

Judicial Independence of Labour Courts and Social Networks: Are They Compatible?

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Stein Evju has devoted much of his life to Labour Courts, labour law and social issues. It has been my privilege to have him as a friend. We have been at meetings on four continents and visited each other's courts and homes. Stein is an important labour law academic and jurist who has been active in the development of this field and has made an important contribution in his country and internationally. Beyond Stein's serious Nordic demeanor, he is a caring sensitive person, willing to listen, analyse, teach and think new and original ideas. The Norwegian Labour Court is an integral part of Stein's life and, therefore, the independence of Labour Courts is the topic of my contribution to this book in his honor.

At the 23rd Meeting of the European Labour Court Judges, held in Stockholm on October 8–9, 2015 we discussed whether the social media and networks have affected the independence of the judiciary. This paper is based on reports submitted and discussions at the meeting.¹

The effect of social media on judges and courts is an important issue because computers are an integral part of the modern judge's workplace. The judge is literally surrounded by them, they are in his or her house, chambers and court room. When the judge attempts to escape from the rigorous discipline of his work, leaves his court or home (where he also works), he remains with his mobile phone, which has many functions of a computer. Social media on the computers permeates every aspect of the court system and it is important to examine whether it has influenced the independence of the judiciary.

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1 I thank those who submitted reports: Italy – Francesco Centofani and Filippo Curcuruto; Slovenia – Justice Miran Blaha, Supreme Court of the Republic of Slovenia; Belgium – Justice Koen Mestdagh, Court of Cassation Labour Chamber; Spain – Judge Ma Milagros Calvo Ibarlucea, Supreme Court of Spain; Finland – Judge Ari Wiren, Vice President, Finnish Labour Court; Germany – Dr. Mario Eylert, Vorsitzender Richter am Bundesarbeitsgericht and Dr. hc. Reinhard Schinz, Vorsitzender Richter am Landesarbeitsgericht; Norway – Judge Tron Løkken Sundet, Vice President, Labour Court of Norway. The reports from Israel, Hungary and Sweden had no authors' names.

1 The General Independence of the Court System

The social media's effect on Labour Courts' independence can best be discussed when we compare it to the general independence of the court system. There are various aspects of the general independence we will consider. First, the independence to develop labour law and social security law. Second, the independence of the courts from outside influence, especially political pressures; and third, the administrative independence of the courts.

I. I THE INDEPENDENCE TO DEVELOP THE LAW

Regarding the independence to develop the law, my proposition is that Labour Courts have more freedom to develop the law when there is no appeal or a limited appeal to a higher court.² To the extent that courts can interpret statutes or decide issues where there is a lacuna in the law they determine how the law develops. Thus, when the highest instance of the Labour Court system is the final instance, its judgments are the precedents which have a great influence on the development of labour law. When labour law is developed by Labour Courts it is done by judges who are experts in the field, who emphasize values and principles suitable to labour and employment law and are best suited to balance conflicting principles and interests of labour law and contract law or other legal branches. These Labour Courts are generally assisted by advocates who are experts in the labour and social security field.

The Labour Courts in Germany, Israel, Sweden, Norway and Finland are separate from the General Court System, although there is a possibility of a constitutional type «appeal» to the Supreme Court or Constitutional Court. This gives Labour Courts the maximum freedom to create and develop new labor law doctrines in accordance with the quickly changing marketplace.

Other courts, such as Slovenia, Italy, Belgium and Hungary are separate branches or «chambers» in the Supreme Court of the General Court System. Sometimes they are separate chambers in all instances of the General Court System. This also gives them much leeway to develop labour and social security law independent of the judges who are not experts in those fields.

The Irish Labour Court, on the other hand, is a tribunal, whose judgments are appealable to the General Court System. Labour law in Ireland, therefore, is developed by judges of the General Courts, whose values and considerations are different than those of Labour Court judges.

2 See Adler, Steve, Further Reasons for the NLRB's Inability to Guarantee American Workers the Freedom to Organize and Bargain Collectively: Comment on autonomous and Politicized: the NLRB's Uncertain Future, *Comparative Labor Law & Policy Journal*, vol. 26, no. 2, winter 2005, p. 261.

