

# « LIAISON MAGISTRATES »: THEIR ROLE IN INTERNATIONAL JUDICIAL COOPERATION AND COMPARATIVE LAW

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Until relatively recently, it was not common practice for a domestic judge to consult the legislation or the jurisprudence of foreign countries before giving his decision, though he might well have been given the opportunity to find out about the legal system of a foreign country, more or less distant from his own in geographical, cultural and linguistic terms, during the course of his legal studies.

This interest in foreign law now appears to be one of the elements forming part of the training of young lawyers. The large number of requests for internships which are received by French embassies confirms this and suggests that future judges may well adopt a different approach from that of their predecessors towards foreign legislation.

The *Ecole de la Magistrature*, which has ensured the initial and continuing training of French judges for over 40 years, has developed programmes with the primary objective of raising awareness of the legal systems of other countries. However, there is a difference between, on the one hand, initiation in the law of other countries and, on the other hand, the concrete and practical use which judges are able to make of such knowledge when they must give judgment in cases where the issues are not confined to the domestic sphere.

The development of Community law and the jurisprudence of the European Court of Human Rights, and the accompanying consequences, have profoundly changed the way in which judges have, up until now, viewed the operation of their legal systems.

Equally, the arrival of the Internet in courts means that judges now have access to the law of foreign jurisdictions by means of a simple click.

Times are changing.

It could therefore be thought that the majority of barriers which discouraged judges from being inspired by, or indeed from borrowing, legal concepts or solutions from their neighbours, have fallen. That would, however, be a somewhat premature conclusion. In reality, even with the assistance of technology, obstacles remain and such obstacles go beyond simple questions of linguistics. A desire to resolve a legal problem by comparing solutions already adopted in other jurisdictions can come up against the problems caused by a greater or lesser understanding of the real meaning of foreign legislation and case law. A lack of knowledge of the local context of a country's laws and jurisprudence can lead to misunderstanding, which does not assist the reasoning of a judge curious to know how a foreign colleague would respond to a question which is similar to the one before him.

For a little over 10 years now, judges have been able to receive assistance from certain colleagues if they wish to find out the solution adopted by foreign jurisdictions towards a novel problem. In March 1993, the first appointment of a French judge to a post in the Italian judicial authorities was made, in Rome, with the primary mission of improving mutual judicial assistance between France and Italy. This first appointment was followed by the appointment of another French judge, this time in Holland. Several other posts for so-called « liaison magistrates » have been created within the judicial authorities in America, Spain, Germany, the United Kingdom, Czech Republic, Canada and Morocco. Reciprocal posts for « liaison magistrates » have been created in France at the Ministry of Justice in Paris. These appointments, made with the common objective of improving, in a general manner, judicial cooperation between countries, have encouraged other countries to embark upon this route. The process was formalised by a Joint Action of the European Union of 22 April 1996.

The activities undertaken by liaison magistrates fall into four broad categories:

- mutual assistance in the sphere of international criminal law ;
- mutual assistance in the sphere of civil law ;
- comparative law ;
- the forging of links between judicial authorities.

## **1) Liaison magistrates and mutual assistance in matters of international crime**

Due to their knowledge of the law and procedure of both their own country and of their host country, liaison magistrates tend to be in a position to remove the principal obstacle which a domestic judge is likely to encounter when he considers that it would be useful to consult the law of another country: the misunderstanding, created by the real or imagined differences between the legal systems. In the sphere of bilateral cooperation in criminal law, an imperfect understanding of another country's legal system can still lead all too often to a form of self-censorship. Thus, for example, a French « juge d'instruction » who wishes to hear evidence from a witness who is abroad or who wishes to collect evidence (bank documents, DNA samples...) may well hesitate to send an international letter rogatory, fearing that a response is by no means certain. On the other hand, if such a judge is able to request assistance from a colleague posted in the relevant country, he is able to direct his request, taking into account the requirements which are particular to the procedure applied in that other country.

An increasingly large number of « juges d'instruction » in France now send to the liaison magistrate, by fax or by email, letters rogatory which they wish to send to the authorities of that country. Their colleague in the foreign post will accordingly be led to clarify certain points, such as in the capacity in which a person is to give evidence (as a witness or as a suspect), to provide the evidence required for a search warrant, or to have telephone numbers identified. This advisory, indeed expert, work, carried out prior to the transmission of the request for mutual assistance in the criminal sphere, can pre-empt the need for the foreign authorities to make a request for further information, which would otherwise delay the execution of the letters rogatory. In an urgent case, the proximity of the liaison magistrate to his colleagues in the host country enables him to draw their attention to the need to respond to the request for judicial assistance as quickly as possible.

Similarly, liaison magistrates are able to provide information to their foreign colleagues on the requirements of French law and on the rules of procedure applicable in their country of origin. This explanation is rendered easier by their presence in the workplace of their foreign colleagues. Even in the era of the Internet, nothing quite compares to a direct exchange, face-to-face, between two people who know each other, and meet regularly.

Equally, the judge who has made the request for mutual assistance can, with the help of his colleague posted to the relevant member state, follow the execution of his request and so will not receive the impression that his request has fallen into a black hole, a reproach heard all too often in the area of cooperation in international crime. Moreover, should difficulties arise in the execution of the request, the judge can swiftly be informed of the reasons for the problem. Such information is particularly useful if one or more of the people being investigated are being held in detention. How often it is heard that a «juge d'instruction» cannot finish his dossier since he is still waiting for the response to his international letter rogatory!

