

Lectures (Court of Cassation): role of the liberties judge

In all liberal democracies, the courts safeguard individual liberties and enforce this principle in accordance with the terms laid down by law. This lecture compared the different approaches to the role of the ordinary courts in the specific field of restrictions on individual liberties in criminal matters in France, England and Germany. Our discussions focused on the judicial system and the authority of the courts in that role.

To address this issue, Stéphanie Gargoulaud, Auxiliary Judge at the Court of Cassation, organised this lecture with Jean-Baptiste Parlos, Senior Presiding Judge of the Reims Court of Appeal, Michael Tugendhat, former High Court judge in England and Wales and Peter Sander, Juvenile Criminal Judge in Saarbrücken.

Jean-Baptiste Parlos noted that the legislator had created the liberties and detention judge (*juge des libertés et de la détention* or "JLD") in 2000 in response to a media outcry over the dual role of investigating judges, who were responsible for both the investigation and also remand decisions. The powers of this new judge have continued to expand: they review not only remand decisions but also restrictions on individual liberties during criminal investigations (searches, phone tapping), involuntary hospitalisations and the detention of foreigners.

This is specific to the French system, as the civil powers are exercised by other courts in England and Germany. So much so that it would now be more accurate to talk about a liberties judge, rather than a liberties and detention judge.

Michael Tugendhat emphasised a key difference between the two legal systems. There is no investigating judge in England, as investigations are conducted by the police force, which is independent of the government in the same way as the judiciary. The police have extensive powers, for example access to electronic data and phone tapping.

Judges safeguard the law, it is not their role to seek the truth. Throughout the investigative phase, judges sitting in Magistrates' Courts may decide to extend the time a suspect is held for questioning, remand a person in custody for a specified time and order searches or measures restricting liberties until the defendant is brought for trial. The judges of the trial court will then have jurisdiction for any restrictions on individual liberties.

Peter Sander noted the same difference: there are no investigating judges in Germany. The prosecutors and the police have sole responsibility for conducting investigations. The role of the Ermittlungsrichter is similar to that of the French JLD, but for criminal matters only. The available coercive measures and the conditions for their authorisation are set out in a legal framework that is similar to that used in France.

We questioned the impact of ECHR case law and the proportionality review on the role of the liberties judge.

Jean-Baptiste Parlos noted that the principle of proportionality had been established at a relatively late stage but that it was already implemented by French judges. Ultimately, the ECHR has imposed such an obligation to check that measures are appropriate for the aim sought (ascertaining the truth) in all cases.

Michael Tugendhat noted that although the European Convention on Human Rights was not incorporated into English law until 1998, judges already referred to ECHR decisions, even though the decisions were not treated as precedent for English judges. A principle of legality has always existed

in England, meaning that all judges act as liberties judges. This principle has been strengthened by the ECHR, which has revived the common law. Judges have a duty to review the legality, necessity and proportionality of any detention, whether for criminal proceedings, immigration controls or mental health purposes.

Peter Sander believed that the principle of proportionality originated from the Constitution and was derived from the principle of legality applied to all State action. Judges take into account this principle of proportionality in all types of cases and the appeal courts check this review by the lower courts. However, the ECHR has had an influence in several areas, for example the translation of documents and the lack of authority of public prosecutors to issue European arrest warrants.

Jean-Baptiste Parlos pointed out a paradox: JLDs now have a special status, a wide range of jurisdiction that is expected to grow and important powers, the reasoning behind their decisions has improved and the Court of Cassation reviews their decisions. However, they have not had the expected impact. There are several reasons for this: a lack of funding of the judicial system and the creation of new powers by the legislator without any concern for the conditions in which they are applied.

Michael Tugendhat was surprised that France had decided to create a special status for liberties judges. Each High Court judge may be asked to judge civil or criminal cases. Judges derive their authority from a very ancient tradition as evidenced by the oath taken by judges since 1346 and the strength of the common law.

The Ermittlungsrichter is a judge appointed within each court by the relevant committee of each court. Peter Sander noted that this method of appointment strengthens the independence of judges. Judges derive their authority from the principles laid down in the German Constitution and the protection of the rule of law.

In conclusion, English judges refer to the common law and German judges refer to the Constitution for individual liberties, whereas French judges start to worry about their future when they realise that they are no longer merely "the mouth of the law".