Editorial: The Independence of Judges – A Concept Often Misunderstood in Central and Eastern Europe

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Recently, when I participated in litigation before an Estonian court of first instance, my co-counsel advised me not to make references in the written brief to established case-law. Observing my surprise, she explained that the judges might react rather strongly against such an attempt at questioning or restricting their judicial independence. Sensing an issue of principle – or rather methodology – I followed up on the relevance of precedents in litigation in various transition countries in Central and Eastern Europe (CEECs). Subsequently, I tested my findings by presenting them at a conference in Budapest where academics and practitioners from CEECs and from EU Member States had come together. The general response clearly confirmed my findings, prompting a senior representative of a Western donor organisation to approach me in the break and tell me that after what he had heard, much of the money that his organisation had invested into training seminars for judges in CEECs had probably been misspent. Instead of hundreds of hours of substantive EU and international law, much more should have been done much earlier on methodology.

Two or three years ago, a poll was conducted in Estonia which included a question whether the respondents considered the Estonian courts and judges to be sufficiently independent. The surprising answer, given by a majority of randomly selected respondents, was that the Estonian courts and judges were considered to be *too independent*.

It can be argued that courts and judges cannot possibly be too independent. The very notion of independence of courts and judges presupposes that there shall not be any outside interference with the administration of justice – whether by bribes and personal advantages offered to judges, by public or political pressure exercised on them, or by shortcomings in the administrative procedure, such as biased case allocation. For these very reasons, legal systems that subscribe to the rule of law will foresee criminal sanctions for anyone attempting to influence courts and judges by offering personal advantages, will shield judges from public and political pressure by a system of long-term or life-time tenure, will contain abstract and neutral rules on

European Journal of Law Reform, Vol. 3, No. 4
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case allocation and procedural management, and may have other rules to protect the independence of the judiciary.

In principle, all of the transition countries in Central and Eastern Europe have adopted the necessary legislation along these lines to protect the independence of their judiciary. Hence, what is the explanation for the Estonians to perceive their judiciary as 'too independent'?

There must always be one standard to which the judges are bound, namely the law and the notion of justice. Would the Estonian opinion poll suggest, therefore, that the Estonian judges are either not following the law or that the legal system as such is wanting? I don't think so.

Certainly, one cannot accuse the judges in Central and Eastern Europe – or, for that matter, any legal professionals in this part of the world – of not following the law, let alone of 'judicial activism'. Quite the contrary, if there is a problem in this respect it is an over-reliance on legal rules, a kind of excessive legal positivism. A famous example is the case of Marcel Vichmann, who held an executive position with Hoiupank, a medium-sized Estonian bank. During the negotiations that led to the take-over of Hoiupank by Hansapank, the largest Estonian bank, Vichmann made a series of securities transactions which would easily qualify as insider trading in Western countries. At the end of these transactions, a sizeable amount of his bank's money, in excess of ten million USD, ended up in a bank account over which only he had control. Later, when Hansapank found out about the missing funds and to where they had disappeared, Vichmann was charged with fraud and sued for repayment of the money. It is interesting to see that the prosecutor decided not to bring criminal charges against Vichmann on the grounds that there was no evidence of criminal intent. The real mystery, however, is the outcome of the civil case for repayment brought by Hansapank. It went all the way to the Estonian Supreme Court but ended in complete frustration for the bank. On the basis that the judges could not find any rules that Vichmann had breached, they rejected the bank's claim for reimbursement and damages and Vichmann got to keep the money. Obviously, principles such as unjust enrichment were either unknown to the lawyers and judges involved or held to be inapplicable in the absence of specific legislation.

What the Vichmann case illustrates is not only an extreme form of legal positivism, it is also a methodological problem with lacunae in the law. The notion of general principles of law – of paramount importance in rapidly evolving systems such as European Union law, for example – is causing great difficulties for many jurists in transition countries. If they are not applied, as in the Vichmann case, this may well result in unjust rulings or even a complete denial of justice. However, if they are applied the outcome may not be much more satisfying. The latter is due to the methodological difficulties many judges in Central and Eastern Europe have with precedent.

One basic difference between Common law and continental or civil law systems is the impact of precedents on subsequent decisions. The doctrine of *stare decisis* is either not applied or at least watered down considerably in the continental European legal systems. That does not mean, however, that continental European judges are

completely free to decide cases as they please, once they establish that the outcome is not completely and unambiguously pre-determined by statute law.

While Anglo-American law started out with far fewer statutory provisions and, consequently, a stronger reliance on case-law, the dichotomy between Common law (i.e. case-law) and civil law (i.e. statute law) has mostly disappeared in the 20th century. Nowadays, Anglo-American law has virtually as many areas of law regulated by statute as does European continental law. Thus, at least as far as the importance of precedents is concerned, it may be more adequate to distinguish areas of law which are essentially regulated by statute from those where statute law is patchy or non-existent. And examples of the latter can be found equally in Anglo-American as in continental European legal systems, and of course in EU law.

Wherever statute law does not provide essentially all the answers to all the legal questions that can arise before a court, resort must be made to alternative sources of law. First, of course, the judges have to attempt a broad interpretation of the existing statute law to see whether it can cover issues of disagreement by analogy to other areas. This will involve careful analysis of the preamble or motives, as well as historic and other methods. Teleological interpretation of statute law can often provide guidance in these kinds of cases. Once the legitimate extension of statute by interpretation has proven impossible or insufficient, one of the most important alternative – or shall we say supplementary – sources to statute law are general principles of law and justice.

