Kluwer Patent Blog

The Rule of Law (Rechtsstaat) is Endangered and Needs to be Defended!

Thorsten Bausch (Hoffmann Eitle) · Monday, November 7th, 2016

1. History

One of the most precious achievements that Europe inherited from England is the so-called Rule of Law, dating back from the days of James I who ruled the union of the Scottish and English crowns from 1603 until his death in 1625. The key parts of this model is that laws are made by a parliament and administered by independent judges. LJ Robin Jacob recorded in chapter 5 of his most recommendable book "IP and other Things" (Oxford and Portland, Oregon, 2015) a speech that he held in St. Petersburg in 2011. Using his words,

> This model means that no one can do what they like. Even the most powerful government, Prime Minister, President, Emperor or corporation must stay within the law. If he or she or it fails to do so then injured citizens or companies can take them to court for an order to redress the wrong.
>
> And that redress is administered by independent judges. Critical here is a fearless non-corrupt judiciary. I am proud to say that not only has no one ever tried to bribe or influence me, but that I have never heard of such a case in my country. It was not always so. Only when two things were firmly established did we get to that state. First is that a judge cannot be dismissed save for good cause. And, second, that the judges are properly paid. (…)
>
> Now the rule of law can mean that sometimes governments do not like what judges do. We in our country have found politicians – even Ministers – complaining about our decisions. But it does not matter. We do what we do, administer the law.

The Rule of Law principle also received its theoretical foundations in continental law. As I noted almost two years ago on this blog, Charles de Secondat, Baron de Montesquieu knew it all as early as 1748:

> "Experience teaches that every human being who has the power tends to abuse it. Therefore, it is necessary that the power sets limits to the power. There are three things in every state authority: the legislature, the executive and the judiciary. There is no freedom, if they are not separated from each other."

And let us not forget the Germans, who are (or should at least be) most concerned about the Rule of Law (*Rechtsstaat*) in view of their history that turned out so horrible exactly when that Rechtsstaat was in effect abolished and replaced by the Rule of a Dictator and a party based on a deeply inhumane racist ideology. This is why the unamendable Article 20(3) and (4) of the German Constitution (Grundgesetz) reads as follows:

> (3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.
>
> (4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.

And Article 97 Grundgesetz stipulates

> (1) Judges shall be independent and subject only to the law.
>
> (2) Judges appointed permanently to full-time positions may be involuntarily dismissed, permanently or temporarily suspended, transferred or retired before the expiration of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws. The legislature may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in their districts, judges may be transferred to another court or removed from office, provided they retain their full salary.

Before that background, Article 23 of the EPC which is titled with "Independence of the Boards of Appeal" may come as no surprise:

> (1) The members of the Enlarged Board of Appeal and of the Boards of Appeal shall be appointed for a term of five years and may not be removed from office during this term, except if there are serious grounds for such removal and if the Administrative Council, on a proposal from the Enlarged Board of Appeal, takes a decision to this effect. Notwithstanding sentence 1, the term of office of members of the Boards shall end if they resign or are retired in accordance with the Service Regulations for permanent employees of the European Patent Office.
> (2) (…)

> (3) In their decisions the members of the Boards shall not be bound by any instructions and shall comply only with the provisions of this Convention.
> (4) (…)

In 2011, as we have just seen, LJ Robin Jacob was proud to state that not only has no one ever tried to bribe or influence him, but that he has never heard of such a case in his country.

But now we are in the year 2016, and I am not so sure that Sir Robin would dare making the same statement again today. At least three shocking events in the UK, the USA and the EPO during the last few months are more than enough to have me ring the alarm bells. They should be a warning to all of us who still stand by the values of civilisation, democracy and the rule of law and who still adhere to the Kantian idea that only the Rechtsstaat and the supremacy of a country's constitution can ensure permanent peaceful life as a basic condition for the happiness of its people and their prosperity.

