

BRIDGE FORUM DIALOGUE : UPHOLDING UNION VALUES IN TIMES OF SOCIAL CHANGE : THE ROLE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

Summary¹ of the academic lecture given by **Mr Koen LENAERTS**, Vice-President of the Court of Justice of the European Union on 16 January 2014. The event took place in the premises of the Court of Justice in Luxembourg and was introduced by **Mr Gaston REINESCH**, Governor of the Banque centrale du Luxembourg and President of the Bridge Forum Dialogue.



Professor Koen Lenaerts, Vice-President of the Court of Justice of the European Union

The European Court of Justice (ECJ) in Luxembourg is a supranational court established by the EU Treaties. If a legal dispute in a Member State gives rise to issues under EU law, the national judge may, and, in some cases, must, refer the case to the EU Court of Justice for a preliminary ruling. The ECJ also decides cases brought against the EU institutions for annulment of their actions and cases brought against Member States for failing to fulfil their Treaty obligations.

By Rosmarie Carotti

Continuity and change

It is Professor's Lenaerts conviction that the European Union must remain faithful to its founding values whilst allowing room to adapt to societal change. He drew an analogy with the designs of Euro banknotes and coins saying that "Just as the euro banknotes bear images which illustrate the fact that the European Union is committed to upholding its shared, founding values whilst allowing room for societal change, pluralism seems to be the message conveyed by the images on the euro coins. On one side, there is a map of Europe which is present in all euro coins. On the other side, it is for each of the 18 Member States whose currency is the euro to decide how it wishes to express its identity. And yet, both sides are minted together into a single, coherent existence."

¹ The full text of the lecture is available at www.forum-dialogue.lu

The European Court of Justice is daily called upon to rule on all areas of EU law in a changing political, economic and scientific environment. It has to safeguard the shared values of the European Union while adapting to new circumstances. The ECJ's law is a case law based on common principles but without the rigidity of absolute law

Professor Lenaerts quotes the *Pringle* case in which the ECJ was called upon to examine the compatibility with the Treaties of the establishment of a financial stability mechanism such as the European Stability Mechanism (the 'ESM'). It was also asked to determine whether the ESM Treaty was compatible with the Treaties and, in particular, with the no-bail out clause laid down in Article 125 TFEU.

The Court of Justice replied to both questions in the affirmative. In so doing, it stressed the importance of the EU value of solidarity which, as Robert Schuman rightly foresaw, is an inseparable component of the European integration project. However, that value had to be adapted to the difficult economic context in which we live. This meant that the financial assistance granted by the ESM had to comply with the no-bail out clause. Thus, solidarity, as a founding value of the Union, was interpreted by the Court of Justice in light of both "continuity and change".

Mutual influence of societal change at EU and national level

The European Union may now exercise its powers over areas of activity which had traditionally been reserved to the nation state. Matters such as criminal law or family law are no longer the exclusive preserve of national sovereigns. In the area of freedom, security and justice, the EU legislator now takes policy decisions that are likely to affect the everyday lives of European citizens.

On the other hand, national societies are not only the passive recipients of change and may also serve as the initiators and promoters of it as the progressive empowerment of the European Parliament shows.



ECA Members in the audience

The role played by the EU law in this parallel evolution

Professor's Lenaerts personal interest lies in the role that EU law has played in this parallel evolution.

EU law may, he says, facilitate change where the EU political process agrees to it. At EU level, social consensus is generally expressed through the Council and the European Parliament which are the EU political institutions. Conversely, if social consensus is lacking, political deadlock may operate as a shield against unwanted winds of change.

The existence of social consensus is also an important factor when interpreting the law of the Union. In this context, Professor Lenaerts draws a distinction between 'constitutional consensus' and 'legislative consensus'.

Constitutional consensus

Constitutional consensus leads to the adoption of EU norms of the highest rank (primary EU law – expressed in the Treaties), while legislative consensus is an integral part of the daily functioning of the European political process. It also goes without saying that ‘legislative consensus’ must comply with ‘constitutional consensus’.

Norms which reflect European constitutional consensus bring stability to the European integration project.

Striving for European constitutional consensus does not, however, operate as a hindrance to social change. On the contrary, where a Member State departs from norms that implement values which are recognised as all-European, those very norms that have been breached may in fact bring about change to the society of the defaulting Member State.

In the absence of constitutional consensus, the Court of Justice will not engage in judicial law-making by creating a new constitutional norm, such as a new fundamental right. For example, there is no European constitutional consensus as to whether same-sex couples should have a fundamental right to marry and if so, whether same-sex marriage should stand on an equal footing with heterosexual marriage. The ECJ will therefore opt for a prudent approach and defer, where appropriate, to the solutions adopted by the constitutions of each Member State.

However, the absence of constitutional consensus regarding the existence of a fundamental right does not mean that Member States enjoy absolute discretion in making their social choices. In exercising such discretion, Member States must comply with other norms embedding EU values. National choices are thus circumscribed by EU values.

Legislative consensus

Furthermore, in order to achieve legislative consensus, the EU political institutions may deliberately decide that some matters are best left unresolved. In such cases, litigation will inevitably lead to solving questions that the political process did not address. The European Court of Justice for example did not define the concept of a “human embryo” leaving that question to judicial interpretation.

National diversity

Whilst it is true that values such as democracy and the rule of law are recognised as all-European, the European integration project does not exclude national diversity. Pluralism means that each national society remains free to evolve differently according to its own scale of values. Value diversity must, where possible, be respected and preserved by the European Union.

However, neither unity nor diversity is absolute. The European Union may not deprive the Member States of their own identities. Nor may those national identities jeopardise the European integration project as a whole. The survival of the European Union requires that what brings Europeans together must remain stronger than what pulls Europeans apart. It follows that pluralism is a relative value which must be respectful of a core nucleus composed of the basic constitutional tenets of the EU.

Where a matter falls within the scope of EU law and the EU legislator has not yet determined the precise level of protection that must be given to a fundamental right, it is for the society of each Member State to make that determination. Yet, since pluralism is not an absolute value, the level of protection granted to a fundamental right by a national legal order must comply with any constitutional consensus that exists at EU level.

Conclusion

In summary, the European Union must remain faithful to its founding values. Those values imbue the European integration project with stability.

European values which are the result of a constitutional consensus are embedded in primary EU law. It is essentially for the political process to determine when, and indeed whether, those norms – which require the unanimous consent of the Member States and, where appropriate, of their citizens – should be adopted. Constitutional consensus can also lead to the adoption of general principles of EU law. These principles allow room for flexibility, yet in a context of conceptual continuity between the European Union and its Member States. When discovering a general principle, the Court of Justice serves as a bridge between the constitutional traditions common to the Member States and their shared European values.

National diversity and EU legislative consensus must both comply with values which are regarded as all-European, i.e. those that are the object of a constitutional consensus at EU level. It is this latter consensus that guarantees that all the forces that bring Europeans together are stronger than those that pull them apart.



From left to right: Mr Vassilios Skouris, President of the European Court of Justice, Mr Vítor Caldeira, President of the European Court of Auditors, Professor Koen Lenaerts, Vice-President of the Court of Justice of the European Union and Mr Gaston Reinesch, Governor of the Banque centrale du Luxembourg and President of the Bridge Forum Dialogue