All Power to the Judges?

Three Questions, Three Paradoxes

Some 'Speaking Notes' regarding a possible
'Americanization of European Law'

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There are three main questions that I would like to address:

1- What is the ***Phenomenon*** that we are talking about?
2- What are (some of) its ***Causes***?
3- What are some of its ***Consequences***?

1. The Phenomenon

1.1. The phenomenon that we want to address is a supposed 'Americanization of European Law'. In order to be able to determine whether there is such a trend, one would have to identify first what is so specific about American law or the American legal system, i.e. what would make for an 'Americanization'. I would argue that what is so specific about the American legal system is not only and so much a specific mode of lawyering - originally identified as 'adversarial legalism' by Kagan (….), but broader, an increasingly important role of legal professionals - lawyers and judges - in society, in the economy, and in politics. Many decisions and choices in civil society, in business, and in politics, are made by them, directly, or indirectly (as advisors). Hence, an Americanization of European law would be synonymous with 'more power to the legal professionals', in society, the economy, and in politics. That is, the emergence of a 'juristocracy' (Hirschl 2007) or 'lawyocracy' (Van Waarden 2004).

1.2. This could be considered a new variation of a combination of technocracy, oligarchy, aristocracy, theocracy (Hirschl 2010) and even an obscurocracy.
a- Lawyocracy is a specific case of *technocracy*: those with a specific 'technical' knowledge - here of the law - compose the new ruling elite.
b- It is also an *oligarchy* in so far as existing legal professionals train their successors in the 'tricks of the trade', in academia, during intern- and traineeships, and in professional clubs (like during 'dinners in the Inns of Court' in the UK) and associations. As such, the existing ruling elite indirectly select its own successors, a typical characteristic of an oligarchy
c- Thirdly, the lawyocracy has also characteristics of an *aristocracy*. Legal professionals like to see themselves - and are seen - as 'noblemen', thought- and mindful, wise, magnanimous, spirited, with wit and high morals and as such deserving to lead society.
d- Fourthly, it can even be considered a *theocracy* (Hirschl 2010, though he meant it differently[1]): an elite of priests interpreting the holy scriptures, read the constitution, international treaties, and other basic legal principles and documents, and ruling society because of the authority they derive from the monopoly on the interpretation of such documents.
e- Finally, typical for the current lawyocracy in Europe is also that it can be considered an *obscurocracy* or *incognitocracy*. Though being of very great importance, real VIPs, that importance is not widely recognized. Rather than being renowned, the judges are unknown, anonymous, nameless. Which European citizen would be able to name even one - e.g. their own - member of the European Court of Justice? That, notwithstanding that these are the real European sovereigns, as they have the last word. The media don't really help. The recent appointment of the new Dutch judge to the ECJ - a Czech-born colleague professor from Utrecht University - was only a one-line news item in a few Dutch quality newspapers. In this respect the US is different. The European judges don't seem to mind, though. They have even cherished their obscurity. Whereas politicians owe their authority to their literal 'popularity', the judges owe it to a reputation of impartiality and dignity and that is aided by keeping a low profile.

[1] Hirschl meant with his book title 'Constitutional Theocracy' that existing theocracies become constitutionalized, that is, religious norms regarding the organization of politics and society get framed in a secular tradition of formal politico-legal norms, in the rule-of;law; I borrow the term, but mean the reverse: that a secular constitution and its interpreters, the supreme court judges, become new 'theocrats'.

(Judges have yet to learn how to deal with media attention, as recently became apparent in the Netherlands, see further.)

