LEGAL TRENDS

Professional Dialogue between Lawyers as a Necessary Precondition for the Development of Law and Legal Policy

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The acceptability of law in social and political lives becomes the subject matter of discussion when the former is not self-evident. The question of whether or not the law in force should be cancelled, how it should develop and if it should develop or be amended at all and – if the answer is yes – arises only when it is known what is regarded as the law for a specific moment and how it should be interpreted, because only then it is possible to speak about whether or not the law leaves something open and, specifically, what. In practice, the law is interpreted through the deliberations of lawyers and the mutual interchange of opinions. Only after a discussion it becomes apparent whether or not a particular provision requires interpretation or if it is interpretable at all. At this point, then, the scope of interpretation also becomes apparent. For this reason, the diversity of opinions in a legal discourse is the necessary precondition for the development of law. What is the place of legal dialogue in German legal reality, how important is it and what impact it may have? Who are the participants of this dialogue?

Why is the professional dialogue between lawyers – which is often called as not only the criticism of court judgements by the attorneys at law, legal scholars, mass media and political community but also as the disparagement thereof – so important today? In Western democratic countries, like Germany, this topic is in the main widely covered and discussed. There are many forms of professional legal discussions and the efficient impact thereof on the development of the judge-made law and the legislation which is the focus of legal and political interests. At the same time, the latter is particularly important for Germany insofar as judicial and legislative powers are always claiming the monopoly on lawmaking.

The most difficult task of both judicial practice and legal drafting is to find the optimum solution in every specific case which is the precondition for the acceptability and efficiency of law. For this reason, German scholars have been speaking intensively about the permanent fight for law dating to the end of the eighteenth century. These main characteristic features of this fight should not be of a modest reservation and reconciliatory attitude but, rather, also of a fierce struggle for justice. The driving force of

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this development is the professional dialogue between the lawyers which should not be dull but, rather, efficient and very intensive. A lively discussion is always characterised by the activity of its participants, controversy and witty dialogues. It should be appreciated, however, if this all has an adequate scope as polemics do not exclude the objectivity but cause controversy and, thereby, promote the advancement of ideas and, ultimately, a correct and targeted accentuation elucidates the respective legal problem.

Initially, the fight for law is the task of the judges. If a lawmaker limits himself to general rules, thus making the process of legal drafting open or even refuses the regulation of certain issue, the judge then takes floor and professional dialogue between the lawyers, in terms of discussions and an interchange of controversial opinions, becomes the necessary component of the perfection and development of law. The active participation of every specialist in this process is absolutely necessary. In this context, the perfection of law implies the participation of almost every specialist to a maximum practicable extent for none of them is to be excluded from the process. The driving force of this discussion is that everyone who has something progressive to say with respect to the case concerned expresses himself and is fully entitled to do so.

Below, based upon the examples from the German reality, we shall offer a detailed analysis of the dialogue between the judges, the dialogue with the judges under the participation of the attorneys at law, legal scholars, mass media and the political community as well as, albeit very briefly, the legal dialogue with a lawmaker. Attention will also be paid to the scope of a legal dialogue which is specified by means of a variety of the rules, partially legislative, and involving some aspects of style, taste and honesty.

I. Legal Dialogue Between Judges: What Can Judges Say Publicly about Other Judges?

The judge-made law has a number of apparent privileges. It is developing as a case law and, therefore, creates the optimum chances for the development of the rules which are very close to the particular reality. It is easier to correct the erroneous and incompatible with the time court decisions than the mistakes of a lawmaker. Furthermore, justice in Germany is relatively less dependant politically and is less influenced by various interest groups. Despite the foregoing, the judge-made law has a number of weak points as well. Its development requires enormous efforts. Due to the multitude of courts, it is very difficult to avoid the different interpretations of one and the same provision and to change something within an incorrectly initiated justice if the latter is already established in practice.

