Collaboration

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Welcome to the Ernst Strüngmann Forum podcasts—a series of discussions designed to explore how people collaborate under real-life settings. Joining us in the series are high-profile experts from diverse areas in society, whose experiences will lend insight to what collaboration is, what it requires, and why it might break down. This series is produced in collaboration with the Convergent Science Network.

P. Verschure This is Paul Verschure and together with my colleague, Andreas Roepstorff, we are speaking with Ernst Numann, who recently retired as the Vice President of the Dutch National Court. Ernst, could you give us a short description of your professional trajectory?

E. Numann After my studies, I took a university position but left after two years to work as an attorney in The Hague. I was 26 at the time and continued my work as a lawyer for the next six and a half years. After that, I was appointed to the district court of The Hague, where I handled both civil and criminal cases. Five years later, I moved to Curaçao, where I served for four years as a member of the Court of Appeal of the Netherlands Antilles, as it was called at the time. Then I returned to the District Court of The Hague, where I became vice president. In 2000, I was called to the Supreme Court and served exactly 20 years. My appointment ended recently when I have reached the legal retirement age.

P. Verschure Based on your experience, how would you define collaboration?

E. Numann This is a very, very general term or notion. Cooperation is what people do to attain certain goals that they are either willing or bound to strive for. Every way they try to reach that goal, without blocking each other, could be called cooperation. Cooperation can be very intense or less so. People can cooperate when they have different goals so long as there are common interests. Generally, though, I would say that there is a common goal and to reach it you need cooperation.

P. Verschure You emphasize the vision of goals, common goals. In your professional experience, could you expand on these collaborative processes in different domains?

E. Numann Cooperation takes place on several levels: First, in individual cases, lawyers generally have completely adversarial goals. The goal of the court, of a judge, however, is to reach a fair outcome, a fair decision, and to apply the law in doing so, whatever that may be at the time. To achieve this goal, some level of cooperation must exist between the two adversarial parties and the judge because all engage in the procedure together—a procedure which aims to respect the contrary interests of the parties. This requires cooperation in a certain way, under the supervision of the judge who may have to make decisions, if necessary, about the procedure itself.

Next there is cooperation between judges to reach a decision. Judges may view a situation differently, but ultimately there can be only one decision: the formal, official decision which is binding for the parties. To reach this decision, cooperation is necessary: judges must listen to each other, and a way must be found to reach a decision that is acceptable to all judges, even those who may oppose it. In the Supreme Court, that is an ambition to which we have always strived.

Then there is a quite different form of cooperation that exists between the different powers of the state, known as the *Trias Politica*: the legislative, executive, and judiciary powers. Unlike the United States, where powers are divided between institutions, in the Netherlands (as I think in all of Europe), tasks or functions are distributed between the powers: Sometimes the government has legislation powers. Sometimes the legislation has some governmental powers. The judiciary has its own responsibilities, but in a certain way it works together, cooperates, with the legislation as well.

Let me give you an example. A couple of years ago, the Dutch parliament introduced new legislation to address *anti-kraak* [anti-squatting]. When this came into force, the Supreme

Court judge (I wasn't involved) stipulated that the legislation was partially invalid because it was possible to remove people from an occupied house without previously attaining an order from the court. In line with fundamental rights and the Constitution, the Supreme Court thus declared the legislation to not be legal. The legislators heeded the Court's decision and changed the legislation to address that point. Then, in a second round of review, the Court ruled that the revised law was valid. This demonstrates a form of cooperation between the judiciary and the legislature.

P. Verschure In your description of this multilayered system of collaboration, you indicate that shared goals are critical in making these types of cooperative processes work, yet within each layer of the system, the goals and the goal-setting process might not always be consistent or transparent. How do all these layers hang together? Because if they do, this suggests that there is some meta-goal to which all these layers serve: the lawyer and his/her client as well as, in the end, the Supreme Court and its judges. What would a meta-level goal of that system look like?

E. Numann Well, in the above examples, there is one common goal: the rule of law [*de rechtsstaat*]. This is the notion that everything, every power in the state that goes into effect, must adhere to the rule of law. To achieve this, there is this division of responsibilities between the powers, the *Trias Politica.* Each power influences the others and must respect each other. They might dislike each other and have different goals, at least on the short term. But the overarching common goal shared by the *Trias Politica* is to maintain the rule of law.