However, these general principles are inherently less clear and less accessible than statutory provisions, first and foremost because they are precisely not written down in authoritative legal instruments, such as parliamentary legislation. Consequently, it is a challenge for each court and each judge confronted with such a case to establish the general principles as applicable to the case from sources other than statute law. International covenants and treaties would often be able to provide guidance but – as is commonly known – national judges rarely refer to international law, probably because of a sense of insecurity about concepts such as direct applicability and direct effect. Here may well lie another methodological problem, widely found among judges in the East and West: Using international law as inspiration for the resolution of cases for which national law does not provide clear-cut answers would obviously not require the direct applicability, let alone direct effect, of that international law. All it would require would be persuasive and consistent arguments by the national courts ...

Case-law, that is, precedents, would be the obvious alternative for filling lacunae in national statutory law. Rather than building an argumentation about general principles from ground zero – and thus re-inventing the wheel – a court should first check whether a similar problem has not already been convincingly resolved before. And even if the present court found the earlier decisions in similar cases unconvincing, they could at least serve as an example of how not to resolve the present case. Finally, and most importantly, the present court should openly discuss why and to what extent it has – or has not – chosen to follow a precedent. (Only) If the reasons given to the present litigants are persuasive, will they refrain from appealing and, in any event, will the judgement stand on appeal.

By contrast, if the courts either refuse to look at precedents or if they do not attempt to provide persuasive arguments to support their choice to follow or to deviate from the relevant precedents, their authority and legitimacy are endangered. If similar cases are decided in dissimilar ways by different courts or – worse – by different judges/chambers of the same court, without persuasive reasons being offered, the jurisprudence of those courts and judges soon will be perceived as unpredictable and arbitrary, 'too independent' in layman's language.

This is precisely the problem in Central and Eastern Europe. If judges do not want to be informed of precedents in legal briefs and reject such references as interference with their judicial independence, this only shows that they have not understood what judicial independence is all about. Reference to precedents obviously does not mean that the present court is bound to follow them. It does mean, however, that the present court would be well advised to provide persuasive arguments if it chooses not to follow them. Such persuasive arguments could seek to distinguish the present case on the facts, to explain that the law has changed, or to explain either why the precedent was wrongly decided in the first place or why it may have been properly decided at the time but should no longer be followed today.

What is really happening in Estonia – and, as my colleagues have assured me, more or less generally in the transition countries – is the following: Only the judgements of the Supreme Court are systematically published. Judgements from courts of first instance and even from appellate level courts are not, or at least not systematically, accessible to the interested public (students, practising attorneys, decision-makers devising their professional and commercial conduct). They are often not even accessible to the judges within the system, with the sole exception of those judges who have actually participated in the decision. As mentioned earlier, the judges are consequently not used to and – on the basis of their methodological misconception of the impact of precedents – do not appreciate reference to case-law. Students are not trained, junior lawyers are not instructed (the main exception lies in the case-law of the Supreme Courts, but that is limited in number and scope). Last but not least, if the judgements were systematically published and then analysed and commented on by academic writers and re-evaluated in subsequent cases, this would provide the judges with a powerful incentive to provide persuasive reasons for their decisions – an opportunity that is lost in CEECs where such publication and debate is not taking place.

The final question I asked myself during this inquiry concerned the reasons for this methodological anomaly. Having worked with lawyers from CEECs for nearly ten years, I believe that the legal education in this part of the world is generally not bad. At least, in substantive law. What seems to be the problem is insufficient or incorrect instruction in methodology of law. Furthermore, I found an explanation for this in the Soviet legacy of law. In a Western system subscribing to the rule of law, there will be a hierarchy of norms which can be described, in a simplified manner, as a pyramid with statutory law (the constitution and parliamentary legislation) at the top, executive regulations in the middle and individual administrative decisions at the bottom. In such a system, each administrative

decision of an individual case has to be consistent with the provisions and values expressed in general executive rules and – most importantly – in legislation.

In the Soviet system, by contrast, this pyramid was essentially turned on its head. It may not be commonly known in the West that for most areas of law there were quite decent statutory provisions in the Soviet Union and the countries in Central and Eastern Europe. With regard to human rights, for example, they had actually ratified many important international covenants and had often provided the necessary national legislation, such as constitutional guarantees. However, we can say that these provisions and guarantees existed only on paper. In the hierarchy of norms, they were superseded by administrative regulations, which were often confidential, and – most importantly – their practical application by the administrative authorities and courts was often overruled by individual executive decisions from the respective organs of the communist party.

What we are seeing today in Central and Eastern Europe, and what prompted my research interest and this editorial, is in a way the pendulum swinging in the opposite direction. We should not forget that only in East Germany the entire judiciary was retired and re-established from young or at least Western-trained lawyers. All other countries in Central and Eastern Europe, for better or for worse, are working with a judiciary where the majority of judges are still those that were educated and received their formative training on the job under the old system. How frustrating it must have been for them, many a time, to be under political pressure or to receive direct orders about how to decide a specific case, even if the law in force would have provided a clear-cut and much fairer solution! Is it surprising, then, that nowadays they protect their judicial independence with vigour and reject any outside interference that would push them into anything other than applying the laws as adopted by their free and democratic constitutional assemblies and parliaments?

One goal of this editorial is to seek feedback from a broader audience than that provided at the time in Budapest. If my observations are correct, the problems can be tackled with relatively limited resources and efforts. And tackled they have to be! Otherwise what could be seen as a minor methodological difference between the East and West could become a major obstacle on the road towards establishing once and for all the rule of law and towards extending the achievements of European integration to this part of the world. As we cannot replace the entire judiciary – an approach that nowadays causes many problems of acceptance and legitimacy in East Germany, by the way – we must shift the focus of judicial re-training from substantive law to methodology of law. It could be argued a judge that is good on methodology and otherwise willing can learn the substantive law pretty much on his or her own. By contrast, no matter how much substantive knowledge we press into the heads of the judges in CEECs, if they don't understand the fundamentals of legal methodology, it will be of little use.

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