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STRENGTHENING NATIONAL LEGAL SYSTEMS
Actions and Mechanisms in Supporting National Legal Systems*

I

We have talked all day about penal law, about prosecuting and sanctioning war crimes through international bodies. You might think, therefore, that my topic "Strengthening National Legal Systems" is just a follow-up, intended to give an overview how the national legal system should be shaped to prosecute and sanction on its own and without international bodies. This is not the case. The subtitle shows that the organisers had something else in mind, namely to describe the support the national legal systems of certain countries generally are in need of.

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It goes without saying that the organisers had in mind countries in transition or countries aspiring for EU membership, and that I should speak about support from the outside. This I will do, not as someone who has a complete overview about all those countries and all mechanisms, but as someone who, after decades in the German Federal Ministry of Justice, later, after German reunification, in the Ministry of Justice of the newly formed State of Brandenburg, has had the chance to work as consultant for a while in Belgrade (2001-2002 and again since 2005). Still, I am not speaking about Serbia alone. Even if quoting examples from Serbia I am referring to that country just as an example for many countries in similar situation.

II

The penal law point discussed so far and the issue of support for national legal systems have some aspects in common, but in other aspects there are big differences:

Both topics, undoubtedly, are of the highest general importance and both have to do with the rule of law, the latter understood in its broadest sense.

However, one should see that the penal law issue with all its implications is but a part, even if one of highest importance, of the implementation of the rule of law, whereas the national legal system, in all its different aspects, is the much broader and complex issue. A functioning national legal system consists, at least, of: (1) the law in the statute book; (2) the application of the law through administration, prosecution and courts; (3) the qualification of the persons involved; (4) a well established commitment of all actors to do one's best and to serve a goal of crucial significance; (5) the trust the institutions and persons have in public opinion, and, as a necessary precondition: free press and media to follow and comment what is going on; (6) the balance of power between the three branches of Government.

Only if all those different aspects are taken together and in good shape you can speak about the general functioning of the rule of law.

And there is another point of difference for which, as a practitioner in the vast field of support to the national legal system, I can only envy those who deal with the topic of "Cooperation with the ICTY": This topic every day is in the centre of public interest. What is tried to achieve in this respect continuously gains the highest publicity, it occupies almost daily highest ranking politicians and diplomats; and to work politically with the concept of "conditionality" in this field is comparatively easy (I am speaking, of course, rather of the principle of "conditionality", not about its many past failures and about its still hoped for success sometime). "Condition" and "meeting the conditions" in certain issues

are relatively simple to juxtapose (sometimes it appears even a bit too easy and simplistic to speak and work in terms of conditionality); in complex issues, however, "condition" and "meeting the condition" are extremely difficult to bring into concordance.

Therefore, there is little chance to operate with this concept of conditionality in the wide field just mentioned: The rule of law topic, understood as the proper functioning of the national legal system as a whole and in its widest definition, is too broad and too diversified to use the big stick of, let's say, interrupting negotiations or withholding money if here and there is no or no sufficient progress. Sure, the "rule of law" is topic of excellent speeches and great papers. Equally sure, the meeting of the Copenhagen criteria is one of the big "conditions" for countries aspiring for EU membership. But, in everyday work on single items of the whole national legal system topic, you principally don't get that much in return for this argument. And the great papers, unfortunately, are seldom read by those to whom they are addressed, and what is excellently done in speeches on Sundays or in academic seminars is difficult to translate into the daily practice of supporting countries in transition on their way to the rule of law by strengthening their national legal systems.

