act under instructions from anyone inside or outside the judiciary. This is elementary but not sufficient. There must not be any risk of external influence, such as influence from the government. It is worth noting that the Court of Justice has already made it clear as regards the requirement of independence of data protection authorities, as laid down in the relevant EU directive, that the mere risk of political influence from state authorities is enough to hinder the necessary independence (CJEU judgment in Case C-518/07 of 9 March 2010, GC). It must be beyond question that the requirements in respect of judicial independence must be even more stringent and the structural guarantees even stronger than those concerning the independence of an administrative data protection authority.

Thus, I would submit that EU law must be understood as meaning that any risk that courts could be influenced in their judicial activity by any kind of influence from political authorities is inconsistent with the requirement of independence.

2. Some points about threats to independence

2.1. independence is not properly ensured

The first point I would like to address today relates to deficiencies in the structural independence of the judiciary. One critical issue in this context is the administration of courts, especially ? but not limited to ? the funding mechanism and the allocation of resources. In several Member States, including my own, the central administration of the courts is not yet at arm's length from the government. The government and other public authorities are party to many cases, and they have a government ministry, or an agency subject to the government, is not in line with the necessary structural guarantees for judicial independence.

When a government body decides specifically where to give and where to cut resources, it comes too close to the courts, too close to the handing of specific types of cases, or even individual cases or clusters of cases. This entails (at least) a risk of political influence through decisions concerning the allocation of funding. A possibility for carrots or sticks straight from the government is not consistent with structural independence.

This problem becomes all the more acute as the public economies are strained and the funding conditions become tighter. The risks are growing as finances are dwindling. If we are to ensure, as we should, that there is no risk of a political influence on the judicial activity of the courts, then we must set up a system where the preparation of the judiciary's budget is organized in such a way as to provide firm, objective and credible guarantees against any specifically targeted political influence being exercised through funding decisions. We also need a system of court administration under which it is assured that the allocation of resources within the judiciary's budget is at arm's length from political authorities.

2.2. There is a risk of an instrumental and selective approach to justice

The second concern that I would like to raise today is the risk of a distortion of the approach taken to justice policy. Justice is a fundamental pillar of society, and as that pillar it is instrumental to good living conditions. But the essence of justice is equal and effective protection under law, not a selective protection under prevailing political interests or policy priorities.

In the same vein, rule of law is about equal and effective legal and judicial protection. It is not about justice

at the service of particular interests or policy goals, whether economic or other. We must avoid and resist tendencies that are not in line with the idea of equal justice under law.

These can take various forms. For instance, effective legal and judicial protection for businesses is essential for a good economic environment. There is no doubt about that, and hence the policy slogan "justice for growth" is clearly relevant. But if focus is put on effective justice for businesses while allowing justice for others to degrade, then we are not upholding rule of law but instead abandoning its basic ideas.

Dangers loom where governments keep or create priority lanes for justice or enclaves where differences are allowed to develop between "first rate justice" and "second rate justice".

Such phenomena represent a conception of "rule of law" as a policy instrument, more specifically as an economic policy instrument, whereas genuine rule of law is about legal and judicial protection as a fundamental right. Fundamental rights are not policy instruments, they are the constitutional underpinnings of the proclaimed basic values of our society. This should not be forgotten.

So, we must be clear and careful about what is actually meant and aimed at when justice policy is made. Are we thinking about justice as an instrument, and rule of law as an instrument, or are we serious about justice as a fundamental right, and committed to rule of law as equal justice under law.

These are two quite different ideologies, and it is important to clarify the ideology and to verify the actual track record.

2.3. An imbalanced justice system undermines quality and independence

The quality and independence of justice can be undermined in many ways. My third point today concerns one topical issue among them, which is inadequate resourcing. This is a chronic problem in parts of the justice system, and it is getting worse with the need ? as such very real ? for trimming public finances in order to make them sustainable.

Funding cuts may well be both necessary and acceptable even in the justice system, like other areas of public expenditure, but only if the justice system is restructured and reformed so that it can function and provide quality with reduced means. This is the crux of the problem.

I myself come from a country where the government seems neither willing to finance the current justice system, nor willing to reform it, although there is plenty of room for major reforms. Another problem is that the timelines for cuts and reforms are incompatible.

A combination of a failure to fund and failure to reform will undermine the quality of justice, but it is also a threat to judicial independence. Firstly, squeezing the courts (or some of them) financially without introducing reforms designed enable such courts to cope with fewer resources can be seen as one way of putting pressure on them. Secondly, if the conditions for providing justice with quality are weak, this amounts to a kind of weakening of judicial independence.

The issues and problems that I have raised above may be interlinked in their context, with a cumulative effect through mutual reinforcement. With an increasing shortage of funds, a tendency to adopt an instrumental approach to justice may gain ground, thereby breeding inclinations toward a selective allocation of resources in line with political priorities.

Unless the structural independence of the justice system is ensured, its ability to resist and withstand such tendencies is not guaranteed. As a result, the conditions for equal, independent and impartial justice may

be endangered.

II. Safeguards

We need a robust, credible and resilient structure for independent, high quality justice throughout the union. Even if the corrective measures must be taken at the national level, a European perspective is nevertheless important. There is a union interest at stake, and the EU level can contribute to a closer review and deeper analysis of the issues and problems of the justice systems. It can also provide necessary external pressure for reforms.

While the justice scoreboard is a welcome initiative, the analysis needs to be taken beyond simple statistical information and perceptions.

We need to achieve European standards on the structural independence of the judiciary, based on the principle that the structures must remove risks of political influence on judicial activity.

The actors of the justice system should be among the interlocutors, because they are in a position to provide insights into the issues and problems of the justice system.

The need for a rule of law mechanism of some kind at EU level will be a separate topic at this event. I would submit that there is a need for developing such a mechanism. One element to be considered could and should be the suspension of mutual recognition in case the justice system in a Member State seriously degrades below the necessary standards. It is a particularly disturbing prospect that mutual recognition should continue to operate in relation to a Member State even if the basic conditions for mutual trust are not in place.

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