The future of EU justice policies in the light of the Union's achievements

The three key words identified to define the present contribution are:
evaluation - progress - step-by-step approach

The Commission of the Episcopates of the European Community (COMECE) brings together the Bishop delegates from the Bishops' Conferences of the European Union's Member States. For more than thirty years now, COMECE has been closely involved in the process of European integration and offering its reflections. COMECE is a partner of the EU institutions in the Dialogue foreseen by Article 17(3) of the Treaty on the Functioning of the European Union. Its permanent General Secretariat[1], based in Brussels, analyses EU policies on a day-by-day basis, striving to bring the specific contribution of the Catholic Church into the debate.

In this context, the COMECE Secretariat is pleased to submit to the attention of the European Commission some remarks concerning the consultation *"Assises de la justice: Shaping Justice policies in Europe for the years to come"*.

General considerations

Actions taken by the EU in the area of justice policies can have a particular, positive impact on the daily lives of EU citizens, thereby contributing to fostering their sense of belonging and ownership of the European project. The EU can play a leading role in the field of justice policies. The challenge for the European Commission, which is responsible for initiating the relevant processes, will be to propose forward-looking measures that at the same time do not provoke excessively 'defensive' reactions on the part of the Member States. The latter occurrence would only frustrate the laudable objective of furthering progress in the area.

The constraints imposed by the economic crisis should not lead to a retrenchment of EU policies (including the ones for the area of justice). However, it would be advisable to concentrate efforts on a comparatively smaller number of 'central' and 'key' priorities and initiatives. An excess of items ultimately leads to only partially successful multiannual programmes.

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Another important goal is that of simplification: in the areas covered by the consultation, a transversal objective should be to foster the adoption of *simpler* legislative texts. Incidentally, this is one of a number of ways the EU can show attentiveness to the needs of its citizens, contributing to laying the foundations for a better protection of their rights.

Concerning the legislative methodology, in certain areas, Directives rather than Regulations are, thanks to their flexibility, still the better option, when it comes to respecting the diversity of approaches and sensibilities existing at the national level. On the other hand, Regulations can unnecessarily negatively impact on delicate legal balances.

Finally, in general, further legislative steps will have to be tied in with an in-depth analysis of the impact and efficacy achieved by existing EU law in a certain area until now in the five sectors covered by the exercise (and in particular in the area of civil law).

Discussion paper 1: EU civil law

In general, in the area at issue, after a consistent EU legislative production, it would be natural to prioritise a thorough evaluation of the quality and impact of the existing laws before proceeding towards even more ambitious schemes.

Continuing to build mutual trust and understanding between authorities and services in the different Member States is a crucial goal, which should be pursued, in the coming years, bearing in mind the need to respect the specificities of the various national legal orders and traditions[2].

In the area covered by discussion paper number 1, family law is a particularly delicate sector, featuring a close link with the aforementioned national traditions and cultures. Consulting stakeholders on family law issues has special importance, as the approaches in this area are not consensual in the EU (e.g. on marriage) and for this reason solutions have to be identified that fully take into account this aspect, in compliance with the principle of subsidiarity. Discussion paper number 1, without any particularly developed explanation, hints at the possibility of a more recurrent use of the so-called *passerelle* clause; and refers to the opportunity of a more frequent recourse to enhanced cooperation in this field. Both mechanisms are designed for being activated in rather exceptional cases and are therefore to be used with caution and on the basis of firmly grounded justifications[3]. This in the interest of

[2] Article 67(1) TFEU states that *"The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States"*.

[3] In this regard, reference can be made to the study issued by the Directorate-General for Internal Policies – Policy Department C (Citizens' Rights and Constitutional Affairs) of the European Parliament, *Which Legal Basis for Family Law? The Way Forward*, 2012, pp. 13-17. The text is available at the link http://www.europarl.europa.eu/RegData/etudes/note/join/2012/462498/IPOL-JURI_NT(2012)462498_EN.pdf.

having sound and legally well-functioning juridical frameworks, which ensure the legal certainty EU citizens demand.

With more particular regard to enhanced cooperation, a two-speed Europe in a sensitive area like the one at issue does not seem to be the most advisable path to be followed. It would also be opportune to first observe and evaluate attentively, in the coming years, the application of and the results achieved with Council Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation. Article 20(2) of the Treaty on European Union clarifies that the instrument of enhanced cooperation is a 'last resort' solution. More cases of enhanced cooperation in the area of family law would ultimately only achieve the result of creating confusion, imbalances and legal uncertainty, in an area that is by definition already complex.

Still in the context of evaluating existing (adopted or eventually-to-be-adopted) instruments, in the area of family law it would be particularly important to verify the effectiveness of EU family law. For instance: will the system that allows spouses to choose the applicable law have truly ensured legal certainty and prevented 'law shopping' phenomena? The erosion of the role of 'public policy' deriving from some of the relevant, recent texts is also questionable[4].