I.2 INDEPENDENCE FROM OUTSIDE INFLUENCE, APPOINTMENTS OF JUDGES AND LAY MEMBERS AND JUDICIAL COMPENSATION

Independence from outside influence has many aspects. One aspect relates to judicial appointments. The proposition is that judges are more independent when there is less political influence on judicial appointments. Also, the quality of judges is higher when there are less political considerations on judicial appointments, since politicians sometimes consider criteria that are not relevant to the applicant's ability to serve as a judge.

Most courts reported that Labour Court judges were appointed the same way as judges in the General Court System. They also reported that the appointments were according to recommendations of committees composed of representatives from the judiciary, parliament, academia and the public. Many of the courts reported that the majority membership of these judicial appointment committees was non-political. In Israel, for example, five of the nine member judicial appointment committee members are not politicians (three Supreme Court Justices and two representatives of the Bar Association). In all countries the official appointment and swearing in is by the President or King, but this is only a formality.

Only in Ireland are the judges appointed by politicians, but the Irish report said that in practice there were no political considerations choosing the judges. This can be compared to the appointment of NLRB members by the U.S. President, with the approval of the Senate, which is claimed to involve partisan political considerations.

Appointment procedure of lay members of Labour Courts raised issues regarding their independence. Unions and management associations were involved in appointment of lay member at all Labour Courts. However, the reports did not complain that lay members favored the sector from which they came. It has been my experience during the 35 years as a judge on the Israeli Labour Courts that lay members were not biased toward the sector they came from, even though their appointment was based upon a recommendation to the Ministers by the unions and management association.

Regarding judges' compensation, especially wages, all courts reported that a government body determines their wages, usually the Parliament. Labour Court judges' wages were the same as those of General Court judges in most jurisdictions. A few nations reported that judges had a «union» or association which represented them and Finland reported that it negotiated a collective agreement for Finnish judges. While none of the Courts reported satisfaction with judges' salaries there was no complaint that the setting of wages was used by any government body to influence the judiciary.

I.3 ADMINISTRATIVE INDEPENDENCE OF LABOUR COURTS

Another aspect of court independence which was discussed was court administration. The proposition here is that the more the Labour Courts have their own administration, without outside interference, the more independent they will be.

Only two courts had a separate administration (Germany and Finland). Some had their own administration, but it was part of a more general administration (Israel and Sweden). Others were part of the General Court administration, which sometimes was administered partly by the Justice Ministry.

All reports said that court administration relating to judicial functions was independent of outside influence or interference. Thus, cases were assigned to the judges in a manner which excluded outside influence. The President of the Court generally assigned judges to panels. Lawyers, unions, management and government could not influence which judges would hear their case.

I.4 JUDICIAL ACCOUNTABILITY TO THE PUBLIC

1.4.1 Public filing official complaints against judges

Does public supervision of the courts and judges' accountability to the public reduce their independence? Should judges be accountable to the public for the way they administer justice, such as the time it takes to write their judgments and their non-judicial remarks during hearings?

All courts saw the appeal system as a means whereby the parties to a case tested the judge who handled the trial and wrote the judgement. However, an appeal is to a higher court, generally about a mistake in law and does not generally concern judicial behavior.

Some courts were of the opinion that in order to protect judicial independence there should be no public supervision of how courts and judges perform their work. Thus, in Germany, Hungary, Ireland and Slovenia there is no system whereby the public can file an official complaint about a judge. Hungary and Ireland reported that the Court President was responsible for how the judges administer justice.

However, other jurisdictions felt that the public should be able to file a complaint against a judge or lay member for improper behavior; including conduct on the bench and even certain private matters. Thus, in Finland and Sweden the public can file a complaint against a judge to the Parliamentary Ombudsman and in Israel, Finland, Italy and Belgium a complaint can be filed to an independent review body operating within the court system.