P. Verschure This hints to a third collaborative process, which refers to collaborating or cooperating over time, over centuries to build this rule of law. That process is a human-created system. Do you see this process as a responsibility or goal that the Supreme Court serves? That is, interpreting a whole tradition of law and fine-tuning it for future application. Is this a cooperative process within which the judiciary would operate?

E. Numann Yes, both on a national level, all the way up to the Supreme Court, as well as transnationally, e.g., the European Court on Human Rights and the EU Court. But this concerns the other powers as well. The government and/or the legislation should not simply do whatever they want and leave it to the court to make corrections. The legislation and the executive power must obey the rule of law as well. Ultimately, a judge has the power to say loudly and clearly that something might be illegal, or forbidden, or not correct. But it is the responsibility of all three powers—each from their own point of view and interests—to safeguard the rule of law.

P. Verschure How should we look at this rule of law? Dogmatically, you could say that this rule of law must be followed. Alternatively, you could say that it's up to the Supreme Court to interpret and advance the rule of law, with a view toward the future. The latter goal is very different, because it concerns how the rule of law can be made more sustainable over time.

E. Numann Again, this involves more than just the courts. Consider, for a moment, where the law, the rule of law, comes from: this involves national legislation and legislators as well as interstate treaties, as in the European Court of Human Rights. The European Human Rights Treaty, e.g., is not part of Dutch legislation per se. It is a form of cooperation between states, and it establishes rules for every state to follow. These rules, however, can be infringed upon by judges. Indeed, there have been decisions from supreme courts in every country that have not complied with the European Human Rights Treaty. In addition to treaties, each country's constitution provides a very important source of the rule of law. Together, these sources form the law which must be obeyed by every power in the state.

A. Roepstorff This is extremely interesting. But let's step back and look at a critical part of judiciary decisions that you mentioned: coming up with a solution that everyone can live with, especially the "losing" party. How does that space of agency unfold? It appears to involve more than imposing or following the rule of law, but rather finding a path forward for the

people involved. This would seem to place the judge in a very important role; namely, to facilitate future collaboration and avoid animosity.

E. Numann In my description, I was referring to arriving at a judicial decision, where the so-called "loser" was colleague judge who held a minority view to the case. The same may hold for the party who is losing a case. We always think, although I'm not certain how true it holds, that formulating good grounds for a decision can be of comfort to the party who loses: this party has been hurt and the decision provides reasons why his point of view has not been accepted. We pretend that this is a factor, but I'm not certain that this is always the case. It is, however, one of the important motivators for judicial decisions. On the level of the Supreme Court, judicial panels are made up mostly of five colleague judges, and sometimes a minority (one or two) do not agree with the decision taken by the majority. In Holland, we don't have a system for dissenting opinions, so a judge is not allowed to bring out their dissenting opinion; nonetheless, there can be fierce opposition against a certain new path that the jurisprudence has taken. I do not know how it is in other countries, but in our Supreme Court, we hold that it is important to formulate a decision with which the minority can live. The minority can say, "Well, I don't agree, but put this way, I can live with it because the dangers are less than otherwise might be the case." This represents another level where cooperation is directed to the feelings of the minority, or the loser.

P. Verschure This also means that accepting a loss is also done within a codex: If I don't accept a loss, certain consequences will follow; certain forces of action can be taken with associated costs. However, if I do accept the loss within the codex that exists, I accept that the cost of continuing is higher than just giving in. To what extent, within the legal system and the rule of law, are there actual and/or implicit incentives and suggestions of how this cooperation should take place?

E. Numann Don't forget: the rule of law is not a fixed thing. The law, the rule may be established, but the law is developing all the time. It is influenced by treaties, by decisions of the European Court of Human Rights in Strasbourg, by the national legislator, sometimes by the government, and by the judges. This sets up a continuous confrontation between the powers: sometimes it veers a little to the left or right, up or down. It reflects the mentality of an era as well. Today we accept things broadly and even gladly which a century ago wouldn't at all have been accepted. These opinions and conventions influence the law, the broad law, and the more concrete legislation which is ruling us all.