1.3. This phenomenon of increased power of the judiciary is composed of three different but interrelated trends:

a- an increasing importance of judicial review. Decisions taken by the other state powers - the legislative and executive powers and their bureaucrats - are subjected to scrutiny by several courts: eventually by the European Court of Justice in Luxembourg and the European Court of Human Rights in Strassbourg, but also more and more by national courts who do so by applying European law as well as basic legal principles (legal equality, legal predictability, etc.) and individual rights.

b- an increase in litigation, and in activity and numbers of lawyers. This fuels of course the first trend. What makes the judicial power stand out from the other two state powers is that it is a passive state power. It can only rarely take initiatives to investigate, decide, and/or enforce, but has to wait until someone brings a case before the court. Only then does it have a chance - but also a duty - to take decisions, which can have political bearings. Increased litigation implies hence more chances for courts to decide and in doing so de facto to declare law. Conversely, with more case law and judicial interventions, citizens see a chance to win in court what they have lost in political controversies or in negotiations with the state bureaucracy.

c- Increased litigation implies that adversarial relations in society, the economy and in politics (where they are by definition adversarial: economic and political competition) are being carried over into the court room. This has also consequences for the procedures in court. It can be observed that even in countries that do not follow an adversarial but an inquisitorial court procedure (like the Netherlands), exchanges in court become more adversarial, e.g. in more frequent cross examinations of witnesses by both parties, after the usual interrogation of the witnesses by the judges (typical for the inquisitorial procedure) is done. Thus, competitive struggles in the marketplace, labor conflicts, and political controversies are more and more fought out in the courts. That means that economic, social, and political resources, like economic competitiveness, mobilization capacity of trade unions, or representativeness and seats of parties become less decisive in such conflicts than words and arguments.

> (In a current highly publicized controversial criminal court case in the Netherlands (for the first time broadcasted live on TV) of the prosecution of the leader of the right wing party PVV, Wilders, for insulting Muslims and instigation to hatred, that is, a case of the judiciary against a member of the legislative, societal and political controversy have been carried into the courtroom, where it has become a conflict between the defense lawyer and the judges. The latter have been by now twice challenged for being predisposed, once successfully, so that the whole case had to start all over again with new judges, something that has never happened before.)

1.4. Probably all European countries are undergoing this institutional and political change, however, to a different degree, and for some the difference with the old system is less great than for others. Thus the newness of judicial review and increased litigation and adversarialism differs among European states. Two countries, direct neighbors, with related languages, closely intertwined histories and with in the past and present close economic and political ties, differ greatly in this respect: Germany and The Netherlands.

Germany has already had both judicial review and a high litigation rate. Actually, the current German federal republic has perhaps the strongest system of judicial review. In addition to concrete review (a concrete case has to be brought to court) which e.g. the US has, Germany

has also instituted 'abstract' review, meaning that the more abstract - read general - language of a law, which has passed parliament, can be directly appealed, e.g. by a minority in that parliament. This product of the current German constitution is related first of all to its federal structure, which requires a neutral arbiter who can decided in conflicts over jurisdiction between the various levels of government. In addition, the current strong judicial review is a product from the Second World War. Not only in the sense that in general war, revolution or occupation tend to produce major institutional change; but also because of the bad German experiences with democracy towards the end of the Weimar period: The decision to abolish democracy and to institute a one-party rule - with which the Weimar Republic came to an end and the Nazi-regime took over - was an explicit democratically taken and legitimated decision. In order to avoid the chance that once again democratic institutions would decide to abolish democracy, the current system of judicial review was instituted. Germany legal culture has also been rather legalistic, fitting with its culture of precision, perfectionism, and formalization and its discomfort with ambiguity. And in line with that is quite a diversity and hierarchy of different courts.

By contrast, its western neighbor, the Netherlands, has been its very opposite: judicial review was (and is officially) forbidden by the constitution. As other countries, like the UK, with long enough experiences with democracy to trust it sufficiently, the Netherlands harbored the principle of 'supremacy of parliament'. The Dutch Estates General, the legislative power, has been in existence for over four centuries. Therefore, in the Dutch trias politica the legislative power clearly dominates. It forms the executive power out of its midst, and, given its electoral system of proportional representation and absence of an electoral threshold (above the number of votes needed for one seat), coalition governments have always been required, which means that parliament keeps close control over the executive. In order to further secure parliamentary supremacy, the High Court has been forbidden in the constitution to test the constitutionality of laws. It is merely an appeals court and as the one in second instance it restricts itself mainly to verifying whether the right procedure has been followed by the lower courts. Furthermore, ever since comparative litigation data is available (since the mid-1900s), the country has had for a long time one of the lowest litigation data among European countries, as I have shown elsewhere (Van Waarden 2009a). Litigation has de facto been discouraged. Access to courts was not easy, and there were many alternative more informal dispute settlement arrangements, often closely coupled to corporatist institutions (e.g. for commercial conflict, labor issues, housing, consumer protection). Thus the judiciary in the Netherlands has had traditionally a low political and societal profile. This more pragmatic, informal and consensual legal culture - quite distinct from the more formal and legalistic German one - is also reflected in its institutional expression: a very simple court structure, three levels, and no really any of the specialized courts that Germany has, such as for labor or …

