

Newsletter n°29/ 2014

Concluding Remarks By Geert Corstens

Colloquium of the Network of the Presidents of the Supreme Judicial Courts of the European Union Rome, 13 June 2014, Corte di Cassazione

Editorial

President Geert J.M. Corstens

At the invitation of First President Giorgio Santacroce, the Network held a meeting of its General Assembly and its Colloquium in Rome last June. The General Assembly unanimously decided to elect as Board members Mmes Susan Denham (Ireland), Pauliine Koskelo (Finland), Bettina Limperg (Germany) and Livia Doina Stanciu (Romania) and Messrs Lasar Gruev (Bulgaria), Giorgio Santacroce (Italy), António Silva Henriques Gaspar (Portugal), Branko Hrvatin (Croatia) and Priit Pikamäe (Estonia). It also elected by acclamation Ms Susan Dehnam as President of the Network, with effect from 1 January 2015.

As to the Colloquium, following General Reports on 'Relations between the Supreme Court and the lower courts?' presented by First Presidents Vincent Lamanda (France) and Giorgio Santacroce (Italy), Presidents António Silva Henriques Gaspar (Portugal) and Branko Hrvatin (Croatia), presented their views and led the discussion. The concluding remarks I made are reproduced below

On the occasion of my last editorial, I would like to express my deep gratitude to all my colleagues for their help during my term of office. I am particularly pleased that a larger number of colleagues have participated in our work. During the last two years, the Network has increased contact with the two European Courts. The common portal of case law has been improved, despite the major restructuring of databases and pending the introduction of a new more sophisticated translation tool. The judges exchange program between supreme courts continues to receive much attention. The Board's decision to introduce the possibility to exchange information among small groups within supreme courts received an initial positive response from the Supreme Courts of Germany, Finland, France, the Netherlands and the Czech Republic. I welcome the support of the Secretariat under the direction of Mr. Dominique Hascher.

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By Geert Corstens, President of the Network

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The choice of **relations between the supreme courts and lower courts** was an excellent one. It is a subject that concerns each and every one of us.

In our countries, the judiciary is structured like a pyramid: the base is broad and the apex narrow. However, it is the same as with pizza: if the base is no good, the pizza will not be enjoyable. It is rare, if not extremely rare, for citizens to come face to face with judges. But when they do, it is always initially with a judge at first instance. And hopefully the judge at first instance will win the trust of the citizen involved in the proceedings. It is perhaps the only time in her life that she will meet a judge. It is therefore of the utmost importance for that first judge to perform well and render a well-reasoned judgment that convinces that citizen. In the words of the former President of the Supreme Court of Israel, Mr Aharon Barak: what is most important is that even those who do not get a favourable ruling from the judge should agree that the judge treated them fairly, listened to them and heard their arguments. In that case, the judge was convincing, notwithstanding the fact that one of the parties suffered a defeat. I do not say this to minimise the roles of the supreme judge and the appeal judges, but merely to stress the importance of a legal system that works properly in all courts. A supreme court which is excellent but which, in the majority of cases, is faced with judgments from appeal courts and courts at first instance that are poorly reasoned, disregard the law and jurisprudence, and show a lack of doctrinal knowledge, is out of place.

As the Dutch saying goes, it is like having a pretty flag on a dredging boat. I believe that this idea also underpins the report by our colleague Giorgio Santacroce. Turning to the reports submitted by our colleagues, Vincent Lamanda, Giorgio Santacroce and Henriques Gaspar, and the debates that followed, I shall attempt to draw some conclusions.

1. Supreme courts should approach their role at the apex in a modern way, that is to say they can no longer content themselves with merely making rulings. This was eloquently underlined by our colleague Mr Lamanda in the following terms: 'Indeed, the times when the supreme courts, heirs to the sovereign courts of medieval times, could remain in splendid isolation, imposing their decisions with no particular regard for those on the receiving end, seem very far away?'. And: 'Supreme courts can no longer content themselves with making rulings. They can no longer simply hand down sentences, demonstrate their authority and impose from above the solutions they adopt and the decisions they deliver.'

2. There is a difference between common law supreme courts on the one hand, and 'let us say' continental supreme courts on the other. The former can be seen as having a normative function, whereas the latter also have a more disciplinary role. These differences are reflected in the very different number of cases.

3. We can see however that there is also a certain amount of convergence between the supreme courts in the two models:

accelerated procedures, systems for non-admission of appeals, systems for filtering by lawyers.

Behind these procedures lies the overburdening of the courts. Such convergence might well lead to the prioritising of the normative role. Courts that have not yet found solutions to the problem of overburdening can take advice from their colleagues from courts that already have solutions in place. I also note that some colleagues recommend introducing a system of specialised lawyers.

4. In a small number of States today there is a tendency to involve the Supreme Court before proceedings have been completed at the level of the appeal courts or courts of first instance, in connection with opinions and preliminary questions already addressed in the judicial system of the European Union (Art. 267 TFEU). This tendency reflects the desire of our citizens and trial judges to have greater security as quickly as possible. We have learnt that sometimes there is a tension with the 'trias politica' principle if the Supreme Court is requested to make a ruling in abstracto.

5. There is no denying that differences exist in respect of precedent. It is also what we see from reading the reports of our colleagues Lamanda and Santacroce. First instance and appeal judges are sometimes authorised to go against Supreme Court case law. Such defiance should not always be looked on with disfavour. Divergent decisions can be the source of innovation.

6. Courts of cassation encounter difficulties when the decision of an appeal court or a court of first instance is based

on the facts and the cassation judge is ill at ease with the decision. Strict application of the cassation system can make it impossible for him to intervene even when the trial judge's decision is considered weak and unfair. Some courts of cassation nevertheless intervene, considering that the obligation of the trial judge to state the reasons for the decision has not been sufficiently fulfilled.

7. Models for organising relations between the appeal courts and the courts of first instance differ from one country to another. There are also differences in the relations between the ministry of justice and the judicial council (if it exists). Sometimes, the president of the supreme court and the president of the council share the same identity.

8. In a State under the rule of law, there is no single authority that has the last word. It is not the legislator that decides everything. Nor is it the executive power which is always ultimately the overriding authority. The judge is called upon to rule on a question of statutory interpretation or practice. The legislator can then adapt the law and the executive can change the implementation of the law. Subsequently, however, the judge may once again be asked to intervene in order to express an opinion on the new law and practice. The dialogue between the State authorities is constantly ongoing.

9. The same phenomenon occurs in relations with trial judges. It is a never-ending daily spiral. Dialogue between judges is constant. This is also true of relations with our European judges.

Agenda ?The Relations between the Supreme Courts and the Lower Courts?

Welcome speeches:

Mr. Giorgio Santacroce, *First President of the Supreme Court of Cassation of Italy*

Mr Michele Vietti, *Vice-President of the Italian Superior Council for the Judiciary*

Chairman:

Mr. Geert Corstens, *President of the Supreme Court of the Netherlands*

Introductory Report:

Mr. Vincent Lamanda, *First President of the Cour de Cassation of France*

Points of view:

Mr. Giorgio Santacroce, *First President of the Supreme Court of cassation of Italy*

Points of view:

Mr. António Silva Henriques Gaspar *president of the Supreme Court of Portugal*

Discussions

Moderator: Mr. António Silva Henriques Gaspar *president of the Supreme Court of Portugal*

Discussions

Moderator: Mr. Branko Hrvatin, *President of the Supreme Court of the Republic of Croatia*

Concluding remarks:

Mr. Geert Corstens, *President of the Supreme Court of the Netherlands*

Attached file:

[Newsletter n°29/ 2014.pdf](#)[1]

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