FORUM

JUDICIAL POWER: SAFEGUARDS AND LIMITS IN A DEMOCRATIC SOCIETY (KEYNOTE BOOK LAUNCH EYCL)

KEES STERK - 06.02.2020

Keynote on the occasion of the presentation of the European Yearbook of Constitution Law 2019 at the Asser Institute of International and European Law, The Hague, 5 February 2020

Ladies and gentlemen,

It is an honour and privilege to be presented the first volume of the European Yearbook of Constitutional Law 2019. A book with the theme: Judicial Power: Safeguards and Limits in a Democratic Society. Indeed, a challenging and most relevant subject in this day and age in Europe.

Challenging, because most judges in Europe feel that their independence is undermined or even destroyed in some EU countries and European governments or members of parliament sometimes feel that judges overstep their competences by deciding cases which – in their view – ought not to be decided by judges but by politicians in the political arena.

Relevant, because this divide more and more affects the well-functioning of states or of the European Union.

No doubt, congratulations are in order to the editors for selecting this topic and to the authors for writing so stimulating in this important Yearbook.

I am asked to say a few words about the experiences I gained in this field, working in the European Network for Councils of the Judiciary for the last six years; the last two years as its president. But let me first introduce the work of the ENCJ so you can value my experiences.

The ENCJ was founded in Rome in 2004 and has currently twenty-four members and fourteen observers. The aim of the network is the improvement of cooperation between, and good mutual understanding of the members and observers. In the early years, the main activity was to exchange best practices in a variety of fields. From 2014 on, the focus of the network was on independence and accountability.

Holmoyvik and Sanders advocate in this Yearbook a judicial stress test. I am very much in favour of this idea. And one could say, of course with humility, that the network has been working on a baby "judicial stress test" as to the independence of judges and judiciaries. An ENCJ working group gradually developed common standards of all aspects of judicial independence and then translated these standards into questions in biannual surveys to judges in Europe (last one in 2019); the answers were analysed and problems identified. The last step is to try to amend the problems by plans for improvement.

In 2019, more than 11.000 judges responded to questions about a large variety of issues concerning judicial independence. For those interested in the results I have a few copies of an article by Professor Van Dijk and myself in English. The data produced with the surveys is also used by the European Commission in the EU Justice Scoreboards.

For the whole of Europe, the judges identified the next three issues as most problematic:

- The selection and promotion of judges, especially of Supreme Court judges: not always based on the right competences and experiences (21% totally agree; Spain 68%; Portugal 53%; Hungary 53%). I will say some words on this issue later on.
- Workload and finances of the court (28% in total agreement; Spain 61%; Portugal 57%). I will leave this subject aside.
- Lack of respect by other state powers and media: (26% totally agree; Romania, Portugal, Italy, Bulgaria, UK and Latvia all above 40% total agreement). I will reflect on this as well.

Parallel to this work the network organized dialogue meetings of five or six members in which they could openly reflect on the relationship between the judiciary and other state powers and the media under the Chatham House rules. This gave the network a unique inside view of what problems the judiciaries in Europe face and how the councils operate in these difficult times.

The lack of respect by other state powers and the media is the fastest growing complaint from judges in Europe, and even more worrying considering that the 10.000 Polish judges were not surveyed in 2019 because the network had suspended the Polish Council in 2018. Lack of respect for judges usually means that politicians, including ministers of justice, do not openly support judgements of judges in controversial cases, but attack them unfairly or remain silent where they should speak out in support. The silence of the Lord Chancellor in the UK while the judiciary was attacked as "enemies of the people", as Paul Daly describes, stands as the best know example, but there are many more in quite a lot of countries in Europe, and not only in Poland and Hungary, as the network learned in

the dialogue meetings.

The question of course may arise what this increasingly felt lack of respect means for the relationship between the state powers in the context of the subject of this Yearbook: limits to judicial powers in constitutional cases and Human Rights Treaty cases. Later on I will come back to this question.

