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Found in Translation: Some Remarks on International Co-operation Between Judges

1. Introduction

In his inaugural lecture at the University of Utrecht,¹ Arjen Meij pointed briefly to the phenomenon of growing international co-operation between judges. He noted that this development was late, compared with the situation of, e.g., natural scientists or musicians. Obviously, this is related to the fact that the legal order has traditionally been, almost exclusively, a matter for national States, created in the 19th and 20th Centuries. For a long time the natural forum for judges has been a national one. The growing international co-operation between judges follows – or is part of – the development of international institutions and the creation of a ‘global’ legal order. Indeed, in the last decades, we may observe the creation of a multitude of international judicial bodies and networks, all fostering the development of ‘a common judicial culture.’

In this essay, I shall take a closer look at the phenomenon of international co-operation between judges. The aim is not to describe all the existing bodies and networks, but to highlight some of the characteristics of international co-operation. What is at stake when judges co-operate internationally; what happens when they cross the boundaries of their respective national legal systems? I will concentrate on co-operation at the European level, more in particular within the framework of the Council of Europe (CoE) and the European Union (EU). The work of the ‘Consultative Council of European Judges’, a body created in 2000 by the CoE, will serve as an example. But at first, I shall briefly recall the perspectives of European integration, as expressed in the relevant treaties.

2. Perspectives of European integration

In the Statute of the CoE of 1949, the perspectives of the CoE are described in highly appealing terms:

“The aim of the CoE is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress. This aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms.”²

1. A.W.H. Meij, *Kringen van coherentie – over eenheid van rechtspraak in de context van globalisering* [Circles of Coherence – on Unity of Case-Law in the Context of Globalisation; author’s translation] (Utrecht: G.J. Wiarda Instituut, 2009), pp. 25 and 26.

2. Art. 1, paragraphs a and b of the Statute.

The Treaty on European Union and its predecessors contain even more sublime prose:

‘Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law.’³

‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women prevail.’⁴

The Statute of the CoE and the Treaty on European Union picture a peaceful, democratic and prosperous Europe, governed by the rule of law. These ideals were inspired, almost needless to recall, by the conviction that economic and political integration, guided by the principles of democracy and respect for human rights, can bridge the divisions between the States and can prevent the outburst of wars, as experienced in the first part of the last century. In the last decades of that century, the wish to overcome the division between Eastern and Western Europe, in itself an outcome of the Second World War, has given new dimensions to these ideals.

In 2009, the CoE celebrated its 60th anniversary, while the EU and its predecessors have existed for 52 years in 2010. Both international organisations have accomplished great and unprecedented projects. However, their aims, as expressed in the earlier quotes, are far from being fulfilled. More in particular, the creation of a society governed by the rule of law remains an ideal that is only very partially realised. The judgments of the European Court of Human Rights (ECtHR) reveal weekly in detail the numerous shortcomings of the justice systems of the various Member States. There are other sources of information. In 1997, the CoE commenced a monitoring procedure on the functioning of the judicial systems of the Member States. In the reports of this monitoring procedure, structural deficiencies are identified in almost all Member States. Some examples: inappropriate infrastructure of the judicial system, lack of access to justice, interferences by the legislative or executive branch, difficulties to obtain fair prosecution, excessive length of judicial proceedings, failure in enforcement of judicial decisions and insufficient training of judges.

This monitoring procedure has been discontinued. The reason for this is obviously not that the deficiencies have been resolved. The CoE has come to the conclusion that other instruments may now be more effective in improving the situation. The CoE created, in 2002, a body called the European Commission for the Efficiency of Justice (CEPEJ).⁵ According to its Statute, this body must, *inter alia*, examine the results achieved by the different judicial systems by using common statistical criteria and means of evaluation. The CEPEJ publishes an extensive overview of the different systems in its report on ‘European judicial systems’. This report, which is regularly updated and improved, contains very valuable data about the functioning of the judicial systems of the Member States. It