P. Verschure I understand, but I was shooting for something a bit more specific in the sense that within the system of law, there are very clear guidelines of how you are supposed to cooperate with each other, as experts in that system and with the system. I would like to understand what these specific rules, implicit or explicit, are. For instance, you can contest the decision of a lower court, which in some sense suggests that you are willing to cooperate within the broader system of law, but that you don't accept a particular decision at this point in time. So, you go to the next level in the court system. That's an example of how guidelines have been built inside the jurisprudence and legal system to make people cooperate.

E. Numann That's, of course, important. I once heard someone say or write that one of the essentials of democracy is that no decision is ever definite. Every decision can, in the future, be recalled and reviewed. Take, for example, the decision of a judge in the ruling on Shell from May 26, 2021, a legal opinion that is now being enforced. If Shell appeals the decision, the Court of Appeal could have another opinion and render a different decision. The Supreme Court may then review that decision. For our democracy, this process of review is essential. Even after the Supreme Court has given its decision, the legislation can overrule that decision by enacting a new law, because remember: the judiciary reaches its decisions within the existing framework of the law, and that law can change. That's democracy. Although the legislation process takes time and the government is bound by all sorts of rules and restrictions, judiciary decisions are subject to review.

P. Verschure That implies that the entire system is floating on a shared belief that the system is effective.

E. Numann Yes.

P. Verschure So, on the Supreme Court, multiple goals must be balanced to accommodate the legal framework and maintain credibility. I assume that these two goals are not necessarily always aligned.

E. Numann That is correct. Being a judge or a Supreme Court justice is not always very simple. Sometimes you must say, "The law is the law, but we can't comply here. We have to find another way forward."

A good example comes from the *Raad van State* [Council of State], the highest court in administrative law matters, and involves the affair known as the *De Toeslagenaffaire* [childcare benefits scandal], which addresses allowances to parents for child support, especially the kindergarten where children stay while parents are working. Under existing legislation, which was very strict, if you did anything wrong, you were required to pay back the entire allowance that you had received. There was no way for the government to pardon an infraction or assess lesser payment. The legislation was loud and clear; no exceptions were made. After review by the judiciary, though, the consequences of the legislation were found to be absurd, unfair, and not in compliance with the rule of law. When legislation does not comply with higher principles, it's up to the judge to correct it.

Our problem is that the state of the legal art can take time to develop, sometime decades, sometimes not. It must be nuanced. It must be fine-tuned, must be changed because developments in the society require new rules. If legislation doesn't offer these changes, then the judiciary may need to act. This happened in the Netherlands in the 1960s and 1970s, in terms of jurisprudence case law on strikes in industry. At the time, there was no legislation, no rule at all about strikes. Today we have the European Social Charter, but back then there was nothing. So, the judiciary needed to establish conditions under which a strike would be allowed. Other examples include euthanasia and abortion. Where there is no legislation at all but a clear social need for new rules, the judiciary may pursue a solution. Very often legislators are happy that they didn't have to figure this out for themselves and just take over the judicial decision.

A. Roepstorff That is a very interesting case, Ernst. Picking up on a point that you raised earlier—in a democratic society, every rule, every decision has the potential at some point to be undone—one could view the democratic society as being the collaborative society par excellence. What you describe is a situation where the overarching goal is no longer the rule of law per se: something else seems to be more important, or not yet formulated, that one needs to move forward. What defines that? When the rule of law isn't there or is somehow unfit for that situation, how does one navigate through the situation? At the end of the day, does the rule of law decide? What is the first step?