The reports didn't complain that the public's ability to file complaints against judges impaired their independence. However, in my country some attorneys or the general

public file unfounded complaints when they are dissatisfied with a judicial opinion. This does not seem to bother judges because these complaints are not common and dismissed when they are unfounded.

1.4.2 Rules of judicial ethics or other restrictions on judges' behavior

Another issue examined was whether judicial rules of ethics or other behavior restrictions impaired their judicial independence?

Most nations have judicial ethics rules which were established with the participation of the judiciary or its approval. This included Belgium, Finland, Hungary, Israel, Italy and Slovenia. These rules were not seen as limiting judicial independence. However, Ireland, Germany and Sweden have no judicial ethics rules, except for the oath judges take when sworn into office.

It is my view that the ability of the public to file complaints against judges and the rules of judicial ethics strengthen public confidence in the judiciary and courts. They show that no one is above the law and public scrutiny and emphasize that courts exist to serve the public and the State. Public support is essential for courts; it is the basis of courts' power to act independently and balance the power of the Executive Branch of Government and Parliament.

Regarding restrictions on judges' out-of-court activities, all courts forbid judges from acting as attorneys, even before another court. Only in Sweden is a judge allowed to represent someone in court in a specific case if he receives permission.

Citing the freedom of speech, most reports said judges could appear and publish in the media, but not discuss cases in which they participated. This includes articles in newspapers and magazines and, in some nations, appearance on television and radio. However, a few countries disallowed or discouraged their judges from public appearances in the media. More research is needed into the positive or negative effects of judges' appearances on television and radio. All nations allowed the judges to write scholarly articles or books and lecture at academic institutions which, in my opinion, is a positive way judges can participate in the democratic exchange of ideas.

There were significant policy differences between jurisdictions relating to the ability of judges to act as a private arbitrator or be active in a political party. Most countries forbid judges to act as private arbitrators (Israel, Italy, Slovenia, Ireland, Belgium and Hungary). However, Germany, Finland and Sweden allow their Labour Court judges to be private arbitrators in certain situations and with permission of the court President. Since October 2015 this has been limited in Finland. In my opinion when a judge is also a private arbitrator it reduces his judicial independence. The attorneys and parties in the arbitration can later appear before the judge in court cases. The fees received

during the private arbitration can be seen by other parties as influencing the judge when he sits in court. It seems to me an unhealthy and unnecessary practice which gives the judge too much non-judicial connections with potential parties to court cases. While acting as a private arbitrator may be a significant source of additional income for judges it is, in my opinion, a problematic practice.

Regarding participation in politics – in Germany, Sweden and Finland judges are allowed to be active members of political parties and even run for political office. When elected the judge must leave his judicial position. In Belgium judges are allowed to be active members of a political party, but most «keep a low profile» and cannot run for political office.

However, Israel, Italy, Spain, Ireland, Hungary and Slovenia forbid their judges from taking an active part in a political party or running for political office. They regard the connection between politics and judges as compromising judicial independence. Judges with political connections are suspect of considering political interests when conducting a hearing or writing a judgment. Judges have different considerations than politicians. Judges are bound by the law while politicians are responsible to the public who elected them. Judicial legal interpretation relies on independent thinking and personal values while politician's decisions are often based on narrow party and political interests.

Jurisdictions which allow judges to be active in politics justified this policy by the freedom of association principle. In my opinion, this does not justify the loss of judicial independence, since judges agree to accept certain limitations on their freedoms as part of their being judges. This includes limits on judges' freedoms of speech, association and occupation. Moreover, freedoms are not absolute, but balanced one against the other, and limited by constitutional principles.³

I.5 DO JUDGES FEEL THEY ARE INDEPENDENT FROM OUTSIDE PRESSURES?

From the reports and discussion at the seminar Judges' general feeling is that they are independent and there is no outside influences on them, neither by unions, managements or their governments.

However, two German judges fear that a dangerous anti-democratic phenomenon was again spreading across many European countries and threatening the independence of their court systems.