2. The UK

The most recent attack on the Rule of Law and its representatives, the judiciary, occurred just a few days ago, on 4 November 2016. Three eminent judges, including the two most senior judges in the Courts of England and Wales – the Lord Chief Justice Lord Thomas of Cwmgiedd, the Master of the Rolls Sir Terence Etherton, together with Lord Justice Sales (all judges in the Court of Appeal, but here sitting as High Court judges in the Divisional Court of the Queen's Bench Division) unanimously found that the UK Government does not have power under the Crown's prerogative to give notice according to Article 50 for the UK to withdraw from the European Union. In practical term this means (subject to the Supreme Court finding otherwise) that the UK Parliament will have to discuss and decide about whether the government is empowered to give such notice. The judges made it explicit that their judgment is NOT concerned with and does not express any view about the merits of leaving the European Union; that is a political issue.

One may agree or disagree with this judgment, which clearly has political repercussions – this is not the issue here. However, what one can simply not do – at least not in my humble opinion – is to fire a full blown vitriolic *ad hominem* attack against the judges, as it was reported e.g. here.

One tabloid paper (whose name does not deserve being mentioned here) described the three high court judges as "enemies of the people". The newspaper's website ran a headline that read: "The judges who blocked Brexit: One founded a EUROPEAN law group, another charged the taxpayer millions for advice and the third is an openly gay ex-Olympic fencer."

Whow! This is truly incredible and absolutely outrageous. The insult is even more aggravated as judges cannot defend themselves from personal attacks, and must rely on the government to step in (which it did, even though only a bit half-heartedly, in my opinion and the opinion of quite a few others).

Esteemed UK tabloid papers, put your vitriol firmly back where it belongs, i.e. in the poison cabinet, and stop poisoning the fundaments of peaceful togetherness as a basic condition for the happiness of the UK's people and their prosperity!

There is so much more I could write about this to express my disgust with the tabloid papers' conduct (which regrettably even seems to be supported by UKIP), yet I will rest my case by chiming in with the archbishop of Canterbury who said he was horrified by the trolling the judges have received, and who emphasized that "British values call for honest but good disagreeing, [we] need reconciliation not abuse". He is perfectly right, and I would add that not only British values call for honest but good disagreeing, these are values that are, or at least should be, shared by all civilized nations.

3. The USA

Which takes us to another great nation with one of the oldest republican constitutions that are still in place today, the United States of America. This constitution played a certain role in the current US election, and for good reasons. But the event which I think deserves a comment in the context of this blog is the behaviour of one of the two candidates for president who called a judge who rendered a procedural decision adverse to his interests "hater", and who reportedly said in an interview: "I'm building the wall, I'm building the wall." "I have a Mexican judge. He's of Mexican heritage. He should have recused himself, not only for that, for other things."

No, with respect, he should not. He as a person and in his capacity as a judge should be respected, not bullied. His role is to administer the law impartially and independently of the political opinions of the parties before him. Being a judge and having to make decisions will often imply that your decisions may not be liked by the losing party. This is one of the reasons why there are appeals. But even if a losing party does not like a decision or finds it wrong or even outrageous, this does not justify an *ad hominem* attack against the judge who rendered it. Hit the ball, not the man – these are the rules of civil discourse. And if you have justified concerns against the impartiality of your judge for personal reasons, you should file a request for the judge to be recused before he or she renders a decision, not thereafter.

All men can err, including judges. Nobody is infallible. But a keystone of a functioning democratic *Rechtsstaat* is an independent and respected judiciary. If there is no respect and trust in at least the judges' impartiality, there can be no peaceful togetherness, only mistrust. The United States of America already had one extremely bloody civil war, leaving 620,000 to 750,000 soldiers dead, a higher number than the American military deaths of World War I and World War II combined. Before this backdrop I think that all candidates for president should be careful not to undermine the fundaments of a civil society, including at least respect of the constitution and an independent judiciary.