Furthermore, initiatives in the field of family law should fully respect the referral to national legislation made by Article 9 of the Charter of Fundamental Rights of the European Union, which states that *"The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights"*. Interpretations of the provision that deprive it of its legal meaning and significance (e.g. with particular regard to its restrictive interpretation in combination with Article 21 of the Charter itself) are to be avoided.

Concerning eventual proposals on mutual recognition of the effects of civil status records, reference can be made to the contribution the COMECE Secretariat submitted in 2011 to the relevant consultation.

The discussion paper also hints at a further recourse to EU harmonised 'optional regimes', on the basis of the experience of the proposal for an Optional European Sales Law. Again,

[4] See Recital 25 of Council Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation; Recital 58 of Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession; Recital 21 of the proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships; and Recital 25 of the proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

considering the strongly innovative nature of the instrument, it would be advisable to await the future assessment of the concrete impact such text (moreover still under negotiation) will be having in the coming years, before extending the scheme to other areas. As a preliminary consideration, and without prejudice to any future evaluation, it can be affirmed that this type of instrument could facilitate a healthy competition and mutual reinforcement and influence between EU and national laws, although it might prove more suited for some areas and far less for others (e.g. family law).

For the sound reasons already identified by the Commission in the discussion paper, the suggestion of spelling out in a new EU text minimum standards for the participation of children in court proceedings on parental responsibility deserves particular appreciation.

Concerning the EU Justice Scoreboard, its introduction as a tool to monitor the functioning of nation justice systems should be saluted. In particular, its aim of providing objective, reliable and comparable data on the functioning of the justice systems of all Member States can give a concrete contribution to progress in the area. Member States should be encouraged to support the instrument and to help addressing the so-called 'data gap'. Consideration might be given to its extension to cover criminal cases.

More generally, in the field of civil justice, another element to focus on should be the one of cooperation with third countries, especially in the context of increased international mobility and exchanges.

Finally, apart for legislative interventions, a substantive contribution to the progress and increased efficiency of national justice systems (not least by the reduction of the relevant costs) can derive from a firm encouragement of an extensive and bold recourse to modern information and communications technologies. This of course also applies to and has an impact on other areas of reflection as well (e.g. with regard to discussion papers number 2-3). The context provided by 'e-justice' should be exploited extensively to achieve the above-said goal. Effective use of funding through the new Justice Programme 2014-2020 is another possible contribution to the efforts.

Discussion paper 2: EU criminal law

The new opportunities for developing EU criminal law offered by the entry into force of the Treaty of Lisbon should be used without any reservations. In facing an increasingly sophisticated (and cross-border) criminality, a closer and closer coordination among the Member States can only prove extremely beneficial. Ambitious policies and legislation on the

EU's side should provide the necessary basis, although in each case there should be an added practical value in a common EU approach.

Concerning possible specific initiatives, consideration should be given to the opportunity of introducing a targeted EU instrument concerning prostitution, with particular regard to the criminalisation of clients. The EU should also continue efforts to ensure a safe online environment for children, including on the basis of a close monitoring of the implementation of Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA. This also considering that voluntary initiatives on the part of the relevant actors and operators can provide useful support but they will hardly ever prove decisive.

In the area of detention, an effective follow-up should be given to the Green paper *Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention*, with particular emphasis on humane conditions of detention at the forefront.

Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, in its current scope of application, has proved to be a useful instrument. The fight against extremist phenomena should continue to be the priority in applying the text. The Commission may consider transferring the main elements of the text (in a scope of application corresponding to the adequate one of the current Framework Decision) in a proper Directive, in accordance with a scheme followed with other similar texts (e.g. Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography).

Among the ideas hinted at by the Commission in discussion paper 2, the creation of victim funds and the promotion of mediation mechanisms seem to be particularly promising. More generally, the strengthening of the safeguards for victims of crimes, to which the Commission also refers in the document, deserves full support. In this sense, Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA should be considered as a starting point, rather than an arrival point.

Concerning the external dimension, efforts by the EU for the abolition of death penalty, as well as in the fight against torture and inhuman or degrading treatment or punishment (in particular the ones aimed at children) should be continued and strengthened.

Finally, respect for the rights of the child should be one of the key elements and reference points in the area of criminal law, as well as in the one of civil law.

Discussion paper 3: EU administrative law and national administrations

In this area it should be especially underlined that less red tape, greater quality and simplification can lead to an administration that fosters economic competitiveness and ultimately growth. The role of national administrations and administrative law courts in ensuring respect for EU law has already, rightly, been emphasized during the *Assises de la justice* conference. Compliance with the right to good administration enshrined in Article 41 of the EU Charter should be monitored particularly rigorously.

Discussion paper 4: rule of law

Concerning possible new 'rule of law mechanisms', and with particular reference to the considerations made by Commissioner Reding in her 4 September 2013 speech, the recourse to particularly solid solutions is called for (e.g. enhanced involvement of the European Court of Justice and/or adaptation of practices already used for infringement procedures) rather than more flimsy ones (e.g. increased role for the FRA Agency). This considering that, as the Commissioner herself has acknowledged, the matter goes to the core of national sovereignty.