The lack of respect, or better put: the systematic destruction of judicial independence by the governments of Poland and Hungary, as described by Kochenov and Bard, engaged the ENCJ in the developments in both countries. It sent delegations to these countries to talk to all stakeholders, including the ministers of justice, it issued several statements on the Polish situation, and as mentioned, it suspended the Polish Council as a member in September 2018 – only the Polish Council voted against - because after the new law on the judicial council it was no longer in compliance with the ENCJ rule that a council must be independent from the executive.

From that moment on the ENCJ sent a delegation to Poland every six months to talk to the Supreme Court, to the judges associations, to the Council, to the deputy minister of Justice, and to the Ombudsman. I am sorry to say that the dialogue with the Council and the deputy minister was always troublesome, but the latest ones were extremely difficult.

A dialogue with governments which do not believe in the values of an independent judiciary seems useless. But the network feels that as long as Poland and Hungary are part of the European Union, it must keep communication channels open, in case political and/or judicial pressure leads to an adjustment in some way or another of the governments' position. I am sorry to say that this will probably not happen soon in Poland, but the combination of pressure to, and dialogue with the Hungarian government seems to work as to the reforms of the administrative courts.

In this respect, I found the conclusion of Kochenov and Bard enlightening that the logic of the internal market deeply contradicts the rule of law values of the Union, because the aim of the internal market is making violence between member states impossible by deep economic interpenetration. However, I do very strongly believe quite a lot of politicians in the member states and the European Union do underestimate the importance of an independent judiciary for the well-functioning of the Union. Once member states succeed in destroying the independence of judges the foundation of the Union – that is mutual trust and confidence by applying and uniformly applying European Law and the values it stands for – the Union will cease to exist, and the Union cannot be effective any more. This, ultimately, will affect the internal market and thus the economic interpenetration, to the core.

If one would ask what my main worry is? I will answer that politicians, like the European Commission, will treat the independence of the judiciary as a bargaining chip, and will implement a policy of appeasement.

In this respect, I want to mention the meeting of last week between the president of the network of supreme courts, Jean-Claude Wiwenius, the president of the European judges association, Jose Igreja Matos, and myself as president of the ENCJ with Justice commissioner Reijnders and vice-president Jourova. We urged the Commission to take immediate interim measures as soon as President Duda signs the latest draft law, which undoubtedly is in violation of European Law. Just two days ago President Duda put his signature on the draft law.

Now the Commission must be strong, and act without delay. If not, I am deeply worried that the independence of the Polish judiciary will be lost by the end of this year. And once lost, it will be very difficult to recover it. In that case, European judges in other countries will not be able to trust their Polish colleagues any longer. The disintegration process of the Union will start and, once started, it is very difficult to stop it.

Apart from this systemic threat, I am also deeply concerned for the personal well-being of my Polish colleagues. Last week for instance, the front page of the Polish pro-government newspaper Gazeta Polska showed a full front picture of mrs Gersdorf, the first president of the Supreme Court of Poland, with the accompanying text: Is mrs Gersdorf going to be imprisoned? And: The first president is not reluctant to destroy the rule of law, which she allegedly defends.

My experience is that these kind of items in this newspaper prepare citizens for the next step of the government. If the Commission and the Luxembourg Court do not intervene rapidly, I fear for her physical freedom, and of other judges like Markiewicz, the president of the judges association Iustitia, and Zurek, the spokesman against the attacks on judicial independence in Poland. Mind you, this is about a country in our own Union legal order.

Ladies and gentlemen, let me now say some words about the concept that judicial power needs safeguards and limits in a democratic society as such.

The ENCJ is very much of the opinion that independence of judges is a constitutional gift from the citizens for the benefit of the citizens. In that view, it is only logical that judges account for the use they make of their independence. And this also includes limits to their power. This opinion is widely shared among judges in Europe, although I notice that judges talk more, and more enthusiastically about independence than about accountability in our network. And, I am sorry to say that the networks' next June report will be very critical on the accountability of

European judiciaries.

To be honest, the political situation in many countries does not always make it easy to be accountable. I give you the example of a video on the internet of the president of the Council for the Judiciary, suggesting he was – rightly or wrongly - taking bribes. The next day the Council unanimously, publicly supported the president, without questions asked. Parliament wanted the Council to account. The Council refused, because of its independence: the judiciary does not account to Parliament for its decisions. Opinion polls showed that the confidence of the citizens in the judiciary dropped dramatically.

