COUR DE CASSATION

UNIVERSITÉ TOULOUSE 1 CAPITOLE — EUROPEAN SCHOOL OF LAW TOULOUSE

The role of the judge in safeguarding the rule of law

It is clear that judges have a part to play in safeguarding the rule of law in modern-day Europe. But what does the term "rule of law" really mean? How and on what conditions can national and European judges effectively and legitimately protect the rule of law, at a time when this principle is coming under close scrutiny and democracies are facing major crises, due to pandemics and terrorist attacks?

To discuss these issues, a round table was organised on 21 October, chaired by Sandrine Zientara-Logeay, Advocate-General at the Criminal Division of the French Court of Cassation (*Cour de Cassation*), with the following prominent legal specialists: Professor Lukas Rass Masson, a German specialist in French law, Professor Pascal Pichonnaz, who teaches at the University of Fribourg and is President of the European Law Institute, and *Maître* Spinosi, a lawyer working before the French Supreme Courts (Council of State (*Conseil d'Etat*) and Court of Cassation).

At the outset, they endeavoured to define the concept of the rule of law and its impact at a European level.

Mr Rass-Masson analysed the role of the judge in safeguarding the rule of law under European law as a key feature of the European identity. The Council of Europe and the EU are based on a political vision, implementing material, substantive principles of the rule of law. The rule of law is therefore a "working principle", upheld by the constitutional and European courts. This can be seen from the work of the Venice Commission and other initiatives by the Council of Europe, seeking to support the rule of law. As an organisation claiming a European identity based on the rule of law, the EU strengthens this political dimension of the rule of law, as the legal expression of the humanism enshrined in Europe.

The European Law Institute (ELI, www.europeanlawinstitute.eu) considers that judges play a central role in protecting the rule of law. This can be seen from several current projects, as pointed out by Professor Pascal Pichonnaz, President of the ELI. These principles also address proportionality and the limitation of powers by the law. Another central project is the ELI-Mount Scopus Project, striving to set standards for judicial independence. The election and appointment of judges is also relevant. In Switzerland, for example, following debates about the independence of judges, a national referendum has been triggered for 26 November 2021 to vote on an amendment to the constitution, to allow judges to be selected randomly instead of being elected by the federal parliament.

They then went on to discuss how the rule of law is safeguarded by judges in practice and the problems they face in this new role, focusing on EU judges, French judges and Swiss judges.

According to Mr Rass-Masson, EU judges enforce this role strictly through infringement proceedings, for violations of specific rules essential to the rule of law. They also play an effective role through their interpretation of EU law, as a building block of the EU community

of law, requiring a common interpretation achieved through dialogue between national judges and the CJEU. However, their role through actions for annulment, reviewing the lawfulness of EU legal acts, appears too unattainable. Judicial dialogue is crucial here too. Through these judge-based mechanisms, the EU provides a forum for collective judicial deliberation, generating a European legal democracy supporting national democracies based on an adherence to the European view of the rule of law.

Mr Spinosi then raised his concerns about the decline of the rule of law, which has come under close scrutiny in Europe and in France, against the backdrop of new isolationist and sovereignist views. He pointed out that the states of emergency declared in France to address the pandemic and terrorist threats have provided a good opportunity to test the extent to which judges are able to safeguard the rule of law and proposed his own initial assessment. He highlighted the fact that there had been no prior review of the constitutionality of anti-terrorism laws by the French Constitutional Council (*Conseil Constitutionnel*). The Council of State, on the other hand, had issued many rulings quite quickly, but had merely regulated the measures restricting freedoms without challenging the very principle of such measures. It played a lesser role than the Court of Cassation and the Constitutional Council with respect to the automatic extension of remand orders.

He made three proposals to improve the effectiveness of the review by the courts: all laws to be enacted under emergency powers should be referred to the Constitutional Council before being enacted, a coordination unit should be set up for the Council of State and the Court of Cassation to avoid conflicting decisions and an emergency procedure should be introduced before the Court of Cassation.

Lastly, Professor Pichonnaz discussed some of the advantages of the diffuse constitutionality review in Switzerland (where all judges have the authority to review the constitutionality of a measure as part of its application), whilst emphasising the fact that the Federal Tribunal does not have jurisdiction to review the constitutionality of federal laws under the (Swiss) Federal Constitution (Art. 189). A prior review can be performed by the electorate, via the right to trigger a referendum. However, they are interpreted in compliance with the Constitution and their compliance with international laws may be reviewed. Lastly, Swiss judges play a full role in all areas through their interpretation based on pragmatic methodological pluralism, under Article 1 of the Swiss Civil Code, inspired by the work of François Gény.

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