As a consequence, the current general trend towards 'more power to the judges' is way more radical for the Netherlands, which comes from 'afar' in this respect, than for Germany which has had already judicial review and historically a much higher litigation rate. But since the train of judicialization has been set in motion, the Dutch are busy catching up, as I have shown elsewhere (van Waarden 2009a). More in general one can say that where there have been or still are significant differences between European countries in terms of legal institutions, legal procedures, and legal cultures, many of these experience a pressure in the same direction: to more power for the courts.

2. Causes

2.1. Causes of this trend are to be found first of all externally, that is, coming from the EU level, as Kelemen (2011) has argued. It started already with the development of Europeanization as a legal project: This was a de facto response to the difficulties to reach progress in integration through intentional political choices among an increasingly larger number of member-states.

Decisionmaking in the EU legislative branch, the European Council and later the European parliament, followed an inter-governmental logic, which, as stressed by Scharpf (2001, 2010), may have a high legitimacy, but a low problem solving capacity. The solution, more incidentally, piecemeal, and after the fact than intentionally, was to let the EU-supranational institutions decide (one they had been created), the European Commission and in particular the ECJ. Majone (….) has called this 'integration by stealth'.A case in point was the project of 'Europe 1972', the aim for a fully integrated market. Lengthy and tedious attempts to harmonize non-tariff trade barriers through inter-member state negotiations became redundant after the ECJ established the principle of 'mutual recognition'. This is similar to Kagan's thesis that the increased importance of the judiciary, also in rule enforcement through private litigation, was a de facto response to the fragmentation of political power and the strong adversarialism in US politics. In both cases, the fragmentation of political power led to a sharp increase in the power of the judiciary.

2.2. Once this train of 'power to the judges' was set in motion, a path dependent logic led to an ever increasing influence of the judiciary on the basis of the precedents that it set itself earlier. This process, that in earlier centuries happened in the US, where the Supreme Court became ever more 'supreme'- seems now to be repeated in Europe with the European Court of Justice and the European Court of Human Rights. By initially voluntary signing treaties and agreements the European member states had accepted the supremacy of European law. Eventually they were confronted with a consequence that they may not have foreseen when they signed those treaties: that with accepting the supremacy of European law they had also accepted the supremacy of the authorities that they had created to interpret that law. That brought an end, albeit gradually and originally hardly noticed, to the much cherished supremacy of parliament in countries such as the UK and the Netherlands.

2.3. Kelemen (2010) has pointed also rightly to the important role of the European 'rights revolution'. Perhaps in order to demonstrate their usefulness and to increase their popularity among the EU citizenry, and to narrow their distance to those citizens, the European institutions have created an ever larger number of rights for citizens across Europe, in the treaties, the directives and regulations, and in the case law. A large part of the 'European constitution that is not allowed to be called a constitution' - hence euphemistically called the Treaty of Lisbon - is devoted to such lists of rights. Including rights to appeal all kinds of decisions in court.

2.4. A third EU cause stems from the intentional aim of the European executive power to reduce its dependence on the national enforcement agencies - many of whom it suspected of being too lenient in enforcement, thereby creating inequalities among citizens and businesses from different member states and 'bumps and bubbles' in the coveted 'level playing field' for business across Europe, thus forming de facto new barriers to trade. The European Commission did so on the one hand by creating the policy specific regulatory agencies by now spread out across Europe (in order to get member states eager to accept their creation in the hope of getting one for themselves). On the other hand it developed a policy implementation style of 'regulation through litigation', as nicely described and analyzed by Kelemen: stimulating European citizens and businesses to aim, claim and appeal: to claim their rights and to bring charges against businesses that infringed upon their rights and regulatory agencies that were considered too lax. This procedure is reminiscent of the earlier alliance that the medieval kings sought with the commoners - by giving them rights - in order to reduce the power of the aristocracy, the real threat to the king.