So, my first point would be: Make the rule of law topic, even if complex and diversified a really big topic of all efforts from outside to help those countries. Make it a topic of the highest level talks of the highest political and governmental numbers and don't speak, as on Sundays and in academic circles, too generally or only generally about it, even if it is a general and complex topic. Don't hesitate to pinpoint, visibly and with publicity, clear violations of the rule of law also in less important points than the extradition of a suspected war criminal, and do so even if it appears, at first sight, that such a point is just an internal affair not meriting or allowing external influence. Do realize at all times: Undoubtedly also in States where, as here in Finland and the other EU member states, the rule of law is regarded as properly functioning and "in full operation", there is no guarantee that there are not at the same time manifold dangers, or even plain failures, from time to time. The more so in the countries we have in mind when speaking about support for the national legal system. Here the rule of law still has to be made functioning in political life, in administration and in judiciary. Here, the rule of law as we understand it – something of high democratic and legal standards and applied with the same standards in day to day business as well as in so called "political questions" – has not yet fully arrived. And even if one day it should be completely realised on paper in the Official Gazette, there is still a long way to go into the brains and hearts of all actors to avoid that it is too easily put aside once political or other advantages become a temptation for the actor.

III

It is commonplace that in the countries we are talking about the national legal system must be strengthened. There have been efforts to this effect by the international community since it had the opportunity and was invited to do so. In certain fields such efforts started even earlier: I am talking about a great number of NGO activities, the influence of which should not be underestimated when it comes to the point how the general public, the people, are made aware of the fact that the old systems had so little to do with the rule of law, and that rule of law is not just a theoretical concept but something to be realised everyday and in daily matters in democratic societies.

It is also commonplace that there have been successes. Nevertheless, I am not going to talk about these successes; they are to be found in the many progress reports or final reports on specific projects which are constantly written and, hopefully, read and evaluated with critical eyes. It is more important to speak about difficulties and failures, unnecessary ones and inevitable ones, and in particular about the long way to go. For our big topic there will be no quick and easy success. You can reach the goal of a functioning national legal system, understood as a precondition for the application of the rule of law, only on a step by step basis and in a period of many years; and over those years there will be setbacks, misunderstandings and even intentional or negligent misuse of new institutions (or of old institutions with changed responsibilities). To be very clear: this is nothing specific for countries in transition – you have such deficits also in countries with well established rule of law. What makes the difference is the number of cases where the finger must be raised, and it is the still under-developed control through the public and the media which nearly every day endangers progress. Independence of press and media, as well as enlightened and well informed citizens; they are essential for the proper functioning of the national legal system and indispensable as an outside guarantor against the many attempts of misuse, of clandestine doing the wrong and of politically influencing here and there. Well informed citizens and free press are, therefore, not just a big topic on its own but at the same time essentially linked to our topic.

I have repeatedly stressed how broad the topic “Strengthening of the National Legal System” is to be understood. On that I must develop a bit, to use the chance to make the audience or reader, from the viewpoint of a practitioner doing fieldwork, somewhat better aware of the difficulties and the long way to go.

It starts, firstly, with the statute book, and you have to decide, for nearly all the different legal fields dealt with in the statute book, what to keep in force, what to amend and reform, what to abolish and to replace, and what to introduce

completely new. This applies to constitutional law including balance of power for the three branches of Government, to civil law, commercial law, labor and social security law, procedural law including execution of court decisions, penal law, administrative law, tax and finance law etc. Some of these changes are essential to introduce the rule of law. But also insofar as changes are just regarded as necessary out of practical or economic or law approximation reasons, the national legal system has to be adapted and must be made functioning and consistent. Thus, the simple enumeration of topics and possible actions is enough to show the complexity of the issue already from a purely law-maker's point of view.