Furthermore, many reports criticized frequent media attacks on judges and courts. The Hungarian report said:

3 Barak, Aharon, «A Judge on Judging: The Role of a Supreme Court in a Democracy» (2002). *Faculty Scholarship Series*. Paper 3692. http://digitalcommons.law.yale.edu/fss_papers/3692.

«Throughout Europe judges face the mediatization of justice. Politicians, clients, journalists try to put pressure on the public and also on the courts in some cases. However, the cases that are most likely to get some attention are criminal and not labour cases».

These last two responses were among the factors which triggered our examination of the social media's influence on judicial independence.

2 Influence of Social Media on Judicial Independence

2.1 INTRODUCTION TO THE SOCIAL MEDIA

Now we will evaluate the social media's influence on judicial independence of the judiciary and courts, taking into consideration their degree of independence described above.

The social media is not just another form of communication. It is the two-way communication revolution. Information technology combined computers and the internet to become a revolutionary tool of communication. Instead of communication one direction (books, newspapers, radio and television) IT enables those receiving information and messages to respond. Also, information technology is advancing at unbelievable rates. This is mankind's next revolution after the industrial revolution.

Court judgments can now reach wide groups of the public through the internet, as can reports on the judgments and court hearings. Judges have the potential of communicating with large or particular segments of the public through the internet and social media. The public has the ability to respond and make itself heard about the courts, judgments and even the judges. Those criticizing the courts in the park before twenty people now have a potential audience of thousands or more. Moreover, the communication is immediate and information passes back and forth as soon as the court or a judge hands down the judgment or does something in the hearing or even outside his official court duties.

The question we tried to examine at the European Judges' Meeting was, what effect does this new social media have on the judiciary and the courts, especially their independence, and how are judges coping in this new information era?

2.2 TO WHAT EXTENT AND HOW ARE LABOUR COURTS USING THE SOCIAL MEDIA

Every Labor Court reporting has an internet site. Most sites contain much information and publish court judgments. Such is the situation in Sweden, Finland, Hungary and Israel. Many court internet sites are in more than one language: Finland (3 languages); Ireland, Slovenia, Belgium, Israel, Sweden and Hungary (2 languages). The German and Belgium courts' sites offer mostly general information, although the latter has a link to a judgment data base.

Few Labour Courts have a Facebook page or blog. However, some of the Hungarian Labour Courts and the German Federal Labour Court do have a Facebook page.

Most of the courts have a spokesperson or public relations person and issue official court press releases.

None of the Labour Courts broadcast their hearing on the social media. The courts in Finland, Sweden and Hungary allow the filming of hearings with judge's permission. However, filming hearings is forbidden in Israel, Ireland, Belgium and Germany.

Hearings in all courts are open to the public. However, many Courts reported that they exclude the public («closed door hearings») for sexual harassment cases and cases involving minors (Ireland, Slovenia, Belgium, Israel, Sweden, Hungary and Germany). Some reports mentioned excluding the public when state secrets or health issues are concerned. Only in Italy there is always an open court but the judge can prohibit publication of parties' names in sexual harassment cases.

2.3 HOW JUDGES USE THE SOCIAL MEDIA

Most judges reported that they use the internet for personal communication.

There were no instances reported of the social media being used by judges to exchange information with other judges about work. There were no reports of judges using the internet to trade opinions with other judges on issues or undecided cases. This surprised me; although each judge is responsible for his judgment, judges as colleagues could be interested in the opinions of other judges on issues they all deal with.

Exchanging information with the public was not seen as a possibility. There was one report of a Hungarian General Court judge revealing information in the media about a celebrity's divorce hearing and publishing the judgment, which led to the judge's resignation.

None of the courts reported prohibiting their judges from using Facebook or Twitter, but the reports indicated that there was not widespread use of these media by judges. There were also no bans on judges posting pictures of themselves on the

internet, although the German report mentioned «unsuitable pictures» posted by a judge resulting in disciplinary action.

2.4 LIMITATIONS PLACED ON JUDGES' USE OF THE SOCIAL MEDIA

What, if any, are the limitations placed upon judges' use of the social media? Few restrictions are placed on the judges' use of the media. However, all courts prohibit judges from revealing «confidential» information and they must be careful not to compromise their integrity and independence. The Irish Labour Court prohibits judges from speaking about court matters on the internet.

