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Autonomy and Heteronomy of the Judiciary in Europe: General Introduction

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Abstract

Judges and the judiciary have always been a subject of debate. The questions of legitimacy, activism v self-restraint; appointment or selection, accountability, the rise of alternatives to formal justice, ADR, are at the heart of the discussion. However, the law-job of dispute resolution is not actually done by the judges on their own, nor in isolation; judges have many different sorts of collaborators and some of these can develop some scope for autonomy. At the same time the judiciary claims to be an independent power, but it is also a basic public service to the citizens; how can the public administration be involved in securing-facilitating this service? Finally, when deciding and interpreting the law judges often need to take into account norms belonging to different but coordinated legal systems and find coherence between them, and it can be questioned whether the method of conform interpretation they resort to might enhance or diminish their autonomy.

Key words

Autonomy of Judges; Judicial Decision-Making; Judicial Adjudication; ADR; Judicial collaborators; Justice as service; Justice as power; conform interpretation

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Judges and the judiciary have always been a subject of debate. This debate has intensified in the last decade. The questions of legitimacy, activism v self-restraint; appointment or selection, accountability, the rise of alternatives to formal justice are at the heart of the discussion. However, the law-job of dispute resolution is not actually done by the judges on their own, nor in isolation; judges have many different sorts of collaborators and some of these can develop some scope for autonomy. At the same time the judiciary claims to be an independent power, but it is also a basic public service to the citizens; how can the public administration be involved in securing-facilitating this service?

The present issue is the result of the proceedings of the Workshop we organised at the International Institute for the Sociology of Law at the spring of 2010. The workshop had some contributors who could not participate in this publication, but their thoughts and oral contributions have been accompanying us as we prepared this volume. Former Judge David Edward, Advocate General Niilo Jaaskinen and Assitant greffe at the General Court Jose Palacio González all from the Court of Justice of the EU; Professors Rosa Greaves and Noreen Burrows, both from Glasgow University, Dr Boris Petersdorf, from the European Court of Human Rights, Peter Dyrberg from the lawyers' firm Schjodt, Oslo and Brussels, Prof Dr Rudolf Wendt, from the Saarland Constitutional Court, Professors Maureen Cain (Oxford) and Susan Karstedt (Keele), and finally Dr Iris Canor (Saarland and Rishon Lezion), Luigoi Cominelli (U Milano) Dr Kathrin Nitschmann (Saarland) and Dunia Marinas (UPV/EHU). Still, we believe we have managed to gather an interesting list of papers, with an acceptable degree of coherence. The workshop, and the volume have brought together practitioners and academics from different jurisdictions and disciplines.

The volume contains some general papers, reflecting theoretically and in an abstract way on the different topics of the workshop - lawyers, ADR (mediation and different forms of arbitration), Supreme Court studies, historical approaches to autonomy, objective interpretation – together with some case studies on Spain – the *sui generis* jury system, including the obligation to motivate the verdict, and the Garzón case as a symbol of the paroxysm that characterises Spanish Justice– and on the Basque Country – penal mediation in a Basque town court and the role of the Basque Government in the setting up of the Judicial Office.

The topics of the workshop and of this volume have been divided into three blocks, each with an introduction giving account of the contributions and discussions from the Workshop.

Block One is on the contrast or opposing ideal types of Justice: one performed and delivered only by Judges conceiving of themselves as each symbolising a Power of the State versus a picture where albeit central to Justice, Judges are seen as providing a service to the citizens in a complex network where collaborators or other adjacent professional groups – clerks, procurators, forensic doctors, experts, lawyers, judicial officers, the administration … - all, ideally, contributing to the quality of the service. What if the picture was turned upside down and the judges became the collaborators? The first picture enhances jurisdiction as judicial decision making, authoritative interpretation and development of the law, it runs the risk of making judicial decision making as excessively central; the rest of the spectrum in the Administration of Justice turns around the judges as satellites. The second focuses on Justice and jurisdiction as a means to deal with conflict and litigation ideally with a view to solving or settling disputes.

This takes us to the second block where Judges are not the only actors involved in this business of dispute resolution, and where alternative forms contribute to the picture that blurs this autonomy of the judges as a Power of the state.

Finally the activity of the Judges as a decision-making body contributing to the development of the law could give a false impression of autonomy in performing

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this function. However judges are bound to the law, and are also often bound to different coordinated systems of law so that a harmonious, consistent and ideally coherent interpretative practice has to conciliate between normative claims pulling in different, if not contradictory directions. Conform interpretation is a useful method in this respect.

At any rate judges and the judiciary are not the only, and in some instances no longer the central, forum for dispute resolution; there are alternatives that can be seen, depending on the situations, as partners or rivals. To add even more complication to this picture, along with dispute resolution there are other law-jobs performed by the judiciary, amongst which, the coherent and ideally legitimate development of the law features prominently.

New light is shed on more traditional questions such as legal interpretation and knowledge of the law, and knowledge within the law, legal doctrine; the issue arises to what extent judges have an autonomous, recognised scope and leeway for interpreting legal instruments, or what forms there might be to control such operations (heteronomy) and bring it within judicial hierarchy, conform interpretation is one such issue. At the end of the day the question of power is always there in the background.

Socio-legal studies have made us aware of the plethora of issues involved concerning personnel, procedures, rituals, or power. Europe is an interesting laboratory since it has opened up new perspectives and allows us to see traditional issues under new light. This volume covers some of the fundamental debates around the centrality of judge-made justice.

Joxerramon Bengoetxea and Heike Jung (coordinators and editors)