

Law and Justice - a contradiction?

Speech - **City** Basel - **Country** Switzerland - **Date** 01/12/2017

Good afternoon everyone and thank you for the invitation to speak with you here this afternoon.

When Beatrice invited me to attend this event some time ago, I accepted immediately as the theme is something that goes to the heart of my understanding of the role of an Ombudsman. We are not a court, many of us are not lawyers and perhaps it is precisely because of this that we can give to the people something a court sometimes does not, or even cannot, give.

A court will always deliver the law because that is its task, and very often, but not always, a court will deliver justice. A good Ombudsman will always attempt to give both and in many cases will give justice even when no illegal act has been committed but justice has nonetheless been offended against.

We exist, yes of course, in the realm of law but our true home is within the realm of justice, of attempting to secure that which at times goes beyond the law, goes to that higher place where people are given even more than that, where they are given their rights and their dignity as human beings.

The 18th century philosopher and statesman Edmund Burke was not talking to or about Ombudsmen when he said the following, an instruction that all of us might perhaps take as our guiding mantra as we make decisions in our work that may profoundly affect the lives of others. He said: "It is not what a lawyer tells me I may do; but what humanity, reason, and justice tell me I ought to do."

But you don't have to reach to a philosopher to understand this. If you're really unsure as to whether something is fair or just, simply ask a child. In my experience, and all of you will also have observed, children have an innate sense of not simply what is objectively right or wrong but also what is just, or is, in their words, what is 'fair'.

A child will instinctively declare something to be fair or not fair. They may not be able fully to articulate it but they will simply know that it offends against a moral order, a sense of the world that perhaps we are all born with but may lose over time.

A child has not yet learned to make moral compromises, to see the grey between the black and the white, to buy into the pragmatic obfuscation of the adult. Like the little boy who saw clearly



that the Emperor was wearing no clothes - unlike the adults who praised the cut and colour of his non-existent robes - a child will simply say it as it actually is or as it actually feels. A child will tell us when laws are actually naked of justice.

If you're an Ombudsman or a lawyer, just test them with one of your cases. The child may not get the law right but I guarantee that they will be spot on when it come to the justice element of the issue.

But navigating this world can be challenging nonetheless. Good lawyers will of course seek justice but may be held back by the law itself, when the laws as crafted – even in good faith - are incapable of delivering actual justice in a given case, sometimes justice to the defendant, sometimes justice to the victim of a crime.

A penalty may be too light or, if mandatory, too strong in a particular case. A clever lawyer may find a loophole which allows someone obviously guilty of an appalling act – killing someone in a drunk driving case for example –to be handed a sentence that cannot match the gravity of the act or which may not result in any punishment at all. How often do we see the devastated families of such a crime speaking out on the courtroom steps, never imagining that the loss of the person that they loved could be met with such apparent cold indifference by the law they thought was there to deliver justice.

Sometimes, and we witnessed this during the economic crash across the EU, no laws are actually in place in certain jurisdictions to punish those who committed what many citizens would have perceived as white collar crime – perpetrated by those who created or presided over or even regulated financial institutions and whose actions led to devastating outcomes for so many people.

In my own country, many people lost their jobs and livelihoods, their homes, their futures, and some took their own lives out of simple despair. Yet still those people await justice from a legal system that was simply not fit for purpose to deal with people and with institutions that were never judged to be capable of committing crimes in the conventional sense; and therefore laws against the actions that led to such suffering were never even created. But a death is a death nonetheless, and the loss of a home and with it the dream of a future for a family is still a loss nonetheless, irrespective of how it is brought about.

Ombudsmen face similar challenges but in the opposite direction. We deal frequently with cases where no law has been broken but where justice has certainly been denied. The challenge for us is to get the relevant official or institution to put down the legal rule book – very often a sort of comfort blanket for officials unwilling to use discretion or take a risk – and look at the case in the round – observe all elements of it and ask themselves, is this really fair?

Let me give me two examples, one from my work as Irish Ombudsman, and one from my work as European Ombudsman.

A family came to me in Ireland. Their father had become seriously ill and as a result was no



longer mobile. They lived in a two storey house and needed to adapt the downstairs living area so that their father would not have the challenge of the stairs, A Government grant was available to do the works. The family employed a builder and the work was completed. Sadly, the man died just as the works were completed. They then sought the payment of the grant from the local authority. The authority refused to pay it. The officials said that the law said that the family should have received a tax clearance certificate from the builder before the works began and as they had not done this, they were not entitled to the grant.

The officials were right. The rules were there in black and white yet the family had acted in good faith, had rushed ahead out of concern for their father, and now, in addition to dealing with their enormous loss, they were facing an enormous bill.

We got involved, pointed out the essential injustice of the case, suggested that it should not be the responsibility of applicants to the scheme to check whether or not a builder was tax compliant, and we asked them to consider the case again. Happily, they did, the money was given to the family but, crucially, the rules were also changed, making it the builders' responsibility in future to prove that they were tax compliant.

As European Ombudsman, I received a complaint about the failure of the European External Action Service – essentially the foreign ministry and diplomatic corps of the EU – to pay its interns at its various missions around the world. This was not against the law but in the eyes of the complainant – a former intern – it meant that such posts were effectively restricted to privileged young people, those who could themselves, or whose families could, afford to pay for their travel, accommodation and upkeep.

