KEYNOTE ADDRESS CONFERENCE DISSENSUS OVER LIBERAL DEMOCRACY

European judges, civil society organisations and dissensus: solidarities, strategies, and silver linings

Brussels, 20 October 2023- John Morijn (Princeton/Groningen)

Dear judges, Dear colleagues, Dear friends,
I'm delighted to be here– tonight's topic lends itself well to be discussed in Europe's capital.
This event marks the end of the FNR project on "judicial resistances" led by Prof. Ramona Coman and Leonardo Puleo.

It is also part of the GEM-Diamond Project and the beginning of the project on "Activism as a modality of resistance and communication? Comparing judicial activism across Eastern Europe" led by Prof. Agnieszka Kubal and co-organised by Prof. Birgit Apitzsch.

Let me start by thanking all four very much for their work in this area, and the opportunity to speak.
I will put my cards on the table: I am going to put myself in a risky position.

My aim here is to offer a characterisation and an interpretation of how European judges and civil society organisations have been and are still facing off dissensus over liberal democracy.
In particular, based on my own observations and contacts with many European judges, I want to make sense of the different formal and informal routes they, and those who support them, have available to them to protect the rule of law, and which they have used over the last years.
I want to talk about the interplay of these avenues, some of the strategies that seem to underlie these actions and situate that in the broader picture of protecting liberal democracy in Europe.
And I want to suggest some of the implications this may have in the longer term, including – of course – some silver linings in the colours of the Polish flag.

So here is why I am nervous: I realise that, given the audience, you may feel that I just announce that I came to explain the rules and tactics of football to Johan Cruyff
But, and perhaps this is not so well known, Johan Cruyff was also a celebrated philosopher.
He once said: Je gaat het pas zien als je het doorhebt.
Which loosely translates to: you only start seeing once you truly grasp how and where to look?
I will offer some thoughts on how and where to look, a perspective on how relevant and spectacularly courageous it is what European judges are doing given their institutional position in the trias politica, and how embeddedness in the European legal order plays a central role.

Here is my starting point: the key-explainer for what we have seen over the last five years is that independent judges at every level have realised that their **independence risks becoming** – yes – **dependent**; dependent on forces external to the judiciary, inside or outside their own countries.

This dependency directly affects the capacity of all European judges to act in line with their oath to uphold the law, which is a general imperative for European society at large.
In that light I want to put two arguments to you

First: the formal and informal **actions** that European judges take in protection of their independence **are reactive, not proactive; defensive, not offensive; and judicial, not political**
This is <u>not</u> judicial activism or political opposition: it is **judges being true magistrates.**
Second: pan-European **solidarity** is vital for judges most under pressure & those who support them
It is not just that there is comfort in numbers when you feel vulnerable in your corner of the trias politica, particularly in a world of polarising politics where it seems increasingly rare for a politician to simply say: "the judge has spoken, so whether I agree or disagree, I respect the ruling".
But **solidarity**, acting together and supporting each other within the judiciary and from outside, such as academia **also powerfully signifies a simple factual and unshakeable reality of today's Europe: deep professional, economic, cultural, societal, and legal connectedness.**

To set the scene, allow me to start in an unconventional way.
Close your eyes and forget for a moment where we are.
Imagine you are one of these whip-smart students in a classroom at some famous US university.
You are following your favourite class, constitutional law.
Today's discussion is about separation of power and the trias politica.
The focus then turns away from the US to a continent where citizens cooperate extremely closely and are economically and societally intertwined- more deeply than any populations in history.
Their leaders have set up an intricate international and supranational infrastructure to support this.
The evident advantages of cross-border realities can be pointed out on a daily basis for anyone.

Then your professor puts forward a problem-question
Imagine the newly elected government of one member state takes control of the executive and legislative, gradually puts pressure on the domestic judiciary to further cancel checks and balances & announces that it will not follow judgments of international and supranational judges.
The effects of these politics are soon felt in other states and by their businesses and populations.
In that scenario, and taking the separation of power as a starting point, which actors in the other states and which international and supranational actors would you expect to act? What would be the respective limitations and strengths of each trias power to do so?
Think about that for a moment.

