

Editorial

Highest Courts and Transnational Interaction Introductory and Concluding Remarks

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1. Tendencies and tensions

In a globalising world it can be expected that not only politics becomes more and more world oriented, but also other institutions will have to turn their gaze towards what happens in other countries. One of the hypotheses is that also judges will orientate themselves more and more to what their colleagues abroad do. They want to learn about how they organise their work, but also how they decide certain cases. Of course, in the last century we already experienced an ever expanding domain of international law which in a way necessitated judges to look to their neighbours' decisions. When applying rules of international law there was, and still is, a need to look at decisions in which courts abroad have already applied these rules. This comes as no surprise to those who are acquainted with legal reasoning. When applying a rule and deciding a case, it is an axiom of legal reasoning that this decision has to fit within the legal system. Law is striving towards coherence.¹ This does not only apply to national law but also to international law. When applying international law, critical analysts will ask if there are good reasons for judges to digress from decisions made by judges in other countries in similar cases.

1.1. Coherence: why?

In the past decade there seems to be a growing interest in the question whether there is not only a need for coherence in judicial decision making at the international level, but also at the transnational level. Already a vast number of publications have been produced on this topic.²

Still, there are several important questions which have to be answered. If we do not assume that coherence will be a spontaneous or automatic product of transnational judging, the question is why it is important and how it can be produced.

Looking for reasons behind the striving for coherence one could distinguish between reasons that are external to the legal system itself and internal reasons of law. Important external reasons for coherence are economic factors. It could be prudent for judges to follow up foreign domestic decisions to

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1 See A.M. Hol, 'Internationalisation and Legitimacy of Decisions by the Highest Courts', in S. Muller & M. Loth (eds.), *Highest Courts and the Internationalisation of Law. Challenges and Changes*, 2009, pp. 77-86.

2 I mention Anne-Marie Slaughter's book as an important point of reference: A.M. Slaughter, *A New World Order*, 2004. For the Franco-phon world the following should be mentioned: J. Allard & A. Garapon, *Les juges dans la mondialisation. La nouvelle révolution du droit*, 2005.

prevent the disadvantaged position of their country in international economic competition. Besides economic reasons one could also think of moral reasons or reasons of justice. It is an important principle of morality and justice to treat equals alike. So, it could be for moral reasons or reasons of justice that judges have to decide similar cases alike. Therefore these reasons could be considered as an explanation for a tendency towards coherence. Possibly, one can also find political reasons at the background of such a tendency. Judges might be prepared to follow decisions of foreign domestic courts because this would be politically opportune. An example could be that a country is growing towards political cooperation with some other countries and therefore it might be prudent to decide cases, especially politically sensitive cases, alike. Maybe non-jurists are more readily prepared to look for such external reasons than jurists themselves. Because of their professional attitude judges rather look for internal reasons for coherence. Judges are not politicians, economists, or philosophers. An internal reason to attune to a foreign legal system could be found if a decision of a foreign court is regarded as a better elaboration of a certain general principle of law that is shared by the different domestic legal systems, e.g. the principle of *ne bis in idem*. When domestic courts do borrow legal arguments from foreign courts in this way, it might be that at the transnational level there will be more coherence in law.