We took the view that this was an issue not of law – as there was no law that specifically obliged the service to pay its interns – but of justice, and that the practice of not paying interns offended against the founding values of the EU which include equality and non-discrimination. The practice meant that privilege was following privilege, that those young people who could afford the internships had a better chance of future employment than those who could not, and a familiar cycle was being perpetuated.

Happily the EEAS responded well and made a case to the EU Council for additional budget to pay future interns and we are hopeful of a positive outcome.

But in recent weeks we have seen an even starker example of where law and justice most certainly do not collide and I am referring here to the mass leak of the so-called Paradise Papers – a set of 13.4 million confidential electronic documents relating to offshore investment that were leaked to the a German newspaper and subsequently shared with the world through the International Consortium of Journalists.

This treasure trove of documents has given us an unprecedented view of the manner in which perfectly legal regulatory and other practices allow the super-rich, both individuals and large corporations, to become even more super-rich by placing their income in investment vehicles designed to avoid tax. We will all have read of the famous names and seen in detail the vast



amounts of money spinning around the globe and away from the tax authorities.

Naturally, everyone has been careful to point out or acknowledge the LEGALITY of the schemes. But some advocacy groups - and particularly those who work in the increasingly high profile work of tax justice - have been just as quick to point out the essential injustice of this schemes. The schemes and the schemers may not be crimes or criminals but neither is large scale tax avoidance a victimless, value free, act.

In a world increasingly made uneasy by the political turmoil now being provoked by the growing unrest over inequality, the leak of these papers turns the spotlight on one particular cause of this politically combustible issue. Estimates differ as to how much tax is foregone with one putting the amount of tax avoidance at \$200 billion.

And this is where justice becomes detached from the law. Again, the child test. Is it fair that people who benefit from the taxes of others – from the basic infrastructure of roads and services, police and other protectors of the public, through to education and healthcare – manage to avoid contributing their own fair share simply because they have the money to do so? Money follows money. Like the interns in the EEAS – those who can afford it have the possibility to secure even greater privilege, and the gap between themselves and their less well-off colleagues – though equally bright and able - grows even wider.

But this isn't just an issue of doing the right thing for others, of being charitable, of being virtuous. Those who oversee or who profit from these legal schemes need to see that they have a significant self-interest in creating a much fairer and just playing field. I have no doubt but that many of those involved in the schemes have been horrified by Donald Trump, horrified by the regressive moves already at play vis a vis gender equality, climate change control, minority rights, even the rule of law itself.

Yet they have to make the link, must make the link, between their actions and the enabling of a clever yet deeply cynical and manipulative man like Donald Trump and those around him. He and others - for example, some of those who championed Brexit - can point to rising inequality, identify the pain of those whose votes they want, find convenient scapegoats for that pain, and the results of all of that are now very visible indeed with the US unravelling much of what was fair and progressive in their laws and regulations and the UK tearing itself apart politically. The result ironically of course will be even greater inequality and pain for those seduced by the populists enabled, again ironically, by the very people who despise what they have done.

And not even the super-rich can avoid the consequences of all of that, and particularly those who genuinely believe themselves to be, and in many instances are, champions of social justice. At the very least, their consciences are pricked.

But none of this is to denigrate or play down the role of the rule of law in a democracy. When it functions well, when the laws seek to match the dictates of justice as closely as possible, the rule of law is a cloak that protects us all, that gives order to our world, that perhaps most importantly protects not just the rights of the majority but of the minority.



But it can be a fragile thing. Many atrocities have been and are committed in regimes that claim to operate under the rule of law. When the persecution of Jewish people and others began in Nazi Germany nothing was done without a regulation or a law to underpin it. The deviation from what is intended to be meant by the rule of law begins of course when that law is intended to protect or to punish only certain groups, when it ceases to apply to all.

The rule of law is particularly important - and that importance is regularly invoked - in the context of the European Union. Where cultures and histories and political preferences frequently deviate, what holds the Union together has to be a shared acceptance of the rule of law that stems ultimately from the Treaties and from the Charter of Fundamental Rights. That is why so much that holds the Union together could be challenged if individual member states begin to deviate from that, if law and justice begin to separate, if laws begin to be selectively applied.

And that is why the spirit of the rule of law must be dynamic, has to adapt, has to spot those spaces where law and justice do not align, when the law is seen not to deliver justice but simply rules. Because ultimately the citizen judges the fairness, judges the legitimacy of the jurisdiction that controls it, by the extent to which it is seen to be just, to be fair.

And that is the space of the Ombudsman. Through the complaints that we handle, we are enabled to reflect back to the administration now just how their laws and their regulations are implemented, but how they actually feel to the people forced to comply with them, how they feel to a young person denied an internship opportunity vital to a future career, how they feel to a family denied a benefit critical to their wellbeing. We do not judge simply whether an act is legal – that is a routine and often simple thing – we judge rather whether the laws and the regulations and the rules are living up to the values that the state is committed to – whether it means it when it says it wishes to treat everyone with dignity, with compassion, and above all with full consideration of the rights that flow to them simply by virtue of their humanity.

And when an administration listens, when it decides to do exactly what it has committed to do, either through its constitution or through the international treaties it has signed up to, it is then that law and justice begin seamlessly to blend together to the benefit of all – rich and poor alike.