3. Second preamble of the Treaty on European Union.

4. Art. 2 of the Treaty on European Union.

5. The abbreviation CEPEJ is taken from the French name: *Commission européenne pour l'efficacité de la justice*.

produces, e.g., figures on the public budget, allocated to courts and public prosecution, the number of magistrates, the number of pending and resolved court cases and the length of proceedings. These data provide a good insight into the differences between the Member States and the remaining obstacles to the adequate functioning of the judicial systems.⁶

It is clear that the aims of the CoE and EU with regard to a society governed by the rule of law have not been achieved and that much remains to be done. The recent Interlaken Declaration⁷ emphasises that it is first and foremost the responsibility of the States Parties to guarantee the application of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). The declaration also underlines that the shortcomings in the justice systems of the Member States, in particular the absence of adequate domestic relief, damages the effectiveness and credibility of the Convention and the ECtHR themselves, given the ever-increasing number of applications brought before the ECtHR.

A pertinent question is, however, whether the European institutions still have time to remedy this situation. When I was writing this essay, an article by Charles Kupchan, entitled: 'As Nationalism Rises, Will the European Union Fall?' was published in a newspaper.⁸ In this article, Kupchan argues that the renationalisation of politics and the upswing of right-wing populism, as well as the current financial crisis, constitute serious threats to the ideals of European integration and that the EU is 'slowly dying'. I belong to those who are convinced that the traditional perspectives of the CoE and the EU are still entirely valid. Where integration has been achieved, it needs to be maintained and, if appropriate, strengthened. The enlargement of the CoE and the EU to States in Central and Eastern Europe brings new challenges. But I share Kupchan's serious concerns.⁹ In any case, the perspective of integration cannot be taken for granted and permanent attention is required to keep it alive. It is necessary to analyse and to understand the background of growing euroscepticism. It is also necessary to make much more effort to explain why integration is a precious vehicle for the achievement of the ideals, as expressed in the treaties. All hands on deck!

3. An example: the CCJE

In view of the findings pertaining to structural deficiencies in the justice systems of the Member States, the Committee of Ministers (CM) of the CoE adopted, in 1999, a Resolution to reinforce the independence of judges in Europe.¹⁰ It was decided to draft

6. The fourth edition of this report (2010) has recently been published. This report, and other documents of the CEPEJ, can be found at the website of the CEPEJ: <www.coe.int/CEPEJ>.

7. Declaration at the High Level Conference on the Future of the European Court of Human Rights, 19 February 2010.

8. The article appeared (translated in Dutch) in *NRC Handelsblad* of 4 and 5 September 2010; it was previously published in *The Washington Post* of 29 August 2010. Kupchan is professor of international affairs at Georgetown University.

9. Kupchan's observations are confirmed in a recent study of the German foundation Friedrich Ebert Stiftung: *Die Mitte in der Krise* (<www.fes.de>). This study identifies a significant growth of anti-democratic and racist tendencies 'in the middle of society'. Nobel Prize winner Mario Vargas Llosa also expresses concerns about the political perspective of the European democracies in his intriguing essay: 'De terugkeer van de monsters' [The return of the monsters; author's translation], *Nexus* 56 (2010).

10. Resolution No. 1, On measures to reinforce the independence and impartiality of judges in Europe, CM(99)122, Appendix III.

a global action plan for the strengthening of the role of judges in Europe and to set up a 'consultative group' composed of judges from the Member States. This body, created in 2000, is called the Consultative Council of European Judges (CCJE).¹¹

The CCJE is an advisory body of the CoE which prepares 'opinions' on central questions concerning the judiciary. In these opinions, the CCJE sets out standards for the justice systems, having regard to the Convention and numerous other international legal sources.¹² The CCJE adopted, during the last ten years, thirteen opinions on topics such as the appointment and tenure of judges, the training of judges, the role of Councils for the Judiciary, the relations of the courts with the public and the media, and the quality of judicial decisions.¹³ These thirteen opinions at present run to almost 200 pages. In order to increase the accessibility of the opinions, the CCJE drafted recently a summary of the most important conclusions in a document called 'Magna Carta of Judges – Fundamental Principles'.¹⁴ The CCJE does not design abstract concepts, but rather tries to provide practical guidance. In its first opinion, it emphasised that 'what is critical is not the perfection of principles and, still less, the harmonization of institutions; it is the putting into full effect of principles already developed.' A basic postulate in all the opinions is that the independence of judges is not a privilege in their own interest, but in the interests of the rule of law and of the citizens.

