

Special issue of the Utrecht Law Review Adjudication in a globalizing context

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Introduction

Globalization from a European perspective started with Portugal's travel and trade links with India, Indonesia, China, Japan and Latin America, followed by the Netherlands, Spain and England, along with the colonization of North America. It is a perspective with a 600-year history, if not more. New, however, is that the internationalization of production, trade, travel, migration and marriage have intensified and grown so quickly in size and speed that it is no longer possible to rely on one national jurisdiction in order to have legal certainty. Between states there is a growing grid of treaty-based rules to address the need for legal certainty in international relations concerning production, trade, animal protection, family affairs, crime etc. In order to have these rules legitimately enforced and applied, adjudication based on the rule of law is a necessity. This comprises the entire spectrum of national judicial organizations, judges, courts, judicial administration, court administration and public prosecutions offices, along with supranational courts such as the European Court for Human Rights and the international criminal courts.

Judicial administration traditionally involves the preparation and organization of court hearings, but also the development and application of judicial policies on operating rules of procedure and, for certain categories of cases, policies on the content of judgments. For the international dimension the exchange of views and opinions of judges over national borders can be added to that, not necessarily limited to judges of the supreme courts.¹ Judges from the British Commonwealth meet from time to time, Councils for the Judiciary² and Councils of State in Europe have founded international associations,³ and slowly an entire infrastructure for the transborder cooperation of judges and judiciaries emerges.

Court administration comprises the management and organization of the courts, and all that is associated with these tasks, closely related to the administration of justice. The relation between courts and the other state powers take shape in financial arrangements for court organizations and are essential for safeguarding judicial independence.⁴ Also in this domain, an

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1 Bas de Gaay Fortman, in: "'Adventurous" judgments, a comparative exploration into human rights as a moral-political force in judicial law development', 2006 *Utrecht Law Review* 2, pp. 22-43, also hinted at this development.

2 The European Network Councils for the Judiciary, see <http://www.ency.net/>

3 Association of the Councils of State and of the Supreme Administrative Jurisdictions of the European Union, see http://www.juradmin.eu/en/home_en.html

4 For a comparison between the development of court administration in Eastern Europe and in the USA, see Markus B. Zimmer, 'Judicial Independence in Central and East Europe: the Institutional Context' 2006 *Tulsa Journal of Comparative & International Law*, pp. 53-85.

international infrastructure comes to life.⁵ Court administrators' tasks are to manage the court organization. Given the increasing complexity of the law and of adjudication, an efficiently functioning court organization is fundamental to adjudication.

For these subjects, there are four points of attention.

- First, the apparent universality of values associated with adjudication. However, their elaboration in court procedure and application in court management are to be considered as major efforts, for which positive outcomes from the perspectives of societal peace and of legal certainty are not self-evident.
- Second, the differences between the North and the South, to use the metaphor developed by De Sousa Santos, and the dominance of European and Anglo-American solutions for local problems in the South.⁶ This applies to adjudication as well as to judicial & court administration, and relates to the subjects of transborder legal transplants and negligence of local habits, values and views – and the risks of failure accordingly.
- Third, judges, also apart from the international legal frameworks, are developing an international framework of interpretation, at least where it comes to the application of constitutional rights.
- Fourth, the apparent importance of organizational development separate from *and* connected to ICTs, related to court performance measurement and organizational quality management, transparency of court proceedings and of court organizations, automated court registries and case management by means of ICTs. From a juridical perspective a most important aspect of organization is the publicly accessible databases of jurisprudence – for the transborder exchange of case law and judicial reasoning, but also for judicial administration in general.

Values in adjudication, judicial administration and court administration

Values addressed by authors are related to adjudication in general, and to values that are so fundamental to procedure that they may be exported to a terrain which is quite different from adjudication.

Jonathan Soeharno asks how the concept of judicial integrity should be understood. Via an exposé on miscarriages of justice he refers to judges as persons and to formal measures to safeguard judicial integrity. Meanwhile he concludes that in the public debate on 'judicial integrity' the term is used rather freely. He positions judicial integrity in the public realm both as an aspect of the rule of law and as an aspect of democratic legitimacy. He perceives it as existing between the ethics of a professional and the external accountability of the organization, but shows the difference between England & Wales and the Netherlands in this respect, as in England & Wales the professional person of the judge seems to be the bearer of integrity, whereas in the Netherlands it is much more the office and not the office holder. According to Soeharno, the perspectives of the office and on the office holder are relevant in debates on judicial integrity.