Assessing this situation, I personally believe the main reason for this Council stand is that the members of the Council do not trust the other state powers: if you show your weaknesses, they will only use it to harm the judiciary. Too many councils in Europe feel that way nowadays. And they are probably right. It is tragic that this leads to a paralysis of councils. They do not make progress on accountability and modernization of the judiciary any more, which will affect the trust of the citizens in the judiciary in the long run.

Coming from a high trust country it is easy to say that a circle of distrust has to be broken for the benefit of the common good, but in large parts of Europe, this chilling mistrust is the reality of everyday life. I mentioned already that 26% of the judges in Europe feel that they are not respected by other state powers: in Rumania, Bulgaria, Italy and the UK more than 40% (as said: Poland was not in the survey).

The Italian Council set a good example of how a judiciary can be accountable in times of crises. When one of its members was accused - rightly or wrongly - by the public prosecutor of accepting money to cast his vote in the Council for certain appointments, the Council was able to convince this member to step down as a Council member in the best interest of the judiciary and its independence, although the member claimed to be innocent.

Ladies and gentlemen, I am already talking for some time now. I will promise to make some progress. That is why I just want to say some words about judgements of Supreme Courts in human right cases, especially the attribution of positive obligations to civil rights.

In the Urgenda case, the Netherlands Supreme Court recently upheld the ruling of the Court of Appeal that the Dutch State is required to reduce greenhouse gas emissions with 25%, based on the European Treaty of Human Rights. The consequence is that the reduction of 20% as decided in the political arena was not enough. The difference of 5% has quite an impact, and not only on the states' finances, but on political priorities and policies as well.

I do not want to go into the merits of the case and into the question whether the Supreme Court rightly or wrongly applied the case law of the Strasbourg Court as to the positive obligations. Based on the contributions of Bossuyt in this Yearbook, saying that the positive obligations doctrine wrongly has no limits, and of Myjer, saying that the development of positive obligations is within the mandate of the Strasbourg Court, it seems fair to say that reasonable and informed persons can differ about the outcome of this case. So it might be that the Netherlands Supreme Court did not only apply Strasbourg case law, but made legal choices of its own as well.

In case a majority of Parliament does not agree with the outcome of the application of national law by its Supreme Court, it can simply change the law, or, usually more difficult, a constitution. In theory, the European Treaty of Human Rights can be changed by the Contracting Parties, but in practice this is hardly possible. The reason is that the Treaty was designed and accepted by the Contracting Parties to last infinitely. That is why its concepts are abstract and must be interpreted in the context of changing societies: it is a living instrument.

In my opinion, this is the reason why judges should only engage with restraint in developing new areas of law on the basis of the living instrument doctrine of the Strasbourg Court.

Still, this restraint does not seem to convince many politicians. They keep having the feeling that judges are out of control and they themselves are not in control of important decisions affecting the national policies of a country. Of course, a state can leave the Treaty, but happily, this seems to most politicians like committing suicide because you had a bad lunch. So the unease remains.

In these situations, politicians sometimes try to get a better grip on the Supreme Courts by increasing their influence on the selection of judges to these courts. Several authors in this Yearbook are of the opinion that it helps to legitimize judgements like Urgenda when parliaments have some say in selecting the judges in these courts.

These authors might be right for some countries, but, in my experience, only for those where the danger of politicizing the process of selection and appointment of Supreme Court judges is constrained. Without constraining the danger, a political “winner takes all” tradition in a country will certainly create a divide in society, because the top justices are seen as the instruments of the parliamentary majority that selected them. The Polish situation is an obvious example.

Once you embark in the direction of more political influence on the selection of top judges, it will not be easy to avoid politicization. As mentioned before, already 21% of the European judges think that judges in these courts are selected on

political grounds, and not on competences and experiences necessary for a judge. Even in apparently balanced selection systems like Germany and Italy, 34% of the replying German judges totally agreed, and 46% of the replying Italian judges.