E. Numann Your conception of the rule of law might be too formal. The law is not the written legislation found in the publications of the legislator. The law is much broader: it's the complete set of legal notions and legal principles. Take, for example, the matter of strikes that I mentioned earlier. Until the 1960s, strikes were forbidden, yet most of society felt that there were circumstances under which a strike against a company or industry could be justified, and people were convinced that something should change. Legislators, however, were unable to revise the law to provide the conditions under which a strike could be possible, even though they had discussed this in parliament for years. In legal circles as well, there was a feeling that this was not correct, that there were situations when a strike was very much justified. Importantly, just because the legislature couldn't bring about the necessary change doesn't mean that strikes were not allowed under the rule of law. It simply means that a different power—the judiciary—must take action to help society find a way forward. That's what happened. The courts didn't stipulate that under certain situations, when interests are X or Y, strikes are allowed. They formulated procedures—if you want to strike, you must give

notice, involve a majority of workers, etc.—and established the principles of procedure to ensure that strikes were well considered and taken seriously. The courts could do this within the framework of the rule of law.

A. Roepstorff The instance of a strike is very interesting because one could view a strike as a breakdown in collaboration, at least a temporary one, and we are very interested in such situations. In this example, it seems important to create a framework that allows collaboration to break down in such a way that it can be restarted, and people can eventually move forward. It appears that the law and the judicial system seem to be critically involved in buffering situations where collaboration sort of ends and yet must restart. What happens during that middle period? How can you avoid the situation from getting completely out of control, while still respecting the positions of the different actors? The position that you describe seems critically important to the creation of a space for collaboration to both break down and continue underneath it. This would be very interesting for us to understand.

E. Numann On an individual level, every case or procedure involving two civilians involves a failure in cooperation. To restore that cooperation, the judge uses the law to determine who is wrong and who must comply with existing articles of this code in the future.

On a higher level, at the state level, the situation is different. As the example of strikes demonstrates, the judiciary aims to give the powers a way to coexist, if that is the best outcome that can be reached at the time. Coexistence, though, is not cooperation, yet it is also not the antithesis. It probably lies somewhere in between.

P. Verschure What you're saying, then, is that embedded within the rule of law is a system in which coordination among many parties can take place that is rational and just, however this is defined. Through that process, as in the example of the strike, the judiciary arm of the *Trias Politica* influenced a change in the legal system to accommodate strikes. In principle, according to the *Trias Politica*, the next step must be taken by the legislature, the parliament. Did that happen? Did parliament act to change legislation, or is this an instance where developing jurisprudence was enough to maintain a credible rule of law?

E. Numann What happened was that the courts didn't feel that they were able, or at least not entitled, to define the circumstances or interests that could be served by a strike. So, there was no legislation at all. They did, however, formulate procedural rules to be followed, and if these were followed, then the strike was, in general, not forbidden. Nobody said it was justified, but the strike was not forbidden. If my memory is correct, the national legislature did not find a solution. Even today, there is no law about strikes, but there is a European treaty, the *Europäisches Sociaal Handvest* [the European Social Charter]—legislation which details the circumstances and interests that may be served by a strike: what is allowed and not allowed. Ever since the Charter came into existence, it has been applied to cases and trials about strikes. It exists within the framework of the rule of law. When unions, companies, or employers have lost their cases based on the Charter, they have complied with the decisions of the court. The rule of law is essential for a good working society. In Belarus, by contrast, there is no rule of law: there is just power, and its society isn't working.

A. Roepstorff Your description of the judicial system and judge not only as arbiters, but also as facilitators for the future could set a path in motion that one cannot control, and this could potentially permit things to develop quite differently. I'm very interested in that process as well. Could you say a bit about the intellectual and emotional stages of this process? What happens when you're trying to create such a space and then see what happens?

E. Numann Well, what you see is that judges can potentially be emotional about certain legal questions. But most judges do not allow their emotions to guide them too much. A judge always strives to work within a legal framework. If there is no clear legislation, no law where you can find in Article 48, e.g., the answer to your question, then you work in the framework of legislation from different sources. Believe me, though, within the framework of that legal system, quite different decisions can be reached. The law allows different aspects, different possibilities:

What is it that I want, and why, to have a system that works, or which is fair, or can be executed? Is this possible? Is it fair? Is it too expensive for certain parties? Will everybody survive with this? All kinds of things like that. Is it compatible with decisions made in another field? Isn't it strange when we decide in one case this and in another that, and now something else? You want to keep a system, to uphold the system, because otherwise everybody gets lost. Those are just some of the questions that you can be forced to answer first.

P. Verschure Ernst, you have listed several criteria that might come forward in such a discussion, e.g., fairness. Isn't that a tremendously subjective notion?