You can open your eyes- welcome back to Brussels!
You will of course have intuitively formulated the correct answer.
Indeed, the most obvious actors to step up are the legislative and executive, both in the other Member States and at the international and supranational level
After all, they are elected and equipped to act proactively and comprehensively.
And the stakes are so high that they should feel urgently compelled to confront the rogue State in timely fashion, if need to be going to court consistently to enforce what has been agreed.

However, this is not our reality in the EU today.
Indeed, the current situation is that determined and consequential protective action by the most obvious actors has been very limited, partial, and delayed.
This leaves judges exposed.
It determines the context in which they were and still are forced to act, mostly on their own, in defence of their own and each other's independence.
This is the starting point of our seeing-is-grasping-how-and-where-to-look analysis.
National judges in Europe work both in a domestic, and international and supranational hierarchy
While connecting these two levels, you might expect there are just two relevant directions and dynamics of judicial interaction: top-down and bottom-up.
But I would suggest to you that, in confronting dissensus over liberal democracy, there are actually **four** formal axes of interactions to consider separately: top-bottom, bottom-bottom, top-top and bottom-top. This last axis, **bottom-top, has a double character and significance**.

I will now go through each of these five, discuss how they are connected & reinforce each other and how the formal interactions led to informal, solidarity-based actions – and the other way around.
It is a spectacular story of pushing back against domestic executive and legislative threats to liberal democracy in a coordinated fashion.

The **first** axis of judicial interaction to face dissensus is **bottom-top.**
A well-known, but **really** crucial aspect of the EU construct is that all judges serving in EU Member States are not only **European** judges in a territorial sense, but also in a legal sense.
When a case they have to decide has an EU law aspect, and they are uncertain about the interpretation to be given to EU law or EU law case law, they can and sometimes must refer a question for preliminary ruling to the Luxembourg Court
Independent judges used this route to clarify implications of dissensus in Poland.
They asked, for example, what should I do when I am supposed to sit with someone who was appointed through the captured Council of the Judiciary that the European Network for Councils of the Judiciary has suspended? Can I provide a fair trial if tribunals above me are captured?
It is important to understand that the judges did not ask or act **on their own individual behalf**, but on behalf of clarifying the situation for those who brought cases to them.

From the perspective of the domestic government in the process of dismantling checks and balances this involvement of an independent European authority was, of course, deeply annoying.
That is why it tried to plug this hole and close off this route by announcing the Muzzle Law
This law made it a disciplinary offense to ask a preliminary question to the Luxembourg Court when these questions were directly related to judicial independence.
It attempted to make European judicial **in**dependence **de**pendent on domestic law.

Very many judges in Europe immediately understood the stakes.
From that perspective it is therefore no surprise that the march of the 1000 robes, which took place on 11 January 2020, happened not long after the proposed Muzzle Law
Other informal action kicked in too.

Because who made up the financial difference for the irregularly withheld salaries of judges, like Pawel Jusczcyczyn, who did his duty and asked a preliminary question despite the Muzzle Law? Indeed: **Judges** themselves, through the organization in which they are organised, like *Iustitia*
You see here how formal routes and informal domestic and pan-European actions interact.

Top-bottom is the **second** axis of judicial interaction.
Partly as a result of the big inflow of Polish preliminary references, where the Commission always gives its interpretation in Luxembourg too, pressure on it increased to bring infringement cases.
These are cases brought before the Court of Justice against a Member State for violating EU law.
It gradually did so, although too few, too late and too slowly
In that way Luxembourg could more freely give guidance as it was less restricted by the legal route of preliminary references where it is eventually the domestic court that decides the case
When judgments were not implemented, the Commission could go back to Luxembourg to ask for financial penalties.
It did, and this indeed led to massive daily fines.