Secondly, you have the application of the law through the executive power, on its highest level as well as through all other administration, through the prosecution and through the judicial power, the courts of law as well as the legal profession. You have deficits on all levels and of all kinds. You have deficits in office equipment (I am not referring to the most sophisticated ones but to ordinary office tools); you have buildings which, apart from the worst possible impression they make on the public with regard to the importance of state functions, don't allow proper discharge of office duties. You have deficits in knowledge and deficits also in a certain civil service tradition giving all actors the sense both of responsibility and of steadfast resistance to improper demands by superiors or interested people form outside. In this context I must mention the problem of large-scale and of everyday corruption which is so poisonous for the legal system and the rule of law, in particular if also the judicial power, and in highest functions, is affected. It will, despite many good faith efforts of better control, need years to eliminate not only the corruption as such but also the conditions conducive for corruption: insufficient pay, lack of ***"esprit de corps",*** lack of good civil service traditions, and existence of bad traditions, e.g. certain expectations for "baksheesh" on many levels. I know that this "Balkan problem" is not just a "Balkan problem"; it has become a problem for many countries where, some decades ago, you never would have expected such things to happen.

To come back, thirdly, to the point of knowledge and qualification: I have met a number of dedicated and highly qualified people in administration and courts. However, it is no secret that the general standard of qualification is not such that, at present, you can expect the ordinary functioning of the application of law everywhere, not to speak about the application of in the process of transition rapidly changed and again changed laws. It is a fact that, partly for the reasons mentioned above, not the most qualified are working as permanent staff for the government, the administration and the judiciary (prosecution included). Of even greater concern is that many of the brightest and best qualified young people (whom in 2001 I have met in ministries and courts) now in 2006 are working, far better paid, as national experts for international

organisations or for bilateral projects. Individually speaking, this is well deserved and it is, of course, a consequence of market conditions which cannot simply be set out of function. However, for the national system, so badly in need of qualified people, it is a grave loss which will only be compensated if, after some years and under changed conditions, these persons go back to their national offices and are being well received there (which, unfortunately, is somewhat doubtful).

Therefore, one of the biggest issues in strengthening the legal system and the rule of law is to make all efforts to improve, by training on the job and generally, the quality of the staff in place, and this not only in terms of knowledge but also in terms of behavior. Even more important for the future is the selection process for the generation now entering civil service: the best possible must be chosen; an assessment of candidates according to certain fixed criteria must take place; personal or political friendship must be excluded as entrance door for appointment; and – above all –overall conditions must be created to make it attractive for the best to work for the government, the administration, prosecution and courts. Strengthening of the national legal system means not just to change the statute book. It comprises all activities to change the situation with respect to the more practical issues of the national legal system. This is not new; many things are ongoing. I mention it, nevertheless, so that you all are permanently aware of the complexity and interdependence of these points.

Fourthly, I come to a point which, as far as outside high level political statements and specific outside help are in question, is not that much in the focus of attention. It is the great lack of confidence in state institutions, both in general and in persons holding office. Public rating of and public trust in politicians is not high in our countries of reference, to say the least. But a matter of even greater concern is the widespread distrust in the institutions (except the army, maybe), in particular the prosecution and the judiciary, in the persons holding office there and in the civil service in general. It is extremely difficult to cope with this situation, which, on the one hand, is a heritage of the past, and, on the other hand, a consequence of disappointments connected with the effects the political changes were supposed to have for individual well-being. It is quite clear (but often overlooked in daily practice) that a national legal system cannot function without trust in institutions and in persons. Therefore, I was, and still am, really astonished that this point is not seen as one of the most decisive. It is not enough to talk about it in general terms and to believe that individual projects here and there in sum finally will change the picture also in respect of general trust in institutions and persons. “Rebuilding trust” must be a big topic of its own and the specific measures (legislative acts, administrative measures, staff policy etc.) must be seen as part of an overall effort. It would be of enormous help if such perception in high level talks would be conveyed to

the national interlocutors. I often have experienced that convincing my direct counterparts is not enough, and that they have the greatest difficulty to convince the other members of the cabinet about their needs – a well known problem, by the way, for Ministries of Justice everywhere when fighting with more powerful and influential cabinet members.