Among the aspects that should be featured with regard to the relevant reforms the following should be highlighted: avoiding confusion and overlapping with other instruments (in particular: infringement procedures); the instrument should still be activated in grave situations and retain a nature of last resort; full cooperation with the Council of Europe's level; avoiding any double standards.

Support should be expressed for the balanced proposal made by the European Parliament at paragraph 78 of its Resolution of 3 July 2013 On the situation of fundamental rights: standards and practices in Hungary[5].

The element of continued *dialogue* and cooperation between the Union and the national level will in any case continue to offer an invaluable contribution in addressing future rules of law 'crisis' (including in preventing possible actions based on Article 7 TEU).

[5] The passage *"Considers that a future revision of the Treaties should lead to a better distinction between an initial phase, aimed at assessing any risks of a serious breach of the values referred in Article 2 TEU, and a more efficient procedure in a subsequent phase, where action would need to be taken to address actual serious and persistent violation of those values"*.

Discussion paper 5: fundamental rights

Concerning the area of fundamental rights, the acknowledgement of the importance of maintaining the momentum for the EU's accession to the European Convention on Human Rights should be widely shared, especially for the positive opportunities it will offer EU citizens with regard to the compliance of the EU with the Convention itself. Already in the context of the consultation on the draft Charter of Fundamental Rights of the European Union (2000), the COMECE Secretariat had supported the accession of the EU to the European Convention as a rational solution[6] and had stressed that *"...the protection of fundamental rights in the European Union cannot be considered as complete as long as the Union is not a signatory to the European Convention on Human Rights and Fundamental Freedoms"*[7].

The respect for the Charter of Fundamental Rights of the EU in inter-institutional negotiations is another relevant point identified by the Commission. It is a delicate one, but indeed one that has to be prioritised, so as to prevent the generally effective work carried out in this regard by each of the three main EU institutions from being marred. Complex and often pressure-packed inter-institutional negotiations can lead to legal formulations that are not entirely sound or even raise questions as for the respect of the EU Charter. The EU institutions simply cannot afford this to happen.

The prospective role of the Charter of Fundamental Rights of the EU - and in particular of its Article 51 - is a central point in the reflection launched by the Commission. The idea of removing some or all the limitations set out by Article 51 of the Charter is not convincing. Article 51 has proved essential and effective in safeguarding the delicate balancing required by the architecture of the Charter. Moreover, the satisfactory European Convention system will be enriched and strengthened by the forthcoming accession of the EU to the Convention itself. How would the direct applicability of the EU Charter in the Member States be reconciled with the aforesaid system? How would the suggestion to delete the provision relate to national identities, which often boast specific and long-standing traditions (including at the Constitutional level) in the area of fundamental rights? In general, a comprehensive vision of all the ramifications of the abolition of Article 51 would be necessary, as such a step cannot be the object of a mere 'legal experiment'. At this stage, a further improvement of the mechanisms to check the compliance of EU legislation with the Charter is more desirable (especially considering that the text is, precisely in accordance with its Article 51, primarily

[6] *Contribution by the Commission of the Bishops' Conferences of the European Community – COMECE – to the Draft Charter of Fundamental Rights of the European Union, Document of the COMECE Secretariat*, 8 February 2000, page 6.

[7] *Observations of the COMECE Secretariat on the draft Charter of Fundamental Rights of the European Union*, 18 October 2000, page 2.

addressed to the EU institutions, rather than to the Member States). Concerning the inherent limits to the scope of application of the Charter, it would be opportune to enhance initiatives to effectively inform and make citizens aware of the limits set to the text (as well as of the legal reasons for having established them).

Concerning the role of the EU Agency for Fundamental Rights, it is important to avoid any duplication on its part of the commendable work already carried out by the European Commission and at the Council of Europe's level[8]. Transparency, independence and democratic scrutiny of the activities of the Agency should be ensured.

We would also like to take the opportunity offered by the broad nature of the reflection launched, to briefly turn the attention to specific fields of particular importance.

In the area of non-discrimination, the specificity of disability, vis-à-vis the other protected grounds, should be fully recognised by means of targeted and specific legislative instruments. The economic crisis and the consequent financial constraints cannot be used as a pretext to lower the legal safeguards and protection of people affected by disabilities.

Secondly, protection of privacy will also have to receive enhanced attention, especially in the light of the developments related to 'Prism' and to other 'programs' of similar kind.

Promotion of EU citizenship is to remain a priority, with particular regard to the correct implementation and interpretation of EU legislation concerning the 'pillar' of the right to free movement of citizens and their family members within the Union (in particular: Directive 2004/38/EC). The positive steps taken with the recent communication *Free movement of EU citizens and their families: Five actions to make a difference* should be followed up and built upon. Finally, in the field of EU citizenship, it is also opportune to emphasize the link between the rights *and the duties* attached to the concept.

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[8] See also the Council of Europe's PACE Assembly Resolution 1756 (2010) on the theme *Need to avoid duplication of the work of the Council of Europe by the European Union Agency for Fundamental Rights* (the document is available at the link http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1756.htm).