This second route interacted with the first in other ways too.
Polish judges always came to attend hearings in Luxembourg themselves, and other domestic judges and representatives of judicial umbrellas joined too – I have been there myself often.
This had the benefit of keeping the issue in the necessary limelight called media.
But, more fundamentally. as a matter of judicial facing off of dissensus, there was something especially urgent and powerful about a formal setting where a domestic government, in open court, could be seen blatantly lying with European judges facing domestic judges in the audience.

A **third** way in which European domestic judges formally interact, and this may be less well-known, is what can be termed **bottom-bottom.**
It is domestic judges in direct contact with each other in situations governed by EU law.
For issues concerning dissensus over liberal democracy, the most relevant policy field where this happens is in the Area of Freedom Security and Justice, particularly when the principle of mutual recognition is operational, such as the European Arrest Warrant
Domestic judges receive requests to execute each other's judgments, or to transfer suspects currently under their jurisdiction – and therefore responsibility.
Under EU law transfer & execution are virtually automatic unless there is reason to ask questions.
And dissensus has been such a reason, because of bottom-top and top-down Luxembourg case law.

The Luxembourg Court, very keen to be strict on saving judicial independence in Poland but equally keen to save mutual recognition, has devised a very complex test for domestic judges.
If they face a case involving colleagues in a Member States with documented **general** rule of law issues, domestic judges must verify whether that affects the situation in their **specific** case.

This is not only about issues such as detention conditions, but also judicial independence.
This forces domestic judges to ask their colleagues: are you, or those above you, independent?
This is, of course, akin to asking your romantic partner: are you still faithful to me?
The very fact of asking the question itself implies that trust, on which the whole system (or love affair) is supposed to be based, has collapsed.

My speculation is that domestic judges who have dealt with these cases themselves and were in direct contact with colleagues across the border in this way, have drawn personal lessons.
They have felt directly that their own independence has become constrained by the dependence of their European partners, or at least the dependence of the judicial hierarchy of these partners.
Captured top courts in one Member State in that way directly affect the way in which even lower judges in another Member State can solve problems governed by EU law.
A **fourth** aspect of formal judicial interaction is top-top.
It is about the interaction of the case law of the Strasbourg Human Rights Court and the Luxembourg Court when they deal with the same subject-matter, for example judicial independence in Poland or mutual recognition-related cases.
It is quite evident, when you read judgments closely, that Strasbourg is more principled.
For example, as was powerfully demonstrated by Professor Petra Bárd in her recent inaugural lecture in Nijmegen, the Strasbourg Court's take on mutual recognition-inspired rulings of the Luxembourg Court may easily – and rightly – become more critical soon.
After all, it is not inconceivable that a domestic judge in one Member State will be obliged to draw consequences if she cannot guarantee a full fair trial in another Member State for someone currently under her responsibility.

If Strasbourg made such an announcement, it would have direct implications for Luxembourg.
The EU's Fundamental Rights Charter, binding primary law, integrates ECHR law & says with so many words that in interpreting its provisions the Strasbourg case law should be considered.
In that way, going to the Strasbourg Court may be a good way to influence the more powerful and consequential Luxembourg Court in the longer term.
The dynamic between Europe's top-court is not only a topic for legal geeks.
It is an avenue for Europe's top judges to converse about how to confront dissensus they both worry about – it is an avenue to make a real difference.

I started with the **bottom-top** angle.
There is every reason to finish with it too.
Because the **fifth**, and perhaps the most remarkable and powerful way for domestic judges to show their worry to Europe's two top courts, is to bring a different kind of bottom-top cases.
Not as a way to seek guidance about cases they need to decide involving **others.**
But **as litigants in their own right**, to safeguard the very integrity of their office and functioning.

Think about this for a moment if you had not yet internalised the urgency of the current moment.
In a context where their trias partners have proved missing in action, domestic judges, advised by lawyers from NGOs such as Wolne Sady/Free Courts, saw no alternative but to go to international and supranational top courts.

