

# Editorial

## COURT, MEET THY PUBLIC

The public stir caused by recent rulings of the European Court of Justice opens a new window on the EU judiciary's condition and especially on its relations with the public. In the *Pupino judgment*, the Court ordered Italian colleagues to align domestic rules of criminal procedure with the EU ones by way of construction, whenever possible. The *Environmental Framework decision* ruling was about a legislative act meant to have states protect the environment by the use of criminal sanctions.

These rulings concern Union action in criminal law, not only a top-sensitive field for the member states but also the one most appealing to the public. This is why they were grist to the mill of domestic populism in the member states. A greater role for the European Court in criminal law is however inevitable in the wake of the US-driven anti-terrorism campaign, which since 9/11 accounts for the greater part of new EU police and judicial co-operation schemes.

Of the rulings mentioned, the most controversial is the one about the environmental sanctioning scheme. The Court struck down the scheme, citing its incorrect legal basis. The Court found that this act should have been empowered and processed by the EC Treaty, instead of by the Union Treaty and its state-centred procedure. Now this will mean a greater role for *Brussels* in criminal law, in other words: for the Commission and the Parliament. Spinellis discusses it in this issue of *EuConst*.

In Brussels, the dispute is read in the key of *hassle as usual* between the Commission (*in casu* especially its environmental chief) and the Council. That is the insider's view. The wider perspective on the matter involves the member states, traditionally the Court's first outside horizon. Beyond this horizon, however, there is the public. Criminal law's increasing weight at the European level is bound to raise public attention, if not concern. If this is answered only nationally, it will be a factor of division. European criminal law, whether formally springing from the Community or the Union Treaties, wants to find ground on the European plane and speak to the European public.

The relationship between the judiciary and the public is not well developed in constitutionalism nor in political science. Most attention goes to the relationship

between the political institution and the public. Koopmans has written a keen book about Courts and political institutions, which is reviewed in this issue of *EuConst*.

Between the courts and the public, the relationship is varied and delicate, hard to conceptualize. It is found in loose elements, such as when the courts sometimes render judgment 'in the name of the people'; it is found in a political element of appointments (see Kühn and Kysela in this issue); in juries; and in the inherently public character of court procedures. Yet it is, to some extent, specific. In contrast to representative institutions, a court of law cannot give voice to the public directly. It cannot consolidate the public, as happens in elections, nor express its preferences in the way representative institutions can. It cannot let the public take decisions. But the courts do have the public as an audience. Once their place was in the city gate! Their functions are performed before the public and this is essential.

Indirectly, the US Supreme Court mobilized the American public in the early days of the Republic in *Marbury v. Madison*, a good two hundred years ago. John Marshall put the American public on a pedestal by sanctifying the US Constitution as the founding act of the original, pre-constitutional American *people*. He argued as follows to establish the charter's unique character:

That the people have an original right to establish for their future government such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated.

In the name of that exhausted Sleeping Beauty named *We the People*, it was then the Supreme Court's responsibility to interpose itself, when necessary, between the powers of the day, the President and Congress. There was hardly a real American people in those days, except in name only (in the Constitution's exordia, as an escape). The public or the nation speaking indirectly through the constitutional court is a work of art. It is not the day-to-day public, whimsical and moody, but the pristine founding public: unspoilt, original, wise, mythical.

Following *Marbury*, constitutional courts have cultivated a special relationship with the nation's original public and its founding utterance, the Constitutional pact. From this covenant, they draw the authority to reprove political institutions and strike down legislation. The *Bundesverfassungsgericht* is presently Marshall's truest disciple, but the seed is blossoming worldwide.

However, this mobilization of the public by way of historic fiction can not be followed by the European Court. There is no formal European constitution and, in so far as there is a substantive one, it is not one of the *We the People* variety, but

of *We the States*. The Court of Justice's doctrine fits in with this seamlessly, so far. The Court may have been very receptive to private individuals and business interests when they were up against their national authorities, but it has done so in the name of the original founding pact between the states, not the people or the public. It has propped up the citizenship of the Union. However, it has not sought support of a European public in the collective, amorphous but moving sense of the word, the audience. It is an experts' Court. Its decisions are addressed to the member states and other parties, and are filleted and subjected to exegesis in conferences of further insiders in which the justices, but not the public, participate.

However, even if the Union is a body politic dominantly of the *We the States* variety, it cannot do without a public of its own. One may even say that this is the heart of its present predicament. So far, the whole story of the European Constitutional Treaty may be summarized as an attempt and its failure to draw the public squarely on board Europe. In the end, however, there can be no further development, least of all in criminal law, without public involvement. So, the ball is now in the courts of criminal law, of which the Court of Justice is one, increasingly so. One more illustration is provided by its *Berlusconi judgment*, reported in this issue by Harmen van der Wilt.

What can the Court do to raise the Union's public profile? This is not the place to give recommendations in terms of action but, rather, to start the thought process. It may be that a shift is in order, a move away from the reasoning modes and cultures of the Court's home turf, EC law, an experts' and players' paradise. It is a bit similar to ball games. The umpire in a ballgame is not just concerned with the players but is also, in a sense, the public's original deputy. Thus, it is the same with courts of justice. As issues and rulings become more sensitive, the Court should speak clear language more often and become more intelligible and accessible to the public.

Moreover, the subject is ripe for an interdisciplinary research project. This could involve a topical item of related interest. As Van Caenegem writes in his book review in this issue, and, as the author of the book reviewed, Koopmans, himself argues, modern government witnesses a shift from a *triadic* to a *dual* structure. On the one hand, there is the symbiosis between legislative and executive authority; on the other hand, there are the courts. The analysis may be correct, but the duality must be unbalanced; you can't expect the courts, by themselves, to weigh up to the political institutions. On the contrary, the public is missing from the picture and should be brought in. The public is becoming sidelined and left unrepresented in the member states by that symbiosis between legislative and executive authority. It wants direct access where political access is denied. This explains part of the rise of populism.

Domestic courts however are in the presence of a public whose relevance and existence is beyond doubt. In Europe, this is not so. The European Court needs a public for support. It cannot strike up or define a relationship with the public; that is left to the political authorities. But it can make the public part of its reality, its thinking ahead.

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