⁵ The International Association for Court Administration, see www.iaca.ws

⁶ B. De Sousa Santos, 'Three metaphors for a New Conception of Law: The Frontier, The Baroque and the South', 1995 *Law and Society Review*, pp. 569-584; also: 'The process of globalization', *Eurozine*, www.eurozine.com, 22 August 2002, pp.1-45.

Mireille Hildebrandt and Serge Gutwirth have taken an entirely different approach to the enlargement of the domain of values related to the domain of adjudication, as they intend to export the values related to a fair trial to the domain of participatory Technology Assessment (pTA). Participatory Technology Assessment is a way of giving citizens (as distinctive concerned ‘publics’) a say in the development and implementation of new technologies of different kinds (e.g. genetic modification of plants). The issue is directly related to questions of representation and of representative democracy. PTA, however, should not be confused with opinion polls, as it stands for an interactive process in which citizens reconstruct their views while building up a specific expertise. The elaboration of the concept of fair trial in this non-judicial context focuses on common sense as an asset, demonstrating that what the authors call ‘stakeholder myths’ about the general public are not true. Organizing concerned publics in groups that develop an informed view on a specific technology may effectively use the same rules as are used in a jury trial. Hence they introduce the term ‘pTA juries’. In order to make pTA juries effective, the different principles governing the fair trial are to be transferred into that specific context: the principle of immediacy (everybody present), equality of arms, contradictory proceedings, external publicness (transparency), the delay and hesitation inherent in the suspension of judgement, and the triangulation of the proceedings (parties and the impartial and independent judge). Thus pTA juries may come up with a sound advice for decision makers, not a binding judgement. Also in a representative democracy the involvement of pTA juries may contribute to the democratic process, because they present the concerns of a public, based on common sense. In that way they are not representing the general public, but they contribute to the public debate with an informed advice. For that reason the authors also favour lay participation in the courts’ professional context.

The values described – judicial integrity and fair trial – are basic values from a Western perspective. The self-evidence they have in economically thriving countries contradicts the societal contexts where personal and economic survival forces also participants in adjudication to be quite discriminating when it comes to the fairness of proceedings, by offering and accepting bribes. Exporting fairness from the North into domains different from adjudication in those contexts may be far-fetched dreams. But if these values can only be very wearily exported to adjudication in the South, then maybe fairness in other public domains in the South than the judicial should develop nonetheless first in order to enable the judicial domains to transform themselves into the so much desired Islands of Moral Integrity.

Apparent differences between the North and the South and the international framework of judicial interpretation

Richard Mohr addresses the globalization of human rights and trade law by referring to ‘the West’ as an empire, which stimulates the systematization, unification and internationalization of the law. But even this globalizing perspective is in need of local applications and solutions, also when these local legal frameworks are based on traditions very different from Western ‘global’ values. International Financial Institutions like the World Bank and the IMF play an important role as carriers of these global values while offering aid in law reform and court reform. But teams of lawyers offering ‘aid’ are often carrying home-made law with them. The legal transplants that result from this may look attractive from an international trade perspective. However, not addressing the local situation, needs and habits will be a recipe for failure, as the case of the Indonesian Special Commercial Court shows. But doing so may work, according to the Venezue-

lan case. The actual explanation for the success or failure of law reform or court reform programmes is much more complex, as it is the result of complex interactions between local interests and pressure groups, national governments and international companies and financial institutions.

Andrea Lollini demonstrates the development of constitutional law by means of an interpretation based on borrowing judgments from foreign courts. This is especially the case in South Africa where the Supreme Court is constitutionally empowered to take foreign law into consideration. Also other supreme courts and their judges have entered into international dialogue, actually applying comparative law in legal interpretation. Lollini enquires into the methodology involved: when to borrow from abroad, from which legal system, how to check relevance & compatibility, and how to check the supposed similarities of meaning between a foreign legal solution and the legal context of the comparing court. He makes a distinction between probative interpretation and probative importation and shows the risk of the latter for too direct a judicial teleology. Logically, he fosters probative interpretation in the form of dialogue between supreme courts, where partners in the dialogue may be chosen for historical and cultural reasons. Each supreme court may thus build an archipelago of foreign sources for interpreting rights in the context of their own legal system. He considers this as a step in a bottom-up approach of juridical globalization.

