

NETWORK OF THE PRESIDENTS OF THE SUPREME JUDICIAL COURTS OF THE
EUROPEAN UNION

Third Colloquium - Ljubljana, 30 June 2008

Concluding Remarks

I.

Thank you very much for inviting me to present the concluding remarks. Karl Valentin, the brilliant German cabaret artist, once said, “Es ist alles gesagt worden, aber nicht von allen”. Everything has already been said, but it has not yet been said by everybody. Concluding remarks tend to prove just how true this quotation is.

The Network of the Presidents was established to give an opportunity to request the opinions of supreme courts and to bring them closer by encouraging discussion and the exchange of ideas. Discussions and the exchange of ideas are not ends in themselves. They aim ultimately at securing the very high level of administration of justice in Europe.

This is an enormous task since European courts of law have to face major challenges:

- The law is in a continuous process of change; and it is becoming ever more European.
- Fundamental rights have become and are becoming more and more important in both civil and criminal law.
- Changes in society and developments in science, especially in the medical and biomedical sciences, are raising new questions.

If we are to meet these challenges, we will need to fulfil a number of prerequisites in regard to the resources required. The discussions and the exchange of ideas that are taking place among the supreme courts may be of great help here, especially since this colloquium focuses on the very essence of a judge’s work, the decision making process.

This process can be described by three core questions which can be derived from the questionnaire and the reports we heard:

How do supreme courts arrive at a decision?

Must a reasoned judgement be rendered?

What are the effects of the decision as precedent?

II.

How do supreme courts arrive at a decision?

This question focuses on how the decision is prepared and how it is reached. The differences that are the result of our different legal traditions are still apparent today. In Common Law countries there is a strong emphasis on the individual judgement while in Civil Law countries the single judgement prevails. But this is perhaps more a historical aspect of the topic.

The great challenges courts have to face today make it desirable - if not necessary – for judges to have legally trained assistance. If judges who are in an early stage of their career act as judicial assistants for the Supreme Court, it is not only the Supreme Court that benefits from their assistance but also the courts of lower instance. The judicial assistants gain experience and knowledge which they may apply in their subsequent work. But this is not the only advantage for the judicial system as a whole. In the ideal case, if the right people are chosen, i.e. those whose performance as judges is very promising, the Supreme Court judicial assistance can be regarded as a kind of “talent hotbed” for future Supreme Court judges.

III.

Must a reasoned judgement be rendered?

The reasoning fulfils different functions: It is a means of self control for the judge, and it makes the judgement more acceptable, thus enhancing the prospects for the future lawful conduct of the parties involved.

In the Dark Ages there was no need to add reasoning to a judgement. In those times fact finding and decision making took place in full view of the public. The hearings were open to the public. The growing influence of Roman and Canon Law brought about a change. The principles of oral presentation and of public hearings were largely set aside. Common Law, in the sense of the perceived Roman Law, rejected the duty to add a reasoning to the judgement for several reasons. It was feared that lawyers might prove to be vexatious. Having to give reasons for a decision was understood as a justification requirement. This was deemed incompatible with the court's position since the judges' dignity and impartiality were ranked very high.

It was not until the 18th and 19th centuries that codes of procedure required judgements to be reasoned. Initially, reasoning had to be added for the court of appeal only and not for the parties. The supreme courts were the last to be required to reason their judgements not only for the files but also for the parties.

It is common practice today that at least judgements on the merits need to be reasoned. The reasoning is usually outlined when the judgement is pronounced. Over the last few decades greater demands have been made regarding this reasoning. Mere reasoning alone no longer suffices. The reasoning must be of a kind that enables the parties to understand the judgement. The reasons must therefore be complete and consistent.

If decisions bear upon topics of general interest, it is often not sufficient to draft a concise and comprehensible decision. Courts, and especially supreme courts, require a person with media skills to explain these decisions to the media. Otherwise these decisions run the risk of being misinterpreted.

IV.

What are the effects of the decision as precedent?

A judgement is primarily rendered in order to solve a conflict. But its impact is usually not confined to the individual case. In almost all European states precedents are followed by all courts although in the vast majority of the states precedents are not legally binding. The reasons are manifold.

Judges must often interpret the same statute or other general regulations. It would be a waste of resources if they did not take into consideration what they had said on the same topic in another case.

This is one aspect; the other side of the issue is of much more importance for the Rechtsstaat, the constitutional state founded on the rule of law. The same facts should lead to the same decisions; like cases should be decided alike. To achieve legal certainty, the decisions that are rendered must be predictable. This implies that the courts adhere to the Supreme Court's case law even if they are not bound by law to do so.

V.

The reports on the questionnaire showed that there are differences in details but that there is agreement on the guiding principles. In the majority of cases European supreme courts decide in a panel of 3 or 5 judges, their judgements on the merits must be reasoned and by rendering a judgement they do not only decide the individual case but also give guidance for future cases.

A few months ago an author defined Europe's identity as the ability to learn from history. By founding the European Union, Europe has shown that the frequently quoted line by the Austrian writer Ingeborg Bachmann is wrong, "Die Geschichte lehrt dauernd, aber sie findet keine Schüler", History teaches constantly, but does not find students.

As judges we are always confronted with new challenges and as a result, we constantly have to learn. In most states courts have to argue their case in order to get the resources they need to fulfil their task in the best way possible. The colloquiums provide good arguments for the political debate. They are therefore an important and valuable means for securing the high level of administration of justice in Europe.

Irmgard Griss