1.2. Coherence: why not?

Although it is not difficult to find reasons for striving towards the coherence of law at the transnational level, it is also easy to see why this striving is not self-evident. There are several thresholds. One important threshold is related to the important principles of the rule of law. Judges are bound by the law. This is not the law in general, but national or internal law, not foreign law. This simply results from the principle of sovereignty. By applying foreign law domestic courts would also infringe upon the important principle that they are not allowed to develop new rules. This means that the decisions of foreign courts do not have binding force as far as domestic courts are concerned. Why, then, should one look at these decisions? Is it merely because they underpin the decision of the domestic court, based on domestic law itself? If this is the case, one could ask whether this way of referencing does lead to more coherence at the transnational level. Referencing becomes a matter of ‘cherry-picking’, something that is free of engagement, and without any need to correct incoherencies. This problem is enlarged because of certain limitations in learning from the decisions of foreign courts. There are limitations because of language. Dutch judges are generally able to read German, English, maybe French, Italian and Spanish, but only a few will be able to read Finnish, Japanese, Romanian, or Russian. Besides the language there is a limitation in learning about decisions of foreign courts because of the knowledge of foreign law. To be able to understand decisions of a foreign court one needs a thorough knowledge of the legal system and its practice. Because a judge’s knowledge of foreign law will be limited, therefore again referring to the decisions of foreign courts will be a matter of ‘cherry-picking’ at most. Judges will refer to the decisions of legal systems of which they have a thorough knowledge. Most judges are not experts in foreign law, so, besides the problem of language skills, it will be difficult, if not impossible, to execute a systematic and thorough legal comparison of legal decisions in certain kinds of cases. At most, a judge or court making a legal comparison with or referencing legal decisions of foreign courts will depend on coincidence.³ A last limitation which we would like to mention has to do with dominance. If there is a lack of a systematic approach to foreign law, there will be a possibility that judges will mostly refer to decisions of foreign courts that have a dominant position in the transnational legal order. This could be because of reasons of legal culture, or because of the political dominance of the foreign country. The dominance of a specific foreign court could also be explained by the active role which the court plays at the transnational level, e.g. by publishing its law reports in different languages, organising meetings, chairing meetings, or networking. This might lead to a kind of coherence in transnational legal decision making.

However, two observations must be made here. First, being dominant does not mean that one has the best solutions. Following a dominant court, simply because of its dominance, is no guarantee for a tendency towards a better legal order. Coherence and justice can compete with each other. And this

³ The Judge may have written a thesis on the subject, may have been advised by a law professor who is an expert on a foreign legal system, or may have been active abroad as a lawyer with a foreign law firm.

brings us to the second observation. The notion of coherence leaves room for a certain degree of plurality of legal outcomes, as long as these do fit a general scheme of legal principles. When it is because of a certain dominance that other courts follow a particular foreign court, plurality might disappear, and the transnational legal order will become completely uniform and maybe 'suffer from sameness'. In this context it becomes understandable how well chosen the notion of a judicial dialogue has been. A dialogue presumes the recognition of plurality, a diversity in striving for a certain result, important conditions maybe for a sound development of a legal order, be it a national, international or a transnational order?

2. The research project

These and other questions have been leading aspects in a research project on internationalisation and the highest courts organised and supported by the Hague Institute for the Internationalisation of Law (HiiL) in cooperation with Utrecht University, the University of Cambridge and the University of Bologna. The project was part of a larger project on the same issue.⁴ The results of this project are published in this special volume of the *Utrecht Law Review*. If one goes through the issue, one will discover that most of the questions presented here are also present in the individual papers.

It is possible to group the diverse papers according to the different methodological and disciplinary approaches that were used. In this project legal comparatists, sociologists, political scientists and legal theorists worked together. Some of the papers are of a descriptive nature, in which developments with regard to what we call the judicial dialogue are described and possibly explained. Other papers also pay attention to evaluative questions. Although this cannot be a complete catalogue of questions dealt with, these are the main questions that structured the research project:

Descriptive:

- a. At the surface: Do the highest courts cite each other's decisions? Which courts do so? In what kind of cases? For what reasons?
- b. Beneath the surface: Do judges influence each other? Is there any dialogue between judges? If so, on what kind of issues? In which way is this dialogue organised? Are they networking? How do courts or their representatives take a position in the dialogue? Are there leaders and followers?
- c. Does this all lead to a more coherent transnational legal order?

Evaluative or normative:

- d. Is there a need for the highest courts to refer to each other's decisions? If so, on what ground? Is it legitimate to cite judgments of foreign courts? Do they touch upon the sovereignty of the national political institutions, and can this be justified?