2.5. However, in addition to these external causes coming from the EU there are also domestic causes fueling the trend towards juridification and more power to the courts. These will differ from country to country and be dependent on the degree to which the judges are already 'no longer lions under the throne', as Huntington (1968) called it.

In the Netherlands such a national cause was what could be called a domestic 'rights revolution'. This is not to mean that Dutch citizens did not already have many rights. However, in line with the legal culture of pragmatic informalism, the rights and possibilities for appeal against government decisions in general, were rather limited. Apparently, citizens did not mind so much either, as there were other, more informal ways to influence policy and also as many public policies were implemented by local or corporatist bodies of associational self-regulation. However, in 1992 a new basic administrative law, the General Administrative Law (AWB), was enacted which made it easier for citizens to appeal government decisions (ten Berge 1995), and many did. Between 1970 and 2005, the number of administrative court cases increased by 700 percent, from a mere 20.000 to over 144.000 (Van Waarden 2009a).

2.6. These new rights were also a product of a movement of social liberalization, caused by, and in turn further reinforcing, the depillarization of society. Other expressions of that were an increasing individualization (people became less dependent on their family, neighborhood community, and pillar), more civil conflict, a rise in divorce rates, increase in strike incidence, etc. These all produced material for civil and administrative court cases, as I have elaborated already elsewhere (Van Waarden 2009a)

2.7. The social liberalization was followed by economic liberalization, in the wake of neoliberalism and new public management ideas. The breaking up of former state monopolies, and increased competition created more corporations - that is more actors who could engage in conflict - and more reasons for conflict, given also their interdependences. Furthermore, it was soon realized that the newly created or liberalized markets needed a regulatory authority, which set off the creation of many such agencies. Their enforcement interventions and bans produced resistance from and conflict with and among industry. Many of these private-private and public private conflicts were brought into courts. A study of my former PhD student Hildebrand (2010) has shown this for the liberalization of the transport and telecommunication sectors in the Netherlands and the UK. These agencies, again inspired by neo-classical economic reasoning, encouraged 'victims' of 'abuse' of business power - notably collusion -, to sue, thus attempting to mobilize civil litigation to aid in regulatory enforcement, as also Kelemen (2010) has pointed out for the European agencies.
This economic liberalization was in first instance a domestic policy choice, but was inspired by neoliberal beliefs of international origin and it was subsequently closely related and enforced by European integration.

2.8. Another dimension of liberalization was the increased 'freedom' potential criminals felt to engage in criminal acts. That might have been reinforced by yet another freedom, the freedom of foreigners/immigrants to move across European borders - and hence also an indirect effect of European integration - as foreigners and immigrants are substantially more likely to get arrested for criminal offences. In any case, crime rates have increased, and concomitantly the incidence of criminal court cases. That led to public calls for tougher justice and more severe punishment. That was new to The Netherlands. The justice system did response, also in the sense that the traditional - quite exceptional - philosophy behind Dutch criminal law that criminals are not so much bad people who deserve to be punished, but poor and/or sick ones, who need to be aided or treated. More severe prison terms were gradually imposed, thus moving the Netherlands from a country with about the lowest pct. of population in prison to a higher rate.

Though having domestic origins, these different expressions of social and economic liberalization were in various ways positively influenced by European integration, which is in essence is also a social and economic liberalization project: the freedom of movement of goods, services, capital and labor (i.e. people), the liberalization of markets, and the freedom derived from more individual rights.

