



Law and Justice Across Borders



Workshop 'Trust and Deference between Legal Authorities in Europe'

Amsterdam, Friday 1 June 2018

Seminar Room A3.01

University of Amsterdam, Faculty of Law, Nieuwe Achtergracht 166, 1018 WV Amsterdam

1. Theme

Trust and deference are crucial mechanisms of interaction and cooperation between legal authorities in Europe. Deference means that an authority does not make its own assessment or decision in a particular matter but relies on the decision of another authority. The basis for this deference is trust in the second authority. It ultimately means that the deferring authority puts its trust on the authority it defers to. It has trust that the second authority takes a correct decision in matters of fact and law, especially the rule of law. The workshop seeks to explore the conceptual and empirical assumptions and justifications underlying the mechanism of trust and deference between legal authorities in Europe.

2. Scope and background

The mechanism of trust and deference operates between various authorities at different levels in Europe. The scope of the workshop is thus deliberately vast in terms of areas of law to be covered.

ECHR

- ECtHR deferring to Parties to the Convention, cf. the margin of appreciation.
- ECtHR deferring to the EU, cf. the *Bosphorus* doctrine.

EU

- Police and judicial authorities of one Member State deferring to a judicial authority of another Member State cf. mutual trust and recognition in the Area of Freedom, Security and Justice.
- Civil enforcement authorities of a Member State deferring to a judicial authority of another Member State, cf. mutual recognition of European Enforcement Orders.
- Administrative agencies of a Member state deferring to an administrative agency of another Member State, cf. Common European Asylum System, esp. Dublin Regulation; European passport for financial services (MIFID).

Domestic law

- Criminal courts deferring to administrative tribunals, cf. criminalization of migration offences.
- Administrative tribunals deferring to the administration, cf. marginal review of the exercise of administrative discretionary powers; judicial *review* of factual assessment done by the administration, instead of a *de novo examination* of the fact.
- Legislative and judicial authorities deferring to administrative authorities in the context of emergency regimes.



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Both in case law and legal scholarship, we find justifications and explanations for this mechanism of trust and deference. A deferring authority may put its trust in other authorities because of their expertise. Deference may express a particular constitutional and political arrangement whereby some authorities are deemed more legitimate to make certain judgments, e.g. policy choices and weighting of interests. Trust and deference may also operate as a compromise between full harmonization and integration of public functions and retaining national or institutional autonomy, eg European Arrest Warrant.

3. Focus, format and questions to the speakers

Though legal scholars examine the mechanism of trust and deference in their respective legal fields of expertise, to date a systematic account of the underlying conceptual and empirical assumptions is still wanting. This workshop seeks to explore whether there are conceptual and empirical assumptions underlying the mechanism of trust and deference common to the various European and domestic field of law.

To this effect we will ask speakers of the workshop to look afresh to their existing research and identify the conceptual and empirical assumptions associated with trust and deterrence in their field of expertise. Rather than comprehensive papers disclosing new materials, we are looking for memo style or essayistic reflections on existing materials that address one of the following questions.

Conceptual

What is the nature of the relationship between deference and trust? Is the relationship causal in the sense that trust justifies deference? Alternatively, trust and deference may be mutually implicating and co-constitutive terms: something only counts as deference if it is based on trust, and trust only becomes visible if there is deference.

Does trust in the legal sense have any substance: can it be gained and lost, or is it just presumed?

How does the mechanism of trust and deference fit with the various conceptions and traditions of the rule of law in Europe? How do trust and deference relate to a normative ideal of the right to justification?

Empirical

How are courts, scholars and policy makers conceiving of and gauging trust in connection with deference in the various legal fields today?

When mechanisms of trust and deference are put in place and maintained how is the trustworthiness actually established and checked? How can a deferring authority check the trustworthiness of other authorities if it always defers?



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4. Guidelines for speakers

Presentations are based on a short max 4 page memo to be circulated to all speakers. We expect the memo to address the following items.

- A short description max. 1 page of the central mechanism of trust and deference in your area of law (including its legal basis: primary/secondary EU law, case law, statutory law). This short introduction should allow non experts to participate in the discussion.
- The memo purposes of the memo is to identify the conceptual and/or empirical assumptions underlying the mechanism of trust and deference in your field of expertise
- **The memo should reflect on one of the conceptual and/or empirical questions mentioned in workshop description**
- You need not explore new materials. Ideally, the memo is based on your existing research

Deadline memo: Tuesday 29 May

Format panel sessions

- Presentation based on memo of max 20 min.
- 10 min. discussion per speaker