Another reason for the amendment of the judicial practice of higher courts is the criticism originating within the community of the judges themselves. Sometimes the publicity becomes the necessary precondition for such criticism. Consequently, in Germany, almost 78 percent of court judgements of the second and final instances are published in compiled judgements, law magazines and legal databases with any interested person being able to easily search for them according to the main thesis, the respective provisions of law or the topic's key words.

The critical approaches of judges are often applied in practice. Until 1984, for example, the High Administrative Courts – the second instance courts of the administrative justice – refused the claims of refugees from Sri Lanka upon granting asylum as a general rule. This practice seemed to be unfair for the judges of lower instance who granted these persons the right to live in Germany through neglecting the practice established by the courts of higher instance. They knew perfectly well, however, that the higher instance would subsequently annul their judgements. Later, the courts of higher instances renounced their practice. With this example, the judges of lower instance made a daring step forward and did not surrender to the risk of the cancellation of their judgements at a higher instance court.

Whenever a judge violates the principles of self-restraint and moderation, however, the good discussion comes to an end. There are some examples in this respect as well. The limits of topical and fair criticism are violated when the diversity of opinion, expressed during the meetings of the Chamber, becomes public. In 1998, the Chamber of the High Federal Court of Justice of Germany – the highest instance for civil justice – was considering the claim on the deficiency of goods sold under a sales agreement. Insofar as the "loophole" of expressing the dissenting opinion was closed for the High Courts of Justice in Germany – unlike the option enjoyed by the Federal Constitutional Court – a controversy of opinions of two judges of the Chamber who were considering the case moved to the level of scientific discussion and became the topic of magazine articles, conference reports and comments on judgements. In general, the judges who were participating in the court proceedings were not supposed to comment upon their decision. This is, however, unacceptable. The judges participating in the proceedings were supposed not to comment on their decision through referring to scientific sources, not to indicate that their decision was approved by the higher court and not to publish the dissenting opinion of a judge which was expressed during the session of the decision-making body.

II. The Legal Dialogue with Judges: How Can Attorneys at Law, Legal Scholars, Mass Media and the Political Community Participate in Streamlining Judge-Made-Law?

Today, there is no longer the opinion that a judge acts in the name of the people with respect to the authority of a court decision. For a long time now, both German judges and German society have stopped interpreting such authority upon the basis of this formula but, rather, derive it from the civil status of the judges. The authority, however, is the burden at the same time. It should be secured, on the one hand, and – which is no less important – subject to control, on the other.

The Bar: One of the Important Instruments for Exerting Control over the Development of Judge-Made-Law is an Attorney at Law.

It is more than clear that an observance of the rules of law and their implementation mainly depends upon the bar. The attorneys at law act as consultants in legal matters who, first and foremost, can influence which cases will be submitted to the court based

upon their duty to advise. On the other hand, the attorneys at law greatly contribute to the development of the judge-made law in the context of various novelties. The recognition of the "General Personal Right" (*Schachtbrief* decision BGHZ 13, 334 of 25 May 1954) and the Right to Informational Self-Determination (*Volkszählungs* decision BVerfGE 65,1 of 12 December 1983) by the Federal Constitutional Court, for example, was mainly conditioned by the attorneys at law who managed to induce the judges to pay attention to these issues. Mention should also be made of the cases when the attorneys at law tried to influence the judge-made law at their own discretion – not within some specific proceedings – though their professional associations. Under the influence of the open letter of the bar association, for example, the High Administrative Court of Lower Saxony changed its judgement with respect to the licensing of notaries in 1988.

There are many fora for the conduct of professional dialogue between the judges and the attorneys at law in Germany. More than half of the total 130 legal magazines publishes the comments on court judgements. These publications are also published electronically. The largest legal database of Germany, *Juris*, for example, enables any interested person to comment upon and criticise court decisions. The other discussion fora are the meetings of the judges and the attorneys at law at the institutional level such as the Day of German Lawyers, the Day of German Attorneys at Law, the so-called Judges' Week and Judges' Advices, amongst others.