Everyone knows that under the old regimes freedom of universities, freedom of the press and independence of the judiciary suffered most. In my perspective, by far not enough is done to cope with the judiciary's problems. To give you one example: whereas after the fall of the old regime parliament, as the legislative power, has gained democratic legitimacy through elections, and government, the executive power, through support in and dependence from parliament, no such democratic re-start happened in the judiciary where, more or less, the old persons remain in office. In Serbia, unfortunately, there was no "lustration" of officeholders like in other countries in transition. This does not only mean that there are some in office who, because of linkages to the old system, should not be there anymore; it also means that a chance for a visible and publicly noticed re-start was terribly missed. No wonder that changes in the statute book on judicial independence so far have had so little outside effects. "Lustration" would have been a marked sign of change also in the judiciary. It would have helped to build new confidence, and it is not surprising that without such re-start the low rating of the institution and the persons has not changed or, if it changed, then to the worse. The absence of lustration, and, in my opinion, also the absence of clear reactions from the international community with regard to this political decision, is one of the clear set-back points for all endeavors to do something for the legal system and the rule of law.

Fifthly, the balance of power between the three branches of government, maybe the most delicate point for the rule of law. Under the old regime you had an over-powerful executive branch, and the executive itself was the instrument of the leading political party or parties. This is over and has to be completely overcome if you want to have a functioning legal system in line with the rule of law. Nobody, outside and inside those countries, is in doubt about the necessities. It would be unfair and unjust to minimize the efforts undertaken so far. However, it would be equally wrong to believe that the changing of some laws is enough for the separation and balance of power of the branches of government. This is true for the new dependence of the executive from parliament under the law and the guarantee of independence for the judiciary in some new laws (the latter is, as you know, no completely new guarantee – just on paper you had it also under the old regime). Again, the heritage of the past is deeply rooted, and those exercising political power now all have in their brains remains of experiences from the past, leading them, here and there when the temptation or a political gain is big enough, to practices which are

completely incompatible with the rule of law. Since I am no politician I can quote some examples, but not without mentioning that one of the greatest helps form the outside for the establishment of the rule of law would be if such examples were made a topic not only here, but also in political talks by the highest ranking politicians.

The examples: (1) Extremely quick and intransparent legislative processes outside the normal procedure when big interests are at stake; (2) the taking away of parliament membership from persons who have left their parties, or have lost the confidence of the majority in their party or in the ruling government coalition; and the disrespect for decisions of the constitutional court not allowing such parliamentary practices; (3) the manner in which sometimes, and independently from qualification in the profession, judges are elected or not, promoted or not, or removed; (4) the ways by which certain judges or prosecutors (I am not talking about those who have proved to be corrupt or unable to properly discharge their offices) are forced to leave office without a legal reason; (5) the way how sometimes competences of certain judges and prosecutors are changed without their consent; (6) the way how in so-called political cases, or cases where public figures are somehow involved, expectations or even demands are most outspokenly formulated by politicians, parties or even members of the government not responsible for the judiciary.

If you know how fragile the independence of the institution and of individuals in those institutions is, you will understand why I stress that the rule of law is so much more than acceptable laws; you will understand that under those conditions it is difficult to re-build trust in the institutions and, in particular, the judiciary; and, finally, you will, I hope, understand that the absence of any high level criticism from outside, apart from abstract "conditionalities", is so detrimental for progress and so regretted by someone who, on a practical level, is trying to help the country to design provisions guaranteeing the rule of law and making misuse impossible or unacceptable for all persons having responsibilities for the well-functioning of the rule of law.

IV

When turning now to the actions and mechanisms in supporting national legal systems you will not expect me to enumerate or systemize all initiatives and projects, all that was done, is done and is still to be done. Let me just say that these actions and mechanisms, both in ways and number, directly correspond to the broadness of the topic, to the many fields where changes are necessary in the eyes of the national insiders, but also in the eyes of helpful or demanding outsiders. I mention this to make it clear that, while both views often are identical (if not in means than in goals), they nevertheless frequently are rather

divergent, not only with regard to means but also to goals, and the outsider's perspective is, by far, not always convincing. This poses problems to which I will come back later.