The CCJE is composed of judges from the 47 Member States of the CoE, geographically ranging from Finland to Malta and from Iceland to Russia. These countries obviously have different traditions and find themselves in diverging political and economic circumstances. The process of arriving at common points of view is therefore complex. Yet, in practice, the CCJE mostly succeeds in bridging the gap between the different conceptions. This is a fascinating aspect of international co-operation. Perhaps we can say that the confrontation of differences can generate a clearer view of the more fundamental issues, involved in the organisation of the justice system. While 'translating'¹⁵ our conceptions to colleagues with different traditions, we discover, or better understand, the basic values that underlie and support our views. This explains the – I admit, somewhat mystical – title of this essay: 'Found in Translation.'¹⁶

4. What is at stake in international co-operation?

International co-operation enables judges, in the first place, to share experiences and knowledge and to learn from each other's 'best practices', e.g. in the field of training or in the implementation of 'quality systems' for the judiciary. Co-operation also enhances 'mutual trust', essential for the proper functioning of international legal instruments. But

11. In French '*Conseil consultatif de juges européens*'; the abbreviation CCJE is taken from the French name.

12. E.g. the United Nations basic principles on the independence of the judiciary (1985), Recommendation No. R(94) of the CM of the CoE on the independence, efficiency and role of judges, and the European Charter on the Statute for Judges (1998). Recommendation No. R(94) is now updated and replaced by Recommendation No. (2010)12 'On Judges: Independence, Efficiency and Responsibilities', adopted by the CM on 17 November 2010.

13. All the opinions are published at the website of the CCJE: <www.coe.int/CCJE>.

14. This document was adopted on 17 November 2010.

15. From the Latin verb *trans-fero/-tuli/-latum*.

16. A variation on the title of the film *Lost in Translation*, directed by Sofia Coppola (2003).

there are more fundamental aspects involved. The example of the CCJE illustrates that international co-operation between judges can contribute to strengthening the role of the independent judiciary in the Member States.

In their daily practice, judges are often absorbed by their workload. If there remains time for reflection, it is often devoted to the 'academic' topics that characterise the science (or art) of jurisprudence. It is evident that the prime responsibility of a judge is to render (fair) judgments in particular cases and I do not wish to underestimate the importance of jurisprudential issues. However, the fact that judges seldom participate in discussions that go beyond the particular cases that they deal with merits our attention. In my opinion, this is a serious failing. Performing a central role in the justice system, judges should reflect on the conditions in which they do their work and on the factors that co-determine their functioning. To what extent is access to justice guaranteed? By whom and how is the budget for the judiciary – 'the weakest of the three departments of power'¹⁷ – established? Are judgments properly executed? What are the detention conditions in prisons? What about the selection, training and tenure of judges? These questions are of utmost importance when one evaluates the concrete features of a justice system. However, judges seldom feel (co-)responsible for the organisation of the justice system in which they function.

It seems to me that, at national level, little action is taken to change this attitude. In most Member States, discussions on the organisation of the justice system are largely dominated by politicians and by the media. Judges often remain silent when reforms in the national justice system are implemented, even when these reforms have an impact on the proper functioning of the judiciary. When judges express their views, their comments often remain inoperative.

If these observations are pertinent, they underline the importance of international co-operation. International institutions focus on the major issues involved in the organisation of the justice systems. International institutions intervene where national forces remain passive or ineffective.

I will give two recent examples, concerning the justice system of my own country, the Netherlands. These examples occurred when I was writing this essay; they can easily be complemented by other, even more serious examples.