3. Some results and insights

3.1. At the surface: citations and cross-fertilisation

Courts do cite decisions of other courts, but it becomes evident that this observation has to be qualified. As one learns from Gelter and Siems,⁵ cross-citations take place first and foremost between courts of legal systems that demonstrate a strong relationship, e.g. the courts of the common law countries,⁶ and the courts of Germany and Austria on the continent. This seems to imply that courts do not have a systematic approach in citing or comparing decisions of foreign courts. This comes as no surprise, of course. Judges will be reluctant to cite decisions from legal systems they are not familiar with, because of

4 Some major publications are the outcome of the project: S. Muller & M. Loth (eds.), *Highest Courts and the Internationalisation of Law. Challenges and Changes*, 2009; S. Muller & S. Richards (eds.), *Highest Courts and Globalisation*, 2010. See also: <<http://haguehcnetwork.org/about-hhcn/>>.

5 M. Gelter & M. Siems, 'Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations Between Ten of Europe's Highest Courts', 2012 *Utrecht Law Review* 8, no. 2, pp. 88-99).

6 E. Mak, 'Why do Dutch and UK Judges Cite Foreign Law?', 2011 *Cambridge Law Journal* 70, no. 2, pp. 420-450. See also Mak in this issue (E. Mak, 'Reference to Foreign Law in the Supreme Courts of Britain and the Netherlands: Explaining the Development of Judicial Practices', 2012 *Utrecht Law Review* 8, no. 2, pp. 28-29).

a possible misunderstanding. It might be the case that judges have knowledge of foreign law, but given the complexities, this knowledge will be practically restricted to only a few foreign legal systems. And of course there is also the language problem. Dutch judges will be able to read English, German and French. Some also Italian and Spanish, but what about Finnish, Bulgarian, or Russian? As Mak concludes from a series of interviews with justices of the Supreme Court of the United Kingdom:

‘[T]he judges in general conduct research by themselves, i.e. without the help of judicial assistants. Therefore, the selection of this kind of foreign sources seems to be very much dependent on the personal background of the judges, in particular concerning the languages they master and the data they have access to.’⁷

However, it is not only because of practical limitations that courts do not cite decisions of foreign courts. Maybe these could be resolved with some effort by – for example - organising well equipped supporting staff to advise on legal comparisons. Limits of a more principled kind also arise. Most important is that when applying domestic law, there might be a deficit of legitimacy when citing from foreign law. An argument borrowed from a decision of a foreign court could maybe provide support for a decision of the domestic court, but it does not have justificatory force. As Bell puts it:

‘The decision could have been taken without the citation. (...) [T]he foreign citation does carry some weight in such circumstances, but it is as a supportive and not as an independent argument.’⁸

One can imagine that these supportive arguments do have more weight when deduced from decisions of foreign courts that have a certain degree of prestige.⁹

All this does not mean that there are no positive incentives for domestic courts to study the decisions of foreign courts. As we learn from the papers in this issue there are at least two reasons for doing so. The first reason is of a pragmatic nature. The other is of a more principled nature. The pragmatic reason is what Bell calls the ‘usefulness’ of comparative law. There are many situations in which it can be valuable to compare the decisions of foreign courts. One of them concerns a situation in which ‘a social problem may be so widespread that it is desirable to have a harmonised response.’¹⁰ And, searching for such a harmonised response will often be motivated by what Markesinis calls ‘practical commercial necessity.’¹¹ Also the arguments that are set out by Giesen fit within this scheme.¹² In his analysis of so-called wrongful life cases, he shows that also in non-commercial cases it might be ‘useful’ to map out all arguments for and against liability in such cases, and therefore to conduct a comparative survey. Conducting such a survey helps to mirror the national doctrine in the field and it better legitimises the decision because one can show that all relevant arguments have been included and weighed. In this sense, arguments of usefulness do carry some weight. It would be unreasonable to neglect the negative commercial effects of a decision that diverges from a decision of a foreign, or to neglect arguments generated by such courts. Still, the legal force of the arguments is limited. As Giesen puts it, judges can learn a lot from legal comparisons, but at the end of the day it is a ‘political’ decision whether or not a domestic court adopts an argument produced by a foreign court.¹³ A legal comparison can help judges to find arguments, but these arguments do not have justificatory weight.¹⁴