There are rules of ethics regarding use of the social media in Slovenia, Israel and Hungary but not in Finland, Italy, Spain, Ireland and Germany.

The report from the Slovenia Labour Court mentioned a judge who resigned after publishing on the web offensive remarks about politicians and police relating to a high profile criminal case which he heard.

2.5 USE OF SOCIAL MEDIA BY THE JUDGES AND IN LABOUR COURT HEARINGS

Many of the judges reported that they read reports on the media about their cases but considered them not to be a reliable source of information. They also read articles and reports about their judgments and were interested to read academic articles about issues relating to their cases.

Social media information, such as newspaper articles or internet information, is admissible, if relevant, in many Labour Courts at the trial level (Finland, Italy, Belgium, Israel, Sweden, Hungary and Germany).⁴ The Irish Labour Court reported that evidence is only what happens in court but that social media information can be used for cross examination, which is the strict Anglo-Saxon legal approach. The German report said that social media information as evidence does not make an impression on judges or lay members. However, the Swedish Court's report said that «... if it is adequate information it can be of importance». Further research is needed into this issue since courts generally evaluate relevant evidence, even if originating in the social media.

4 Labour Courts at the appellate level generally do not accept evidence and most participants in the European Labour Court Judges' Meeting are appeal court judges. However, we asked whether social media information, such as newspaper articles or information appearing on the internet, is admissible in court hearings, since the court systems in most participating nations also have trial court.

2.6 HOW JUDGES FEEL THE SOCIAL MEDIA EFFECTS THEM

Judges generally responded that they were not influenced by the media, even when there were articles or information posted about cases in which they were involved. The Swedish, Finish and German report said that the social media has not changed or influenced the situation or transparency of the Labor Courts. Other courts also reported that the social media has no influence on them (Finland, Italy, Hungary, Belgium and Sweden).

However, the German report also mentioned that the attacks by the media on specific judges were a «burden». It further described that parties made subtle attempts to influence the court by having experts and academics publish articles prior to court hearings but these had no influence on the judges. This reminds me of university medical researchers publishing research sponsored by pharmaceutical companies relating to their medicines. Also, the Swedish report said: «We don't think the social media has changed the situation for the court. Of course there can be articles or reports on a pending case at the court in media (papers, radio, t.v., internet, social media). We don't hesitate to read it. It is interesting to know if it is presented in a proper way». Moreover, the Slovenian Labour Court's report said: «While social media or the social networks do not seem to have an influence on the hearings or judgments as such, they can have a significant influence on the general perception».

Therefore, given the all-embracing presence of the social media in judges' lives, both private and professional, the judges' responses that it does not have any influence on them is an issue worthy of further research.

3 Conclusion

This is a preliminary study but has the advantage of drawing its information from the senior judges in Europe and Israel's Labour Courts. It is a first step to gather information about important issues from the people involved within the courts' systems. Obviously, further research is needed to evaluate the issues from the viewpoint of those outside the system with the help of statistical data. Furthermore, the shortcomings of reaching conclusions based on a survey must be balanced with other research. All this being said, this article has attempted to draw some conclusions on the basis of the information already obtained.

In conclusion I would like to emphasize the following:

Judges feel that the social media has not compromised their independence. On the other hand, the reports indicate that some social media affect judges and courts in some

way and further research is needed to determine how it effects their judicial functions.

Social media is widely used by courts and judges and has increased the transparency of Labour Courts. In general there is more information published about the courts and their judgments. However, not all Labour Courts are taking advantage of the social media's potential for strengthening the understanding between them and the public. The social media is also an excellent tool for improving understanding between courts and legal systems of various countries.

In my opinion courts are more independent when their relationship with the public is stronger and this happens when the public has more accurate information about the courts. Thus, it is a positive phenomenon when courts use the social media to inform the public about their judgments, their purposes and how they perform their duties. In this way the social media can be used as a positive tool to strengthen independent judiciaries and democracy institutions.