In a report of 27 July 2010, the Human Rights Committee of the United Nations criticised the Dutch criminal law system, which provides, in some cases, for the possibility of unreasoned judgments in criminal matters and limitations of the right to appeal.¹⁸ In 2007, a Dutch citizen was summoned to appear before a District Court for failing to comply with an order to move away from a railroad track, where he was demonstrating against its use. An oral judgment was rendered, convicting the person without written reasoning, sentencing him to a fine of EUR 200. No trial transcript was drawn up. The person applied for leave to appeal. The Court of Appeal issued a decision declaring that the appeal would

17. This famous description was given in 1788 by Alexander Hamilton in *The Federalist Papers* (No. 78) (London/Vermont: Everyman, reissued 1996). Hamilton refers to Montesquieu who wrote in his *Spirit of Laws*: 'Of the three powers above mentioned, the judiciary is next to nothing'.

18. Human Rights Committee, 18 August 2010, Communication No. 1797/2008.

not be considered, as the interests of proper administration of justice did not require this case to be heard on appeal. The Human Rights Committee found that the right to appeal under article 14, paragraph 5 of the International Covenant on Civil and Political Rights had been violated, due to the failure of the State party to provide adequate facilities for the preparation of the defence and conditions for a genuine review of the case by a higher tribunal.

In a judgment of 14 September 2010, the Grand Chamber of the ECtHR held that there had been a violation by the Netherlands of Article 10 of the Convention.¹⁹ In this case, the company publishing the Dutch weekly *Autoweek* was compelled by the police and the public prosecutor to hand over photographic material on an illegal street race. The authorities were led to suspect that one of the vehicles participating in the street race had been used as a getaway car, following a ram raid some weeks later. According to the prosecutor, the needs of the criminal investigation outweighed the journalistic privilege. Since 1 February 2000 (when article 96a of the Dutch Code of Criminal Procedure came into force), the Dutch legislation no longer provides for prior review by a judge of orders of the authorities to surrender materials. The Grand Chamber ruled that this situation is 'scarcely compatible with the rule of law' and that this failing is not cured by the possibility of judicial review *post factum*, which is powerless to prevent the authorities from examining the photographic material the moment it was in their possession.

It is interesting to observe that judges in the Netherlands have accepted the practice of (partially) unreasoned judgments in criminal cases for decades.²⁰ They seldom expressed doubts about this practice, which was introduced for reasons of 'efficiency'. Likewise, few objections were expressed when, in 1999, the role of the judge in the review of acts of the public prosecutor was substantially diminished and when, in 2006, limitations to the right of appeal in 'minor' criminal cases were introduced.

5. Conclusions

'*L'union fait la force*' is a well known adage; 'United in Diversity' is another one.²¹ The power of union has not only a quantitative dimension, in the sense that 'many are stronger than few'. Co-operation between judges from different Member States develops a common judicial culture and mutual trust. Moreover, it enables judges to (re)discover the core elements of their function, vital in a democratic society governed by the rule of law.

International co-operation demands specific faculties of the participants. One of these faculties is, of course, the command of languages. Another one is the ability to 'translate', to see concepts in their perspective, to be interested in other conceptions and to search,

19. ECtHR 14 September 2010, Application No. 38224/03, *Sanoma v. the Netherlands*.

20. I am referring to the so called 'head-tail' judgments, that do not contain a description of the evidence (Art. 365a of the Dutch Code of Criminal Procedure); these 'abridged' judgments are only completed in case of appeal. At stake in the case before the Human Rights Committee was an oral judgment (Art. 378a of the Dutch Code of Criminal Procedure), possible in 'minor' criminal cases, sanctioned with imprisonment for a period of maximum one year.

21. The first adage was, in its Latin form (*concordia res parvae crescunt*), the motto of the Dutch Republic in the 16th century; the internet teaches me that it is at present the national motto of at least three States (Belgium, Bulgaria and Haiti). The second adage serves as official motto of the EU since 2000.

untiringly, for common principles. International co-operation is only successful when the participants have a certain level of 'education'.

In a *liber amicorum*, a more personal remark is perhaps permitted. Arjen Meij is a European judge highly gifted with these faculties. He not only enjoys these faculties, but stimulates others, in an almost imperceptible way, to develop them as well. I have learned a lot from him, for which I thank him most respectfully.