One point needs specific attention at the outset: The number of genuine external experts in the legal field who, at the same time, know the country, the language, the history, the political and legal system and the economic situation, the opinion building factors and the thinking of the people, is terribly small. That means that the great majority of outside helpers, even those highly qualified in their field of action, need translations for the total duration of their projects (in the legal field this is particularly bad) and become experts for the country or the legal system they are attempting to reform or replace at best towards the end of their activities instead of starting as such. I can't be more explicit on that point in the course of this paper; you will understand what I mean and what kind of problems in communication this permanently creates.

The broad field of needs and the extraordinary high number of organisations and bodies willing to help has led to innumerable different projects of wider or narrower scope. The organisations range from the big supranational players, like EU-Commission, Council of Europe, OSCE, Worldbank and IMF, to powerful and generously funded national institutions with tax-payers money, to smaller ones with public money or private money (and if you refer to private money this does not necessarily mean that the organisations are small in size or influence, see e.g. the Soros Foundation or the American Bar Association).

It would be interesting to make the attempt to figure out the motives of the helpers or donors: you have the altruistic and humanitarian approach; you have the approach to create conditions for lasting peace and public welfare; you have the approach of widening the sphere of true democracies sharing the same values; you have the more political approach of getting influence globally or even strategically; you have, also in the field of law approximation, economic interests and incentives, and, finally, you have the hundreds, sometimes thousands of international, regional or bilateral organisations (among them those acting under government instructions and the NGO's with no such government influence) who just do, and must do, what is in their job description: to give aid of all kinds and to spend the money allocated to them for such purposes.

I mention the enormous number of active organisations, their different size and power (both politically and financially) and their different motives and goals just to introduce into one of the biggest problems in strengthening national legal systems: the problem of coordination of projects, the problem of overlapping of projects financed by different bodies, of sometimes contradictory approaches of donors (in means and goals), of real competition between donors (not only to find the best possible solutions but rather to place

the own organisation in the lead position, to run the "all-embracing" and most attractive program, to find for the own project the most prominent place in the Government's policy statements or in the statute book); finally the problem of big differences in the conditions under which assistance can be given (e.g. can you pay both internal and external experts? Is payment of experts only possible when working in the beneficiary country? Can you finance study tours? Can you pay for hardware?). All these differences may have well considered reasons or motives. But, when working on the ground in a specific project it is sometimes very hard to understand that not the actual needs determine what is possible in means and mechanisms to help, but rather the general conditions and too narrow terms of reference of the specific project.

This situation has consequences also for the beneficiary country. There is, of course and in the first place, the big advantage that so much help is offered, that so many experts stay ready to come or to work from abroad, that so much money is made available, not only to pay for foreign expert advice, but also to pay locals (both outside local organisations and, remarkably, sometimes even inside such organisations by raising their salaries above what is normal for other public servants); and that there is even money to invest into buildings, computers and other equipment.

However, there are also big disadvantages. The innumerable donor organisations all need their counterparts on high level and working level. The number of counterparts in the beneficiary country on both levels is much smaller than the number of persons coming from donor organisations who are, normally, experts in consultancy, but without specific knowledge of the country's situation in detail. They, therefore, ask for general information, for the needs in the eyes of the beneficiaries, for the appropriate shape of a program, its goals, duration and its fitting in into the details of the own framework for this specific country and the project budget. It is normal that the representatives of donor organisations who try to start a specific project in the broad field of the national legal system (fact finding phase, then inception phase) do ask the same substantive questions. However, the local counterparts not only need the time to answer those questions. After a while they get tired to answer them again and again to different people, to cope with the different approaches and possibilities of the donor organisation and to experience that, very normal, a great many of these conversations in the end do not lead to a project. During my first stay in Belgrade I noticed that one of the consequences drawn by my interlocutors in the field of rule of law simply was to choose the mightiest organisation which offered, besides the legal advice, the highest amount of cash money for investments; they did not necessarily choose the best legal drafting project that tempted to take into account the national situation, its legal traditions and the other laws in force. One was inclined to opt (or, in order not to miss the money, had to opt) for the one which just followed a global