3. Consequences:

3.1. A major consequence of this development is a *loss in legitimacy of the judiciary*, notably in the Netherlands. Of old, the Netherlands has had a long-standing tradition of delegating policy issues, including potentially controversial ones, to experts: hydraulics to engineers, economic policy to economists, farming to agricultural experts, legal issues to legal scholars. Up until this day, the government administration is surrounded and intertwined with a series of publicly funded research institutes and 'planning bureaus' which aid, if not lead, in agenda setting, policymaking and policy implementation. Politicians themselves were also often recruited from among academics. There is perhaps no other country in the world where so many leading parliamentarians and cabinet ministers used to be recruited from among university professors rather than from among already prominent politicians. While the political leaders engaged in ordered conflict during election campaigns, once these were over and the need to form coalition governments was there, the various parties came up with often rather unknown academic experts. These were more or less loosely connected to their party but not 'tainted' by political conflict and hence easier given to cooperate, also because they shared an identity as members of epistemic communities. Thus social democratic, Christian democratic and liberal economics or law professors found it much easier to compromise on joint policy that the active politicians. (Though these professors often subsequently did become leading politicians with a more political profile). It seems to have been an intentional strategy of conflict diffusion among the societal and political pillars, characteristic for Dutch consociationalism and consensual democracy (Lijphart ….). Such a depoliticization of policies was made possible thanks to the high respect that the Dutch have traditionally accorded to experts, stemming from a time that citizens were for their very physical survival dependent on hydraulic experts, and also had the experience that their country was literally 'makeable'.

This expert authority was shared by jurists and in particular judges. Public trust in them was traditionally high. That was also due to the fact that they could and did shy away from intervening in politics, given the ban on judicial review, the weak development of administrative law, and the low litigation level. In this situation they could nurture a neutral and apolitical image. They had a domain for themselves, where there was no rivalry with other state powers. In that domain they had a monopoly. And authority. Any hint of criticism by politicians of the judiciary and of individual judges was anathema. Not too long ago yet, a Member of Parliament and former immigration minister was publicly chastised by her peers for even sitting on the public gallery during a court case. That authority was so unquestioned and self-evident that the judges did not have a tradition of giving arguments for their decisions. (This can still be seen in a popular TV program where a 'mobile judge' decides on various civil conflicts.) Judges-in-training are even explicitly warned not to give any hint of an argument, as 'that would only raise questions'. Judges had authority, thanks to their academic title, robe, unimportance in politics and society, and lack of knowledge of citizens about them. That bred judicial arrogance. Judges thought they had all the authority and respect they would want.

3.2. This legitimate authority is now increasingly being questioned. There are several indicators for this:

a- Decreasing trust of citizens in the judiciary, as indicated by surveys. Hertogh (2010), who reviewed all major public opinion surveys regarding trust or confidence in legal institutions and legal authorities, concludes that 'for many years, public support for the Dutch justice system has been stable and fairly unproblematic. Recently, however, there have been several signs which suggest that this may be changing. .. Based on a reassessment of survey evidence, it is argued

that the legitimacy of the justice system in the Netherlands is no longer self-evident, but has become structurally contested.' (2010: abstract).

b- Increased public criticism by members of parliament - hitherto unthinkable - as well as scholars and incidentally even judges of the judiciary or specific other judges. The Euro-skeptical British, fond of their long cherished 'supremacy of Parliament' were among the first to question the inadvertent rise of judicial review in Europe. The irritation has been mounting. They have already been forced by the European courts to modify their political institutions. The long stable history of these institutions may have proven their viability, but being early with the rule of law and democracy, the British suffered from the dialectic of progress: being the first ones they were eventually overtaken by others. Hence their institutions did not satisfy later adopted basic constitutional principles such as the separation of powers, yet they worked for the British. However, they were scolded by the Courts 'for their British exceptionalism' and had to modify institutions such as the position of the Lord Chancellor (who combined the three powers in one person) and the inclusion of the judiciary - the Law Lords - in the legislative power, the House of Lords.