Maybe this is different in the case of principled reasons. Waldron has argued that there are indeed reasons of principle for a domestic court to consider the decisions of foreign courts.¹⁵ According to

7 E. Mak, ‘Reference to Foreign Law in the Supreme Courts of Britain and the Netherlands: Explaining the Development of Judicial Practices’, 2012 *Utrecht Law Review* 8, no. 2, p. 30.

8 John Bell, ‘The Argumentative Status of Foreign Legal Arguments’, 2012 *Utrecht Law Review* 8, no. 2, p. 12.

9 See Mak, *supra* note 7.

10 See Bell, *supra* note 8.

11 As cited by Bell, *supra* note 8.

12 I. Giesen, ‘The Use and Influence of Comparative Law in “Wrongful Life” Cases’, 2012 *Utrecht Law Review* 8, no. 2, pp. 35-54.

13 *Ibid.*

14 Bell, *supra* note 8.

15 J. Waldron, ‘Treating like cases alike in the World: the theoretical basis of the demand for Legal unity’, in S. Muller & S. Richards (eds.),

Waldron there is a ‘demand for consistency’, based on the principle of justice that like cases be treated alike. This seems to be a strong argument. Could one provide sound reasons for limiting the equal treatment principle to cases of the national legal domain only? However, the question is whether the principle has much driving force for studying foreign decisions and making a sound comparison. The problem is how to compare the outcome of cases. It is possible that sound reasons can be given for treating like cases not alike, given the particular arrangements in a legal system. Damages awarded by a Dutch court could be less than those awarded by foreign courts because of the compensation of the system of social security. So, in practice, the application of the principle will be complicated and will therefore have less weight.

These and other reasons analysed in the papers in this issue make it understandable that there are not many indications that domestic courts do compare their decisions with those of foreign courts in a systematic and broad way.

Still, some interesting observations are made showing under which conditions courts are more open to transnational ‘referencing’. As Piana and Guarnieri, and also Lollini suggest, courts in countries with new democracies, such as South Africa and the countries of Central and Eastern Europe, are more open to foreign law than the courts of other countries. These courts do cite the decisions of foreign courts more frequently than other courts do. As suggested by Piana and Guarnieri, when analysing the constitutional courts in these countries, this is because these courts have a kind of legitimacy deficit. Because of the rather problematic status of the legal infrastructure of the regimes before democratisation, there might still be a kind of distrust concerning the courts of these countries.¹⁶ By citing the decisions of foreign courts, especially from the ‘stronger’ states, they can better legitimise their own decisions.

Something similar seems to apply to the constitutional court of South Africa. This country has a constitutional provision explicitly allowing the court to use foreign law in its decision making. Still, this observation has to be put into perspective. The cases heard by the constitutional courts often concern fundamental rights which already have a universal pretension. Therefore in these kinds of cases a comparative approach is more obvious than in other kinds of cases.