4. The EPO

The first two examples that, in my view, demonstrate how the Rule of Law is currently

endangered came from the "ugly world" of politics. So you might not expect that my third one stems from an organisation which ought to be relatively apolitical, namely the European Patent Office. Unfortunately, however, all is not well there either. This has to do with the peculiar "constitution" of the EPO, the European Patent Convention, which only provides for an imperfect system of checks and balances and in particular does not subject the Office President to an independent judiciary, whereas the members of the Boards of Appeal are subject to being proposed by the President for being (re)appointed by the EPO's Administrative Council. In other words, the Office President has a lot of power and the only entity that can control him is the same Administrative Council that elected him in the first place.

Given how important an independent and fearless judiciary is for a functioning system of checks and balances, an Office President would, in this author's view, be well advised to exercise utmost restraint in interfering with the Boards of Appeal as the EPO's judiciary. Yet I am afraid that this is not what happened in summer of this year. Quite to the contrary, the members of the Enlarged Board of Appeal (EBA) of the EPO made very clear that they actually felt threatened by disciplinary measures of the Executive Branch of the EPO, i.e. the President, and insufficiently supported by the Administrative Council. The clash came up in proceedings between the Administrative Council as Petitioner and a member of the Technical Boards of Appeal who seems to have been accused of libelling the EPO's President and Vice Presidents, which he/she has apparently denied. The Enlarged Board stated in its decision this:

> As the Petitioner did not clearly distance itself from the Office President's position, there is the threat of disciplinary measures against the members of the Enlarged Board. It is then the Enlarged Board's judicial independence in deciding on this case which is fundamentally denied.

I will not bother you with the complete background of this case that is summarized in the EBA's decision and has amply been reported by IPKat, in my 2014 blog on the same case, and by others. Suffice it to say that the Enlarged Board had ordered to conduct its latest hearing *coram publico*, which apparently incensed the Office President (why? – *honit soit qui mal y pense*) to a degree that he felt he should intervene into the judicial proceedings by writing a letter to the Enlarged Board of Appeal which the Board perceived as a threat. Inter alia, the President instructed his lawyer to write that *"In view, in particular, of the gravity of the reputational, security, welfare and public order risks identified, there is a strong case for saying that any decision to conduct this hearing in public would be unlawful because it could not be defended as either proportionate or reasonable"*. (This may be right or wrong, but is it for the President to decide on whether it is lawful or unlawful to conduct the EBA's hearing in public, or is it for the EBA itself???) And even more, the letter continued with stating that the President *"will not hesitate to take any appropriate steps available to him to ensure the proper running of the Office and the safety of its employees"*.

Now, might you argue, the President has just voiced his opinion to the EBA – so why should this be a threat? The problem is exactly the background of the case at stake,

i.e. that the President imposed and immediately executed a house ban on a Board of Appeal member for alleged unlawful conduct, without adhering to the procedure prescribed in Art. 23 EPC. Who can guarantee to the EBA that such a thing cannot happen again, if the President feels that some conduct of the EBA is unlawful and sees only himself in the position to ensure the "proper" running of the Office?

I am afraid (and very sorry) to say that even among the EPO's top officials, the principle of the Rule of Law does not seem to be respected very much. Where are you, Administrative Council?

5. Ceterum Censeo

As Sir Robin Jacob LJ rightly stated, the Rule of Law

> … means that no one can do what they like. Even the most powerful government, Prime Minister, President, Emperor or corporation must stay within the law. If he or she or it fails to do so then injured citizens or companies can take them to court for an order to redress the wrong. And that redress is administered by independent judges. Critical here is a fearless non-corrupt judiciary.

How do we ensure that we have a fearless and non-corrupt judiciary? Jacob LJ mentioned job security and appropriate payment as cornerstones. I would add to these two that judges must also be shielded against personal bullying, threats, incendiary language and *ad hominem* attacks. When judges start being intimidated by threats or radical and shameless voices, our civil society will be severely endangered. It is time to stand up against these voices and demand respect to our judges and Board of Appeal members, and to their judicial independence.

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