The rule of law and the effectiveness of civil justice

VALORISATION ADDENDUM

The present study is intended to further a reflection of European legal thought and in particular the way in which European common legal rules and principles are formed and articulated. It is a study of European human rights law, framed as a criticism of the existing practice of the European Court of Human Rights in an area where reliance on conceptualist thinking appears to be problematic due to institutional dimensions. The criticism is in turn meant to encourage further thinking about the possible development of the case law of that Court on the basis of a more coherent and pragmatic approach, in order to strengthen European standards of judicial protection of civil law rights. It is hoped that the proposed analysis of the idea of effectiveness in the field of civil justice and the related human rights doctrine can contribute to the shaping of European human rights law and European civil justice in the years ahead, by providing a starting point for the reflection on the relationship between rights and policies in the formation of transnational European law. The added value of the proposed theoretical study is a better understanding of the problems of conceptualisation and interpretation that arise in connection with the application of European human rights law to the domain of civil justice.

The first problem is dealt with by an extensive discussion of the issue of judicial effectiveness in the context of the global rule of law discourse and, in formal terms, in the context of European legal integration. Many international actors, ranging from the United Nations to the European Union, as well as many nongovernmental organisations, now devote significant efforts to improve the working of justice systems in various countries, by using the 'rule of law' as the key argument. However, the vagueness of appeals to establish the rule of law, in particular when they relate to judicial reform, has created a significant efficiency problem for public policy, because no recognised benchmarks currently exists that could guide the formulation of rule of law projects and developmental efforts. The present study accordingly identifies effective justice as a key component of the rule of law and lists the main issues that ought to be tackled under this heading. By proposing a policy-based framework of analysis, it intends to orient both the rule of law debate and rule of law development. It is submitted, in particular, that a streamlining of efforts along this axis could contribute to greater efficiencies in public policy and an achievement of better results in international law reform cooperation.

The study also seeks to identify the issue of effectiveness of civil justice as one of the major legal and institutional issues of European legal integration, and it therefore reviews the formal contexts in which effectiveness plays an important part in the institutional architecture of European transnational organisations. Both

within the Council of Europe and the European Union, the enforcement of key principles and mechanisms defined on the transnational level often depends on the performance of national civil justice systems. However, the effectiveness of national courts differs markedly from state to state, creating major issues for cooperation and symmetry in the application of commonly agreed rules. A more comprehensive understanding of effectiveness as a fundamental principle of international and European law, applicable to the obligations of member states by policymaking bodies and implemented by institutions like the European Commission, could, it is submitted, assist in the formation of European standards of justice and foster a culture of respect of legal rights that is often lacking at present. Moreover, a comprehensive conceptualisation of effectiveness could be applied by the Court of Justice of the European Union in the formulation of standards under Article 47 of the Charter of Fundamental Rights. Especially in the context of the recent economic crisis, a discussion of core institutional prerequisites for the enforcement of civil law rights, including those relating to the practices of national courts, has become very topical. The criteria of analysis of effectiveness defined in the study could accordingly serve as an inspiration for further work on this pressing subject.

Within the legal and academic communities, significant uncertainties appear to exist at present regarding the precise meaning that one should associate with judicial effectiveness. The confusion created by the plethora of different vocabularies used to criticise the performance of judicial systems, in part caused by the fact that different institutional problems arise in different legal systems, calls for a certain clarification of the academic and policy debate if internationally applicable standards are to be defined. The proposed definition of effectiveness, in particular as regards its policy dimension, is intended to serve as an aid in this debate, by creating a kind of a bridge between policy considerations prevalent on the national level and the rather abstract principle of effectiveness that is currently mainly applied on an *ad hoc* basis. The advantage of a clearer conceptualisation of the principle of effectiveness lies above all in the positing of certain priorities for public policy, by emphasising the crucial value of reasonable length, cost and predictability as essential qualities of a functioning justice system and the economic dimension of structuring justice systems.

The second problem tackled by the study, that of interpretation, is addressed by a comprehensive and analytical overview of the case law of the European Court of Human Rights. The target audience of this section of the study are of course theorists and practitioners of European human rights law, who may use the findings to develop arguments in the defence of human rights and in the formulation of judgments in the area of civil justice. The approach advocated by the study would allow for a more substantial engagement of the European Court of Human Rights in this area, so that the functioning of judicial institutions in Europe could be improved where judicial intervention is warranted. The proposed analysis

encourages the Court to identify more explicitly the criteria of effectiveness of justice under the fair trial provisions of Article 6 of the European Convention on Human Rights and to better articulate its requirements, notably by asking states to responsibly balance fairness with effectiveness when organising and structuring their civil justice systems. In jurisprudential terms, the proposed analysis suggests that the Court should apply a coherent doctrine on the key issues of effectiveness, namely the length, cost and predictability of judicial proceedings, and define European standards in a way that takes into account their importance in the design of civil procedure. Finally, the analysis also suggests that the Court should adopt a more contextual and pragmatic approach to its decisions in order to induce institutional change where such change is necessary to deal with deficiencies in the structure and performance of civil justice systems.

The study has analysed three specific areas of Strasbourg case law, but there is no reason why a similar methodological approach could not be applied to other fields, in particular policy sensitive areas like criminal justice or property rights. In terms of further research and theoretical development, it is suggested that the evaluation of European human rights law ought to go beyond the conventional identification of obligations applicable to European states and a literal reading of the justifications used by the Strasbourg Court, by identifying the background assumptions of the relevant policy area. A policy-oriented reading of human rights law could, it is submitted, yield valuable insights in the debate over the proper scope of European intervention in the working of national legal systems. In this sense, the present study is meant to foster a discussion among academics, lawyers, judges and policymakers about the approach to the formation of European rules and an examination of the underlying techniques applied in that process. For students of European legal integration, the study could be a building block of a more comprehensive analysis of the substance of judicial rulemaking in Europe, which is particularly interesting on the transnational level due to the multiplicity of institutional backgrounds, policies and value orientations at play.

Broader political dimensions of research into the work of European institutions cannot be neglected in this context. In the current stage of European legal integration, which is becoming more and more contentious, the findings of the study could help to reorient debate from the more ideological or even emotional conflict regarding the role of European institutions and rules - which appears to be simultaneously criticised as either too imposing or as insufficiently active - to a more nuanced and precise evaluation of the actual substance of common European standards and the value of adopting such standards with reference to the interests of European citizens rather than with reference to narrowly conceived interests of states characterised in terms of opposition to those of other states. A proper identification of shared values and standards that can help to pragmatically develop public institutions of European states whilst respecting their different traditions

and procedural models can therefore assist in supporting the public legitimacy of common European institutions and the expectations of the general European public rather than those of fragmented national political communities that currently tend to dominate public discourse.

Finally, the study is also aimed at supporting institutional reform and, more indirectly, at creating conditions for social and economic development on the basis of better performance of justice systems. The potential economic benefits of an improved functioning of civil justice institutions ought to be evident, given that economic enterprises rely on enforcement by legal institutions to organise and structure their activities and business decisions. However, the main advantage of improved judicial performance is not economic in nature. This is because expectations about justice touch upon some of the most fundamental moral values and beliefs that we hold as individuals, and trust in justice systems is accordingly essential if stable legal and social relations are to be maintained, especially in times of increased individualism as well as significant economic and social pressures. It is therefore hoped that by outlining some ideas for analytical, policy and legal work in the field of civil justice, the present study can contribute to strengthening of the legitimacy of justice in the eyes of the general public and, as a consequence, to the strengthening of the moral value of law in contemporary society.