template in a certain legal field (e.g. the bankruptcy law or the law on leasing contracts). But this has changed. Nowadays one knows that the template solutions not necessarily are the best and mostly do not fit into the system. One has learnt that, e.g. in the law approximation field, a recommendation (I am not only referring to EU recommendations but also to those of the Council of Europe which are of specific importance for the judiciary) is really a recommendation and not to be understood as a blue-print just to translate into Serbian language. One has experienced that "island solutions", which, without looking right or left, quickly are financed and implemented in one branch of the judiciary, create new problems when it comes to the necessary integration of the system also for the rest of the judiciary; in particular when the mighty donor has left the country and others have to be found to complete or, much worse, to replace the first system.

The situation has changed also in other respects. The beneficiaries in the ministries I know have learnt to work, sometimes to play, with the many donors. They have developed state of the art techniques in combining different projects of different donors, in compensating the substantial or financial deficits of the terms of reference of one project with the possibilities of another. They have learnt to do so sometimes with open cards for everyone, sometimes, and admirably tricky, without telling every donor everything and in, hopefully, tacit understanding that all this is serving the common goal under difficult conditions. Let me explicitly state that I do not blame anyone for such actions: One is simply reacting upon conditions which are created by the donors themselves and cannot be changed by the beneficiaries. So, one has to make the best of it.

It is most regrettable that time and money is wasted for this type of coordination, time ad money which both would be better invested into substantial work. I am sure that I am not telling stories which are particularly new. "Coordination" is a main topic in all relevant high level papers and a respective clause is inserted in every project description. Practice, however, is something different, even if efforts are made on the ground. After having been asked to chair an informal coordination body in the legal field in 2001/2002 I know what I am talking about: We may have succeeded sometimes in avoiding duplication or multiplication of efforts as far as projects in the pipeline were concerned. As far as clearly overlapping but ongoing projects were concerned I sometimes had the feeling that the coordination meeting was a market where participants rather tried to dig relevant information for their own project than to give information and to share knowledge. The explanation for this type of behavior is: (1) ambition for the own project, something nobody would like to stamp as a bad thing; (2) the need to spend allocated money for your project in order not to risk a decrease of funds (and importance and influence) for the next year, be it in the beneficiary country or – important for those who are

living from consultancy – in another country elsewhere. Both factors are equally important, normal and not to change in principle. My only advice for improving the system would be to attach much more importance to coordination on a higher level than the level of the project leaders themselves. Their individual interests as project leaders are different from the overall interest of proper coordination; therefore, there is no real choice but to change the level of coordination. I am deeply convinced that this would not only lead to big savings in time and money but also to greater satisfaction for the people involved both on the donors as well as the beneficiaries' side.

V SOME FINAL REMARKS TO CONCLUDE

Should you have expected more details on specific programs and a long list of great successes in strengthening the national legal systems, my statements might not be overly welcome. But, instead of apologizing for unfulfilled expectations, I just admit that I could not resist the temptation to confront the audience or reader with my practical experiences on the ground, working rather close to persons and problems: There is still a long way to go before we can praise the successes.

Don't think that my attempt to clearly address problems is an expression of principal doubt and disappointment about what is being done and still to do. In principle, I am optimistic that we are going to reach our goals. I frequently quote something which became some sort of a motto for me: You have to be skeptic in analysis, but you have to be optimistic when it comes to action (Antonio Gramsci). All who are active in the field of strengthening the rule of law need this sort of critical optimism. Even if the optimism is sometimes desperately in danger, it is worthwhile to believe in something what I don't hesitate to call a mission. It is my firm belief that clearly focusing on problems and difficulties is better guarantee for success than shoulder-clapping talk about progress and achievements. With the same amount of money we all can do more, better and faster.