The formation of joint inquiry teams between two or more countries – a form of cooperation which is now indispensable in order to combat more effectively the new types of international organised crime – will cause liaison magistrates to play increasingly the role of facilitator and interpreter of legal systems. Even though the rules applicable in a country are often no more than the specific enunciation of common principles, the intervention of liaison magistrates means that a rapid response can be provided to the everyday, practical problems of cooperation : changing the letter of the law is not enough unless there is also a simultaneous change of mentality. Mutual assistance must be founded on a great degree of confidence between operators, based on common standards which guarantee the respect of the rights and liberties of those participating in a criminal trial.

For some 10 years now, liaison magistrates have thus intervened as real «legal adapters» between different systems. Since they are integrated within the workplace of their foreign colleagues, liaison magistrates are also regularly consulted by the judicial authorities of their host country when members of such authorities have an interest in the legislation, the jurisprudence or, more generally, the operation of the French legal system.

This role of facilitator between the procedures of different countries also encompasses extradition procedures (which are going to undergo profound change in 2004 with the entry into force of the European arrest warrant). In 2003, it must be acknowledged that, despite the European texts which are applicable to the extradition procedures between different countries of the EU, there remain significant differences in between countries. Which should take priority: a provisional arrest request or an extradition request?

The answer may differ according to the country in question. The compilation of a dossier must also take into account the avenues of appeal available in the country in question: for example, the opening of a dossier of extradition to the United Kingdom is directly dependent on habeus corpus appeals and judicial review, exercised against the decisions of the judge sitting at Bow Street in London and of the executive power (the Home Secretary). The liaison magistrate must thus play his role of adapter between two systems which are even further apart.

The same goes for matters concerning the transfer of people who have been sentenced to imprisonment and who wish to carry out their sentence in the country of which they are a citizen.

## **II) Liaison magistrates and mutual assistance in civil matters**

Liaison magistrates also participate in the handling of bilateral cases, such as those concerning the international abduction of children by a parent (The Hague Convention of 1980). Liaison magistrates ensure that the two parties who are claiming custody of the child do not take advantage of the different legal systems in order either to deprive one of them of the exercise of their rights as a parent of the child, or to render impossible any amicable agreement: liaison magistrates aim to fill the gaps between the legal systems which might otherwise present problems to one or other of the parents when they have to make submissions to the foreign judiciary.

Moreover, the recent creation of the European Judicial Network in civil and commercial matters, in which liaison magistrates are included, should contribute to facilitating the execution of judicial decisions from one country to another, preventing parties from « choosing » their judges.

The implementation of measures to protect those under guardianship increasingly gives rise to the intervention of liaison magistrates as soon as those under guardianship move from one place to another, thus presenting difficulties for the administration of their possessions.

The execution of letters rogatory in civil matters therefore means that the liaison magistrate's sphere of competence is not limited to matters of criminal law.

### **III) Liaison magistrates and comparative law**

An area in which liaison magistrates are increasingly involved is that of the dissemination of foreign law, when a national court is called to pronounce upon a new legal question.

In the absence of any relevant legislative provision or case law precedent, it is tempting and even advisable, for the domestic judge to try to find out what answer has been given to the question by a foreign legislature or court. This situation can often arise in the sphere of so-called « social problems ». In France, one can cite the legal problems raised by, for example : a couple's use of a surrogate mother ; an application for adoption made by a same sex couple ; the case of involuntary manslaughter of a foetus ; the principle of whether compensation should be granted to children who are born handicapped, where the mother had been denied the option of abortion due to a clinical error ... Each time they have been consulted, liaison magistrates have informed their colleagues of the response, or absence of a response, made by the foreign legislature or courts has made to these sorts of fundamental questions which confront our society.

Even in more so-called « classic » cases, bearing on, for example, the right to respect for private life, liaison magistrates are invited to inform the court of the approach adopted by the courts in their country of origin. Obviously, it is not simply a matter of copying another judge's decision, made in the context of a different legal system. However, the knowledge of the law applicable in another country and of its interpretation by one of that country's judges undoubtedly provides valuable assistance in reaching a decision. Liaison magistrates do not content themselves with simply providing a copy of the relevant judgment, which could prove to be of limited use to a foreign court. Rather, they accompany their response with personal commentary, enriched by their knowledge of the legal system of their host country.

Thus, the era, not so long ago, when it was considered to be an admission of a lack of serious argument for a lawyer to cite foreign legislation or case law, appears to be consigned to history. This can only be welcomed.

At their modest level, liaison magistrates thus participate in the growing convergence of legal cultures.

#### **IV) The « rapprochement » of judicial authorities**

Knowledge of the particular characteristics of a foreign legal system can assist in preventing misunderstandings, assuaging anxieties borne of ignorance and facilitating exchanges between those participating in the civil and criminal systems.

Each year, internships are organised in order to allow lawyers, judges or public prosecutors to discover or to deepen their knowledge of the operation of justice in other countries. Evidently in those countries where there is a liaison magistrate, the latter will intervene directly, both in the setting-up of the internship and in the choice of the programme. Liaison magistrates benefit in this from the valuable assistance provided by organisations which forge links with different legal cultures, such as associations of lawyers, schools, universities or training institutions. In addition to such institutions, an important role is played by the goodwill shown by many lawyers in welcoming their foreign colleagues and in helping them to get to know their legal system plays an important role.

Liaison magistrates also participate in the preparation of bilateral negotiations concerning, for example, the implementation of a convention on mutual judicial assistance in criminal matters (such as that signed between France and the United States of America) with a view to forging links between the positions of the countries in question. During the elaboration of these new texts, liaison magistrates are asked to shed light on the difficulties that they have observed in the course of their everyday work, enabling the implementation of concrete and useful solutions.

At the point at which linguistic and textual barriers disappear, the barrier which exists too often in the minds of those participating in the legal systems must also be removed, in order to give way to confidence: in their own way, liaison magistrates are dedicated to achieving this aim.

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