E. Numann Yes.

P. Verschure Is that the emotional space that Andreas mentioned?

E. Numann Fairness involves more than your personal idea of fairness. For instance, in a situation that requires protecting victims of traffic accidents, as in pedestrians over car drivers, the idea of fairness holds that the weaker party should be protected. This is not so subjective.

P. Verschure Well, of course, but it could also reflect the sociocultural context.

E. Numann Certainly. A judge functions within a certain cultural context. This is a given.

P. Verschure Have you ever experienced situations when you felt, "This is the moment that cooperation is breaking down in the system?" A situation where you felt that you really hit the wall, and recognized, "This is a breakdown." And, if so, what caused such a breakdown?

E. Numann Well, in my 37 years of being a member of the judiciary, I cannot say that I have experienced a situation like that. Of course, one could point to the situation during World War II, when under Nazi occupation individual judges as well as the Supreme Court were expected to apply rules that were not only inhumane but also contrary to international treaties. Should they accept this, should they remain in their position, should they step down? If you don't step down, do you have to accept things unconditionally?

P. Verschure What happened in Holland?

E. Numann There was a very bad outcome because the Supreme Court at the time decided that Court could not review the legislation of the occupier against international treaties. It determined that the Court did not have the authority to do so. Thus, they accepted the legislation of the occupier as law. This decision was very much criticized at that time, and after the war, even more so. Situations like this pose very, very difficult issues: At what point should barriers be erected and one refuse or say no? That's the point of no return.

P. Verschure During that period, you point to a fragility to the rule of law which could very easily be turned around. Were new laws adopted after World War II to prevent this from happening again in the future?

E. Numann Yes, both on the level of treaties—the European Treaty on Human Rights, the Convention on Human Rights—as well as in our own constitution. In the Netherlands, we have a unique situation in that a judge in a Dutch court is not entitled to review national legislation to the constitution. Judges are not allowed to say, this legislation does not comply with Article 6 of the Dutch constitution.

P. Verschure But if the judge is correct in his/her assessment, what options are there?

E. Numann Well, there are, thank God, options. One of the measures taken after the World War II, now embedded within the Constitution, is that it is now possible to review Dutch law against international treaties. So, Dutch legislation can be reviewed according to the European Treaty on Human Rights or the European Union Charter of Human Rights. This provides a clear instrument, which the Court did not have during the World War II.

P. Verschure I could imagine that this would keep you up at night if you're a Supreme Court judge, because now you are anchoring the coherence of your own legal system into an even more complex

cooperative process, the developing European Union, which has its own fragility. How solid is that link?

E. Numann The layers of legislation—national, European, international—can sometimes be very complicated, but as far as the European Convention and the European Charter are concerned, specific judges interpret those rules. The European Court of Appeal of the European Union in Luxembourg has the final authority to explain the European rules, and the court in Strasbourg interprets the human convention.

P. Verschure Ernst, if you wanted to bring down the rule of law, how would you go about doing this?

E. Numann Breaking down the rule of law? Well, I have never thought about this!

P. Verschure But you, more than anyone, should know how to do that.

E. Numann Well, although many rulings of judicial decisions can be executed by bailiffs, etc., in the end, the trust of the people in the system is essential to maintain the rule of law. So, judges must do everything in their power to maintain and uphold the trust of the people, not every single individual, but people in general in the system. Otherwise, the system collapses.

P. Verschure Then, in the face of the current onslaught of industrial-scale disinformation, how much of a chance does our current system have?

E. Numann That is a good question. As time goes on, my hope is that people will increasingly realize what misinformation is, and how to identify it. Misinformation is a real threat to the rule of law…to democracy.

P. Verschure Absolutely. I would have expected you, however, to say that legal decisions need to be better explained and disseminated on social networks, which are also abused for disinformation, so that the information is out there and accessible. Is it fair to say that the legal system is stuck in its old-fashioned patterns of communication and trust-building, and does not adequately respond to the world around it? Or are they responding?