3.2. *Underneath the surface: networks*

If one wants to learn about the role that the domestic highest courts play in the development of an international and transnational legal order, one must not only look at citations and arguments that these courts have explicitly borrowed from foreign courts. Except for the common law maybe, most legal cultures have built-in thresholds for courts to refer to the decisions of foreign courts in their judgments. As already explained, this does not mean that judges are not interested in foreign law and do not have incentives to study it. That judges indeed have a growing interest in how their colleagues abroad think about all kinds of issues related to legal decision making becomes clear when one also looks at judicial networks. One can observe that the number of such networks is increasing. This applies especially to those regions where judges do have special incentives to ‘network’, as in the European Union where judges from the different member states have an interest in developing a common understanding with regard to European law. Claes and de Visser make an interesting conceptual and descriptive analysis of these European networks in Europe.¹⁷ The development of networks which they observe makes them even speak of a paradigm shift. It is no longer merely in a hierarchical way that legal development in Europe is coordinated by, say, the decisions of the European Court of Justice, which are applied in a top-down way by the highest national courts. Because of the rise of strong networks it is increasingly in a horizontal setting that legal decision making by adjudication is shaped. The networks they describe are of a virtual nature or are centred on face to face meetings. The aims of the different networks also vary. Some concentrate on learning about the law of other European countries. Others aim at sharing practical experiences and promoting the exchange of ideas related to institutional issues. In all cases, the networks have the general aim to promote and develop a common legal culture.

Highest Courts and Globalisation, 2010, pp. 99-114.

16 D. Piana & C. Guarnieri, ‘Bringing the Outside inside. Macro and Micro Factors to Put the Dialogue among Highest Courts into its Right Context’, 2012 *Utrecht Law Review* 8, no. 2, pp. 139-157. A. Lollini, ‘The South African Constitutional Court Experience: Reasoning Patterns Based on Foreign Law’, 2012 *Utrecht Law Review* 8, no. 2, pp. 55-87.

17 M. Claes & M. de Visser, ‘Are Networked Yet? On Dialogues in European Judicial Networks’, 2012 *Utrecht Law Review* 8, no. 2, pp. 100-114.

The incentives for judges to participate also vary. In some cases there is a strong and direct incentive to participate in a network, because applying European law requires cooperation between the courts of different countries. This is for example the case with the execution of international mutual legal assistance and the implementation of extradition requests. To promote cooperation on this issue Eurojust has been established. Judges working in the domain of civil and commercial law will also have a strong incentive to cooperate with each other, because of the often international or transnational character of commerce itself. One does not exaggerate when one says that, because of internationalisation, judges have to participate in networks if they still want to be able to do their job properly. One recognises one of the pragmatic arguments we discussed above. There are also other kinds of incentives to participate in networks. Courts or their representatives can, for example, have strategic reasons to join a network. Claes and de Visser refer to courts that have a good reputation in the domestic legal order and want to export its practices and ideas to other domestic legal orders. There might also be courts, especially those in countries that are in transition, which want to participate in order to show that they support the ideals of the rule of law, and in this way hope to strengthen their legitimacy. The argument is analogous to the observation we made above with regard to Central and Eastern European courts.

3.2.1. Leadership

This brings us to the question of how a transnational legal order is in fact produced. As said, it would be naïve to think that such an order is produced in a spontaneous or automatic way. The analysis by Claes and de Visser already gives an indication that in the field of transnational legal development this might be partly a matter of leadership. And, as is reasoned by Huls, showing leadership at the national level implies that courts play a leading role at the transnational level.¹⁸ Network analysis shows that certain courts do indeed take the lead,¹⁹ and even individual judges can play a leading role, especially in the highly specialised domains of the law. This is what we can learn from the network analyses by Lazega. Although Lazega is reluctant to make strong conclusions, his analysis of the network of patent judges shows that there is a strong variance in the efforts that individual judges put into relationships with their colleagues, and so can have a leading role in legal development.²⁰ The coordination of legal development seems to be bound to leadership, be it of courts or individual judges.

3.3. Evaluation

With regard to the evaluative or normative questions, most has already been said. There are at least three kinds of reasons for transnational adjudication. The first reason is that law inherently strives towards coherence. Incoherent law is a contradiction *in terminus*. This means that when judges do increasingly look towards foreign law, the internal legal principle of coherence not only relates to the national legal system, but also to the transnational legal order. In fact, the notion of a legal order assumes 'coherence'; otherwise one could not speak of an 'order'. The second kind of reasons is what Bell calls the reasons of usefulness. These reasons refer to all kinds of arguments that are external to the legal system, be it economic, political or cultural reasons. The third kind of reasons we could call reasons of justice.