The best example of the power of the criticism of court decisions by the attorneys at law is the decision delivered by my Chamber (BSGE 95, 275) on 24 November 2005 with respect to the so-called top managers. Under this decision, one of Germany's largest companies was imposed with the payment of a rather sizeable amount in favour of the pension insurance fund. This decision also concerned the chairperson of the Employers' Association of Germany who was a very powerful and well-known person in the country. The attorneys at law and the tax agents regarded the decision as politically unsatisfactory and it was their influence upon the lawmaker that led to the change of the respective legal provision and, therefore, our decision turned out ineffective for the future.

The scope of criticism of a court decision by the bar is provided for by the duty of the latter to act as a body implementing law. The publications under the title *In One's Own Case* or *In the Mandatary's Case*, for example, are not generally sanctioned in Germany. Based upon their own interests, the publishers avoid the publication of those articles which are of preparatory nature or are accompanying the court proceedings (the so-called boomerang effect) outside of the proceedings. Quite often, however, the attorneys at law who are leading the proceedings, make declarations which stress the instability of court decisions after the unfavourable resolution of the case and call the judges to review these incorrect opinions in the future. One of Germany's most renowned attorneys at law, *Conrad Redeker*, and the Chairman of the Federal Administrative Court, *Horst Zendler*, said with respect to the foregoing:

"Naturally, these representatives of court proceedings cannot be dropped out of the legal discussion. They out-step the limits of impartiality, however, as they go into the

heart of someone else's matter. In any case, they should admit that their scientific research is of a unilateral nature."

Furthermore, an attorney at law may criticise or even slander a judge due to the latter's style, taste and even honesty. This criticism is not subject to any sanction as it is neither unethical, offensive nor defamatory and does not encroach upon the independence of a judge.

Legal Science: The participation of legal scholars in the professional dialogue of lawyers is of particular importance. Unfortunately, however, their role of a controlling instance of judge-made law is also inadequately stressed in Germany.

Legal science and judges perform one and the same duty. In particular, they promote the development of law although they attain this purpose through different means. The main goal of a judge is to deliver a court decision whilst the purpose of a legal scholar is the determination and specification of a concept. A concept is one of the auxiliary means for a judge amongst many others. The lesser is the number of concepts provided by the scholars to the law, the more intensively it refers to other means. For a university professor, a court decision is the material which he assesses mentally. This enables him to critically look at the rules of law, to identify the development trends and, thereby, to reveal the new ways of development. This again is beneficial for a judge.

In Germany, judges and university professors seldom enter into direct discussions with one other. We should also act in this respect as the reason for this lack of interactivity, in my opinion, is that professors do not adequately assess the importance of the judicial practice and, ultimately, are dissatisfied when judges (courts) do not share their legal opinions and do not quote their works.

The best example of partiality and overestimation of one's self was offered by a German professor in international law in 1985. Due to the decision delivered with respect to the international law recognition of the Democratic Republic of Germany, this aforementioned professor referred to the High Federal Court as a "court of diletanttes" which overlooked a "grave" legal error. He blamed the court for the violation of law. This professor participated in the court proceedings within the capacity of an expert with respect to this issue. Other professors also joined this discussion and proved to the professor concerned that he had been upholding this very "erroneous" idea for several years already. The well-justified opinions of legal scholars prevented the High Federal Court to develop in this direction. *Egmont Vitten*, a judge of the Berlin Civil Court, later commented upon this case:

"A judge who refers to a new field is awaiting the response of scholars from whom he expects assistance, ideas and their promotion. He does not need a school master who assesses the delivered decisions with such care as if it were a seminar work!"

Mass Media: The mass media contributes greatly to the development of law unless it expresses its opinions only for "making some effect or for the purpose of gaining

popularity." It should be protected against an attack of the state even when it publishes an opinion which is not favourable for the judges.

Classical criticism of the judiciary is the prerogative of the media. Even though the court reports are generally made by non-lawyers by trade, their impact upon judge-made law should be highly appraised. There are many cases in Germany when media successfully discharges controlling duties. The platform for the foregoing is the press conferences of the high federal courts, the court reports of the daily newspapers and the television programmes of actual or moot court proceedings (Court for Road Accidents, Court for Family Disputes).