They were forced to ask their own colleagues, other European judges, to help face off dissensus.
Let's be clear: this is a sign of abnormality, of dysfunctionality – not a cause for celebration.
Yet, it has been absolutely transformative.

For example, it is highly significant that the Strasbourg Court has issued some of its most important rulings when judges were themselves litigants.
In Zurek versus Poland, a case brought by one of the bravest Polish judges, Waldemar Zurek, the Strasbourg Court made far-reaching statements about the obligation- so not just right- for all European judges to stand and speak up for judicial independence.
In this way the Court gave formal backing to what had already developed informally
It also made a statement to those European judges who had been on the fence over worries that their independence may be affected by public action.

I was personally somewhat involved in helping Europe's four most important umbrellas of judges to sue both the Council of Ministers and the Commission for deciding to release COVID-money to Poland on conditions undermining Court of Justice caselaw on judicial independence in Poland.
Even if the legal analysis is compelling, I saw & felt first-hand just how counterintuitive it is for domestic **judges**, constrained by their oath and place in the trias politica, to be forced to go to **court.**
But they did, and they did so with great conviction
Because, when push came to shove, they opted- as judges- for what they felt is most important.
They choose to make a statement that judicial independence can **never** be dependent, negotiable.
It is a sign that principled leadership is fully possible when the issue defended matters enough.
Now it is for their independent and impartial colleagues at the General Court to decide the case.

So this is the Cruyff angle of looking at the actions of European judges and their supporters.
But Cruyff is famous for another statement too, expressed in typical Amsterdam vocabulary:
Als wij de bal hebben, kunnen hun niet scoren
As long as we've got possession of the ball, the opponents cannot score.
Even if this may seem today's default, in that apparently only judges are playing ball, in protecting liberal democracy this is highly unfortunate and unsustainable.
Other state powers should pick up the ball too in confronting dissensus.
In fact – staying with the football-analogy – judges are best positioned to be the referee, with the other two state powers, and other actors, in most direct sporting action.
Skilled and trained impartial and independent referees are necessary for any game.
We expect them to step in when required.
But we all know that the most memorable matches are those where the referee goes **un**noticed.

In conclusion, in 1788, in Federalist Paper 78, US Founding Father Alexander Hamilton famously described the judiciary as **the least dangerous** branch of government.
In our own Europe, sadly, a different description is more apt.
Here the judiciary is now **the most endangered** branch of government.
The judiciary today is virtually the only state power acting on the implications of dissensus over liberal democracy in a situation of being left **dangerously exposed** by its two trias-partners.

European judges do so defensively, reactively, coherently, in formal and informal ways
They do so in determined, strategic, consequential pan-European solidarity.
Crucially, they do so as a powerful **judicial** act- as the magistrates they swore an oath to be.

I have myself witnessed that this has real consequences for real people having to make real and difficult, personal, often far-reaching choices, sacrificing much more than all of their free time.
When I ask – which I annoyingly do to grasp what drives them – they tell me it is nothing special.
Ladies and gentlemen, I must respectfully dissent
There is absolutely nothing normal about this level of determination and courage.
In today's Europe we have really come to rely much too much on this unsung expression of the **extra**ordinary, without even so much as acknowledging it.
The least all of us can do is to stand with European judges, publicly, in any way we can think of
We need them- they act to protect the freedom of us all.

Some of these independent, impartial, principled, and courageous individuals are here tonight.
Some who have dropped everything to help them are here too.
It is a great privilege for me to personally pay tribute to them for their priceless perseverance in defending our common European foundations.
Let us all remember and act on what we learned in our basic constitutional law classes, wherever we followed them.
Based on that, let us all keep on working together to wake up the other branches of government
Let us get **them** to play ball.

But, for now, I would simply ask everyone present to join me in giving these quite incredible European judges, and those standing by their side, a determined and deafening applause.

Thank you.