

DONAUKURIER 20 APRIL 2016

FORMER CONSTITUTIONAL JUDGE SIEGFRIED BROSS ON THE EPO

Mr. Bross, over the past few months the EPO has been hitting the headlines with a large number of labour law disputes. You are seen as a major critic of the organization. Why is that?

Siegfried Bross: The EPO is the central authority for the protection of patents in Europe. However, it suffers from an underlying flaw in its structure, which slipped in when it was established. It is a creation of a combination of states, and its immunity was recognized. That in itself is in principle not a problem, but within the EPO an entirely autonomous legal system has been created, which is not based on any effective system of checks and balances.

What does that signify?

Bross: The Patent Office is detached from national systems of law. That has two consequences which are not acceptable in the context of a state governed by law: On the one hand, as can be seen at the present time, there is no legal protection for the workforce. On the other, there is no legal protection either for patent applicants. There are only the Boards of Appeal at the EPO, which are both officials and judges in one, and which, moreover, are subordinate to the President. Anyone who comes to grief there has no further recourse. Nor is the Office subject to any parliamentary monitoring or control.

How could the constitutional arrangements be structured so as to avoid such problems?

Bross: Either a new court would have to be established inside the Patent Organization, which would be independent of the President, or the legal protection would have to be assigned to one of the states where it has a domicile, such as Germany.

In your view, then, the structure as it exists up to now is not reconcilable with applicable law?

Bross: It contravenes the European Convention on Human Rights, because the 38 Member States cannot ensure the status of a state governed by law. It is a basic principle of human rights that states cannot rescind their responsibility to uphold human rights. This means that the organization should never have been established in the way it was. The combining of administrative and legislative power in one entity is unacceptable. The position of the President contradicts all basic principles of the democratic state governed by law, and the EPO has by now essentially gained autonomy. I have repeatedly said, if this form of thinking were to be followed, Guantanamo on German soil would be possible.

In the attempt to make the Office more efficient, have the states lost sight of the clients and the staff?

Bross: The focus on cutting costs and higher yield from fees have nothing to do with the task of the EPO. The procedures of issuing patents, the aim of which is the protection of intellectual property, are an absolutely inviolable right for the economy. It is a fundamental task of the patent authority to ensure that there are sufficient personnel available for the thorough examination of patents.

*Siegfried Bross was a judge at the Federal Constitutional Court from 1998 to 2010.
The interview was conducted by Daniel Wenisch. Archive photo: Deck/dpa*