E. Numann I do not agree with your opinion that it's all old-fashioned. The judiciary is expending a lot of effort to explain decisions and discuss them, not by individual judges but rather on regular TV channels and in the media. The Supreme Court, e.g., has a Twitter account and regularly circulates press releases on important decisions (e.g., the Shell decision from May 26, 2021), as do other courts. The judiciary must explain what it does, although when you look at the case-law of the Supreme Court, there are many decisions that are very technical. Details of bankruptcy law, e.g., can be very difficult to explain, but you can always relay the importance of a certain ruling: what is covered and, importantly, what is not covered by a certain decision. The judiciary understands this very well; it is an important component to ensure trust in the judiciary.

P. Verschure Do you think that the COVID-19 period—with confinement and emergency law—holds important lessons for the concept of cooperation?

E. Numann Certainly: keep your head calm, be as open as you can be, and don't accept everything from everybody.

P. Verschure Ok…we have discussed rule of law, which we hold is an abstract concept. It's not something we can touch. It's an evolving concept with lots of contextual elements to it. Do you believe that humans will be able to attain sustainable cooperation under this notion of rule of law? Or is it just a matter of time before things breakdown again, as it did 75 or 80 years ago in during World War II, or as is happening now in other countries?

E. Numann The rule of law and democracy constitute opposite sides of the same proverbial coin, and this coin is very, very vulnerable. When we speak of Western Europe, we need to be very careful. I think it's an illusion to believe that Western Europe will last forever. History has proven otherwise. Eighty years ago, we saw how quickly it can be completely overthrown. And

although the rule of law may not disappear forever, it is vulnerable, and there are no automatic mechanisms to ensure its return.

P. Verschure So, if you could change one thing about humans to make them more constructive contributors to this kind of property, what would you change in humans as we are today?

E. Numann Good memory.

P. Verschure Thank you very much for this conversation, Ernst. Before we end, I would like to point out an interesting issue: Andreas and I have been speaking about "collaboration" while you have referred to "cooperation." Does this have to do with the Dutch language, because in Holland "that collaboration" has a very specific meaning.

E. Numann Most certainly—"collaboration" involves working together with the enemy.

P. Verschure Exactly. In Dutch, when we want to refer to constructive collaboration, we would never use the word collaboration. Where do you think the differentiation come from?

E. Numann In Dutch, collaboration is specifically what happened during World War II: working together with the occupying force. Otherwise, we speak of *coöperatieve chaar van acteren* or *samenwerking* [cooperative state of acting or cooperation]".

P. Verschure Exactly. Since I'm not a native speaker, I don't think you would make this differentiation in English. Collaboration carries a much more neutral connotation.

A. Roepstorff In Danish, we also make the same distinctions as you do in Dutch. We also speak of a *collaborateur* (someone who worked with the occupying forces during the Second World II) and use *samarbeit*, similar to *samenwerking.*

P. Verschure There is one final issue, Ernst, that we should think about: the role of humans in the whole process. For instance, there is a famous case that tracked the judgments made by Israeli judges over the course of the working day. It was found that the time of day influenced the types of decisions, and that this was not uniformly distributed (e.g., judges gave much more severe punishments just before lunch, than after lunch). [see Danziger et al. 2011 PNAS]

E. Numann I am familiar with this research and think that it can be used to guide corrective measures. There are, of course, other influencing factors, e.g., whether a judge is experiencing a bad relationship with their partner or has a stomachache, etc.

P. Verschure When you were on the Supreme Court, would you sometimes say, "Let's discuss this at another point in the day, or let's do this tomorrow when everyone is rested."

E. Numann This can happen, but this point is usually reached when deliberations stagnate. Then one might say, "Let's bring it back next week" to allow judges time to rethink issues or exchange papers on various points. Sometimes one might say, "listen… we aren't making any progress, so let's have lunch now." But not at 10 o'clock in the morning.

P. Verschure Did our questions help you formulate your thinking about cooperation, or did we miss certain questions? Did we miss things that you feel are critical to understanding?

E. Numann No. I think it's always good to see the system from different points of view, from different entry points. And this was another one because it was not so much a discussion about the brain. The neural rule of law doesn't exist. Then again, maybe, it does exist.

P. Verschure & A. Roepstorff Ernst, we thank you very much for your time and insight.