For our perspective the relations between the North and the South necessitate an interactive recognition of the particular properties of states and the culture of countries in the South. Lollini's imagery of a supreme court adjudicating by means of interactions with their own *archipelago* of foreign supreme courts fits in well with this. Mohr's description seems to fit the circumstances of the peripheral South: sometimes you win, sometimes you lose, depending on the durability of newly established settings of interactions in organizing courts, whereas it is a matter of fact that the usefulness of newly established institutions – like the Indonesian commercial court – is not at all self-evident.

Interaction with parties and the general public, organization development as quality management, with and without ICTs

The position of courts between law and society – citizens – needs our full attention as courts are not only institutions where judges hear cases and pronounce judgments in cases brought before them, but also organizations that are part of the state and relate to society. This position necessitates strategic management for the courts in order to combine their adjudicative, legitimizing and rights-preserving functions. But, at the same time, it makes monitoring and management of the organizational functioning necessary. This is not new from a public administration perspective as the New Public Management has affected other public sector organizations in a similar way. Governments and worldwide institutions like the World Bank seek to improve the functioning of courts as a matter of efficiency and timeliness, but also as a means to guarantee legal certainty.

ICT also in the meaning of office automation and relations to the public have had a large impact on court organizations, as it may enhance the accuracy of court functioning. ICTs also facilitate interactions between the courts, the public and repeat-players, but the development of new applications, like on-line proceedings and case (flow) management systems and having new applications implemented need special organizational and managerial skills, strong enough to relate day-to-day decisions to strategic management perspectives. Information management relating to questions concerning what information is generally public, and what information must

be withheld from public accessibility, either as a right of third persons to privacy, for organizational reasons, or due to other aspects, have become important questions.

We have five contributions addressing these issues in a variety of ways:

Marc Loth and Elaine Mak describe the quantitative and qualitative changes in the judicial domain, with the Netherlands as their main case. They start from two different paradigms:

1. The quantitative or descriptive paradigm: the judicial system's domain is approached as the scope and demarcation of the judge's work terrain, both in numbers of cases as well as types of cases; this is closely related to the vision that the function of the judicial system is to solve conflicts that cannot be solved otherwise.
2. The qualitative or normative paradigm: the judicial system is seen as a necessary result of political decision-making in society and an indispensable link in the political debate. The judicial system has in this communal idea – above its conflict-solving function – a community-forming function, through its contribution to the development of public values and with that to the self-image of a political society. The freedom of citizens is not confined to the private sphere or the free market but exists in the self-realization of the individual citizen in that political community.

For the quantitative paradigm, comparing the Netherlands with the USA, they conclude that where the Dutch judicial domain is expanding, the American judicial domain is decreasing. They explain this decrease by, among other things, the effects of government policies, shifts of jurisdiction to international courts, and the development of alternative ways for dealing with conflicts. They describe the enlargement of the Dutch judicial domain in qualitative terms like international and supranational domain enlargement, reinforcements of the judiciary in its relation to other state powers, improvements in domain management, enhanced court capacity and a growing demand for judicial services. Their conclusions are based on the view that the legitimacy of the legal system is also based on the visibility of the courts in conflict resolution and law enforcement. Societal involvement of the courts and the judiciary in organizational and communicative ways is a necessity, and this normatively limits policies for the dejudicialization of bulk cases like divorces and traffic offences, as there is an inherent risk that defence rights may be lost.