In Germany, mass media greatly contributes to the administration of justice by case reviewing courts when the case concerns the persons suspected in the participation of grave economic crimes. The errors made during the establishment of the facts of the case and the application of law are being revealed often mercilessly and made known to the public at large. In this case, the judiciary should be ready to enter into dialogue with respect to the facts of the proceedings which it is considered particularly important. Public criticism is, as a rule, of a negative nature. When the judiciary prefers not to respond to it, one may have the impression that the judiciary does not want "to let someone into its kitchen" and that it has concealed something.

An impressive example is the sentence of "guilty" passed with respect to one of the high officials of the banking system in Hamburg in 2006. On the one hand, the results of a journalist investigation, conducted by the Hamburg printed media, turned out to be very helpful for the second instance court of Hamburg when delivering this sentence. On the other hand, the printed media complemented and scolded the court in turns. Even when the sentence was entered into force, the judges were still obliged to answer the journalists' questions for hours on end.

The media's criticism, however, cannot be abusing, sarcastic or unfair. The typical example herein is the so-called abusing criticism in the Soldier's Sentence or the Murderers' Sentence passed by the Federal Constitutional Court on 25 August 1994 NJW 1994, 2943). The sentence was delivered with respect to a man who put up the following inscription on his car "Soldiers Are Murderers – Kurt Tucholsky" (German journalist and writer). The case was tried by the court of lower instance and it imposed a sanction for the abuse of the profession of a soldier upon the person concerned. The Federal Constitutional Court repealed the sentence and referred to the freedom of expression. When the information about this sentence became public, the printed media initiated an exemplary campaign against the Federal Constitutional Court and opened general debates about the role of this court.

Politics: The Most Critical Partner in Legal Dialogue.

The role of politics with respect to the judiciary can be partially denominated as the rage stemming from the public which should substitute the obedience of a judge of law by the obedience to public opinion or, put more simply, to the pressure of the street. *Gottfried*

Marenholz, the former judge of the Federal Constitutional Court, made the following statement in this respect:

"The criticism of a court sentence by politics promotes the improvement of the circulation of blood between the public and judiciary. It safeguards a judge from growing musty and becoming self assured and, at the same time, is being permanently stimulated to be either accepted or rejected..."

In this respect, the reactions of politicians promote the interpretation of law by a judge who reacts to public relationships. On the other hand, they strengthen the independence of a judge insofar as the latter requires particular endurance from the judges' community. For this reason, the call for disobedience to the law because of the decision on the display of the image of the crucifix did not result in a lessening of the influence and importance of the Federal Constitutional Court. Under its decision of May 1995, the Federal Constitutional Court ruled that the image of Christ's crucifix should have been removed from classrooms commensurate with the desire of atheist/non-Christian pupils (BVerfGE 93,1).

III. Legal Dialogue with a Lawmaker: Intensive Efforts of a Lawmaker to Attain the Legal Certainty

Like judges, a lawmaker also faces the problem of comprehension and decision-making. Official compromises, backstreet political bargaining, charities and the influence of interest groups may result in an opportunist position for a German lawmaker. A lawmaker safeguards himself against all this through searching for a professional dialogue with lawyers. To this end, special committees are being set up within the Parliament of Germany which are staffed by lawyers whilst the expert opinions of professors are also being sought and commissions, consisting of legal experts, are being appointed amongst whose members are judges as well, however, only a few.

IV. Conclusion

On the one hand, it is impossible to upset the equilibrium between the judiciary and the bar, legal scholars, mass media and politics. Mutual respect should be particularly stressed as a constant. On the other hand, the legal criticism expressed within the framework of a legal dialogue demonstrates a high level of legal culture. If the limits are observed, no one will be as content as a judge. Furthermore, our law will be less damaged and it will continue to flourish and be respected.