But even so, judicial restraint in these cases and a balanced influence of parliaments on the selection of Supreme Court judges will probably not be enough to ease the unease of many politicians and judges.

My guess is that one of the important reasons is that the professional logic of judges on the one hand, and of politicians on the other, is very different, and that the politicians do not understand the judges anymore and vice versa. For a lot of politicians everything is politics. These politicians look at a case like Urgenda as a political decision, not as a legal decision on human rights. It is this political logic that judges do not understand, and strongly object to.

Perhaps this ‘not understanding each other anymore’, is due to the fact that in recent times politics has become more instrumentally driven, and less value driven than before. Or, that most important politicians nowadays are educated in the fields of economics and finance, rather than in law. Or, that judges do not appreciate the difficulties and dilemmas of modern politicians. Or, that judges do not fully realize, and take into account the growing impact of their decisions on politics. Who knows exactly?

For me it is obvious that the impact of judicial human rights decisions on finances and political priorities is increasing. I admit this needs some elaboration.

The first actual explicit reference of the Strasbourg Court to the Treaty as a living instrument was in 1978, in a case on corporal punishment on juveniles. During the years, the Court developed the Treaty in the fields of gender equality, environment and technology and science.

In 2004, an important case in the field of environmental disasters and the right to life was decided. The facts of the case were about a methane explosion at a rubbish tip, which caused the house of a family to be destroyed, with the loss of nine lives as a result. Considering this 2004-case and the Urgenda case, I think it is clear that the latter case has far more impact on state finances and political priorities than the former.

By now, some might think I do not champion the central idea of human rights protection, that is to create a part in law concerning fundamental rights that politicians cannot affect to the detriment of individuals, not even by a (large) majority in Parliament. Others might think I criticize the case law of the Strasbourg Court that the Treaty is a living instrument.

They are wrong.

My point is that I do understand unease amongst politicians.

I am not saying that the context of changing societies does not legitimate, or is not necessary to uphold the rights in the Human Rights Treaty in cases like Urgenda. I am saying that the growing impact of cases like Urgenda on state finances and political priorities makes a dialogue between politicians and judges absolutely necessary. On merits, that is, not on the integrity of the judiciary.

So, I think it is essential that state powers invest more in their mutual relationships, to better learn the other state powers. This could be done by a dialogue. This dialogue should be hold on a regular basis, and not driven by incidents. Its frequency? I say every two years in a fixed period of the year with the highest representatives of the state powers attending.

When I was an undergraduate, my professor of Constitutional Law taught me that law is about trust and confidence: the purpose of law is to make trust and confidence between people possible, and to protect justifiable trust and confidence of people. This idea appealed to me then, and it still does so. And I feel it applies to the relationship between state powers as well.

A biannual, regular, constitutional dialogue between the state powers could found a better mutual understanding of judges and politicians and thus more constitutional trust and confidence in each other. It is my educated guess that such a dialogue is of greater importance for the legitimation of judgements in cases like Urgenda than a balanced political influence on the selection of judges.

Working in Europe in the ENCJ I was constantly confronted with distrust, fear, unease, and sometimes blatant deceit in the relations between the state powers. On the basis of these experiences I firmly believe that trust and confidence between the state powers is of the essence. Constitutional rules concerning a clear and balanced distribution of power are important to establish trust and confidence, but they are not all important. My experiences tell me that a constitutional culture of mutual understanding and respect is as important as rules are. A regular, constitutional dialogue, difficult as it nowadays might be, is absolutely necessary in establishing and maintaining this culture.

I believe the thinking power of the academic community could be very helpful in creating such a culture. May I challenge the academic community to work on the idea of a regular constitutional dialogue? On what you think of it, on existing practices and experiences, national or supranational, and on how such a dialogue can be organized in different European countries and on a supranational level, for instance on European Union and European Council level. All in an effective way,

so it best helps create a constitutional culture of trust and confidence.

Ladies and gentlemen, I thank the Asser Institute for the honour of addressing such a distinguished audience. Again, I congratulate the editors and authors on this first Yearbook, and I am looking forward to the next one.