Conceição Gomes describes the development of adjudication in Portugal and the policy efforts to respond to these changes. The major problems are the lack of the courts' responsiveness to societal developments, the concentration of the population in the coastal region between Lisbon and Porto, the consequent increase in the demand for justice for that reason and the decrease in the demand elsewhere in the country, and the dominance of mass-litigation in the courts in the area with the fastest-growing economic development. This is at the detriment of accessibility to the courts in complex cases. Another important issue is the tardiness of judicial proceedings, and the lack of (organizational) differentiation between different kinds of proceedings. She discusses the way out of this deficiency of justice and argues that a distinction between real conflicts and other reasons to litigate, like debt collection, should form the basis of the policies under development, also in combination with stimulating alternative dispute resolution. Furthermore, she asserts the need for quality management, a reinforcement of the management of the Portuguese judicial system and the development of ICT. She stresses that the current Portuguese justice reform is a *sine qua non* for the realization of the right to have access to justice.

Richard Schauffler addresses the issue of court performance measurement, also from the perspective of the interrelatedness of global developments and local court reform and management. After describing the variation in judicial infrastructures in American states (state judicial organizations, locally organized courts), he focuses on court performance measurement as a tool which is directly related to New Public Management. The Trial Court Performance Standards were instrumental to that goal, but failed, as they were too complex and there was not enough support either from the political domain or within the courts. Also from within the courts there was reluctance to adopt and apply these standards. Innovating the TCPS and transforming them into Court Tools, a much more simple set of performance standards, has been piloted in five American states. He summarizes the experiences with this evaluation system and especially discusses the difficulties concerning the interpretation of outcomes of performance measurement with regard to the ratings of access and fairness, and employee satisfaction. Court management is learning how to use this information, but lacks continuity and professionalism. For Schauffler this set of instruments contributes to the transparency and public accountability of courts, and will strengthen the courts not only as an organization but also as the spenders of public money.

Marco Velicogna provides us with an inventory of ICT applications in justice organizations in European countries. He describes an important change in vision. Policy makers have considered ICT in court organisations as a means to enhance efficiency. But the development and implementation of ICT applications in the public domain, and especially in the field of justice has appeared to be of a highly complex nature. The development and implementation of new ICTs in judicial organizations are always late, and also prone to complete failure. As a consequence, policy-makers have learned that new ICTs are not only tools for innovation. Problems related to ICT innovations – risks – are that ICT solutions should match the complexities of proceedings within court organizations. An important factor is also that the adoption of new applications by the persons working in the courts is not self-evident. An important phenomenon is also that old applications dominate the routines in court organizations. Innovation usually has to be built on the legacy systems and demand a new learning and adaptation process, which may be at the cost of production. In that sense existing applications may be an obstacle to innovation.

Wim Voermans considers access to the information of courts, also from the point of view of the courts' transparency and the accountabilities to which they are bound from a comparative perspective. He describes the differences between several European countries and the USA concerning the right of access to court information, as well as the different modalities of the openness of court documents. A basic distinction is whether there is a special freedom of information regime for courts or whether courts are part of the general freedom of information regulations.

The right to information for the general public is in general balanced against the right of privacy of persons other than the general public. Especially most juvenile and family matters are heard behind closed doors. More intrusive forms of publicity than physical access to court hearings, like TV cameras in court, are restricted everywhere by court rules. These rules provide discretion to the judges hearing the cases whether to give access to TV cameras. Also reports and judgments must be published in many countries, but with the limitation that the names of the parties and witnesses are generally concealed.

Next to access to information, courts also generally provide information of their own accord; this is to be seen as part of a strategy which entails that the courts maintain contact with the general public. Voermans argues that passive and active transparency are a *sine qua non* for

court legitimacy, but does not speculate as to other factors sufficiently *resulting in* the courts' legitimacy.

In conclusion

The developments described in this special issue are not restricted to one country, or to one region. Adjudication is undergoing rapid changes as a result of globalization, but also because major institutions like the IMF and the World Bank foster policies for improving court functioning, judicial quality and integrity. As a result, the law, but also the courts and judicial organizations, have to adapt. Adjudication needs strategic management in order to be able to respond to societal and technological developments; courts and judicial organizations also need to adapt for the same reason. As a result, adjudication and judicial organization have become participants in local, national and global processes of change. Judges and court management will, as a result, have to live up to increasing demands and pressures for juridical and organizational development. Judges and courts need to demonstrate that they can fulfil their societal roles in an infinitely enlarged environment: The World.