The reason of fairness or equal treatment, as already discussed above, is such a reason. The protection of democracy, as set out by Benvenisti and Downs, could also be mentioned.²¹ In their analysis Benvenisti and Downs pay attention to the role of national courts 'to impede the dilution of the democratic controls of government to which judicial deference to the government's dominance of the international policy sphere can easily lead.' They also indicate that to be able to fulfil such a task in an internationalising era, the courts begin to forge coalitions across national boundaries.

Although there are both pragmatic and principled reasons for transnational adjudication, as we can learn from the papers in this research project, this does not lead to the conclusion that courts should or

18 N. Huls, 'The Ebb and Flow of Judicial Leadership in the Netherlands', 2012 *Utrecht Law Review* 8, no. 2, pp. 129-138.

19 For this the analysis by Gelter and Siems in this issue might also be interesting (M. Gelter & M. Siems, 'Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations Between Ten of Europe's Highest Courts', 2012 *Utrecht Law Review* 8, no. 2, pp. 88-99).

20 E. Lazega, 'Mapping Judicial Dialogue across National Borders: An Exploratory Network Study of Learning from Lobbying among European Intellectual Property Judges', 2012 *Utrecht Law Review* 8, no. 2, pp. 115-128.

21 E. Benvenisti & G. Downs, 'The Democratizing Effects of Transjudicial Coordination', 2012 *Utrecht Law Review* 8, no. 2, pp. 158-171.

even are obliged to borrow arguments from each other in their reasoned decisions. Because of all kinds of differences between national legal systems a simple transplantation of arguments is not possible. This is not only because of internal legal reasons that oblige judges to apply national or international law only. It is also because there is always a certain space or gap between the argumentation of the foreign court that has to be bridged to be fit to be applied in a case to be decided by the domestic court. Neither reasons of coherence, or justice, nor pragmatic reasons can be specified in such a way that they could determine the outcome of an individual case. Therefore judges are still reluctant to integrate arguments of foreign courts in their decisions.²²

4. Dialogue

Therefore the notion of judicial dialogue still seems to best describe what is happening, and maybe also what should happen, at the transnational level. This is because the notion of a dialogue leaves space for a kind of autonomy of the courts, while at the same time it makes clear that there is a need for discourse. Although there is no immediate need to attune one's actions, one admits that one cannot neglect what others are doing. This seems to be the condition of judicial dialogue, which is indeed a dialogue because the communication between judges is in a way free of any obligation. Still, a dialogue is not merely an incidental circumstance. Engaging in dialogue is essential for building one's own identity, learning where one stands and finding recognition for oneself. This is exactly the case with courts at the transnational level. In an internationalising world, domestic courts are urged to reflect on the identity of their national legal system by comparing it to foreign law. They may also feel the need to persuade other courts to borrow their arguments, and so to ask for recognition. This all presumes that one enters into a dialogue with an open mind. One has to be prepared to learn from the other party. In this way, a dialogue differs from a monologue and assumes mutual respect between the parties involved therein. Here one recognises one of the traits of networks: they promote a horizontal way of decision making, not a hierarchical one. In the long run, a dialogue will bring parties closer together. Their acts or decisions will become more coherent, or will fit better in a more or less coherent scheme. Thus, coherence is not produced by force, nor by ruling, but by and in dialogue, although this is not a simple process. As stated by Lazega:

'Dialogue and collective learning do not, by themselves, lead to convergence towards a uniform position in these controversies. For example, on average, opinion leaders in this group have different positions from most judges with respect to several issues. In particular, opinion leaders, even if they increase transparency by referring to decisions of foreign courts, are not *always* considered by their peers to be closest to a future EU uniform position. Dialogue across borders does not mechanically create consensus.'²³

22 See Bell, *supra* note 8, Giesen, *supra* note 12, and Mak, *supra* note 7.

23 Lazega, *supra* note 20, p. 125.