As in particular the ECHR has piled ever more controversial rulings upon rulings, the criticism has grown. In recent months the British government took issues with ECHR-rulings that banned the use of 'mosquitoes', gadget that produce an irritating sound in order to chase away loitering youth, as it infringes upon their human rights'; or the ruling that prisoners in Britain should be given voting rights, something the criminals lost there 140 years ago and which has strong support among the British. Leading conservative politicians and even a person like the former most senior Law Lord Hoffmann (also former governor of Amnesty International) went even so far as to call for the abolishment of the European Treaty of Human Rights, as it is being abused for making 'crazy decisions'. Hoffmann derided the Court severely: 'The Strasbourg court has been unable to resist the temptation to aggrandize its jurisdiction and to impose uniform rules on member states. It considers itself the equivalent of the Supreme Court of the United States, laying down a federal law of Europe. But we remain an independent nation with its own legal system, evolved over centuries of constitutional struggle and pragmatic change. I do not suggest that the UK's legal system is perfect but I do argue that detailed decisions about how it could be improved should be made in London, either by our democratic institutions or by judicial bodies which, like the Supreme Court of the United States, are integral with our own society and respected as such. … The court's 'one country, one judge' rule meant that Liechtenstein, San Marino, Monaco and Andorra have four judges, despite the fact that their combined population is smaller than the London Borough of Islington. 'It is therefore hardly surprising that to the people of the United Kingdom, this judicial body does not enjoy the constitutional legitimacy which the people of the United States accord to their Supreme Court.' (Kelly 2009)

The criticism has in the meantime crossed the Channel and reverberated in that other country, so far used to a low level of judicial interference. Thus recently two leading liberal Dutch MPs criticized in an article in the quality newspaper 'De Volkskrant' (Blok and Dijkhoff 07-04-2011) in particular the ECHR for stretching the coverage of rights so much, thereby interfering more and more with national governments, that they threaten to destroy not only their own legitimacy, but also more fundamentally the legitimacy of human rights and of protecting them. They argue that by stretching and eroding the concept of human rights, even the basic ones, so far unquestioned, come under pressure. And they challenge the arrogance and absence of mandate of ECHR judges. 'Appointed judges have too often become politicians in gown', they stated.

c- A third indicator for an emerging legitimation crisis of the judiciary is the rise and growth of new right wing (and in some cases also left wing) Euro-skeptic populist parties across Europe, in Italy, France, Austria, Hungary, Poland, Belgium, the Netherlands, and most recently Finland

with the ‘True Fins’ party gaining out of nothing almost 20% of the seats in the Finnish parliament. From France came just now the news that a larger percentage of French workers would apparently vote now for the right-wing Front National of Marine Le Pen than for their traditional party, the socialist one. What these populist parties, whether from the right or the left, share, is that they are ‘against’: Against crime, against migration, against market liberalization, against privileges for the elite, against the (internationalizing) elite itself, and against what they see as projects of the elite, notably European integration. These are all seen as threat to their national identity and safety. Included in the threats to national feelings is in particular that part of the elite made up by judges. The populist parties see the judges both as a threat to nationalism, and to democracy, which they themselves see as their avenue to power. Will the judges block this, either by reducing the influence of democratic institutions anyhow, or by outright outlawing such right-wing populist parties as has happened e.g. in Belgium. Therefore, some parties, like the Dutch PVV (‘Partij voor de Vrijheid’ or Freedom party) have called for direct elections of judges. This PVV platform plan has immediately been ridiculed by almost all other parties as a ‘serious threat to the independence of the judiciary and hence to the rule of law’. Rather than seeing it as an extension of democracy, they see it as a threat to ‘the democratic rule of law’, overlooking that in many US states democracy has been extended to the selection of judges, thus merging democracy and the rule of law.

The clash between the judiciary and the legislative, and between the judiciary and its populist critics, is nicely symbolized, or even crystallized, in the currently ongoing (spring 2011) fascinating criminal court case against the leader Geert Wilders of the new Dutch populist party PVV which is with 24 out of 150 seats suddenly the third largest party in the Dutch parliament. An appeals court has ordered a lower court to prosecute Wilders for discrimination and defamation of Muslims and inciting to hatred against minorities. This live-broadcasted court case - for the first time in the history of Dutch courts - is literally a case between some members of the judiciary and a member of the legislature, defending his right to the freedom of speech, which may need even more protection that that of the ordinary citizen. The case has acquired quite some adversarial characteristics, but not only and so much between the prosecutors and the defense attorney, but between the latter and the judges, as befitting the inquisitorial court procedure. The defense has already twice challenged the three judges for being biased. Once this was successful. That meant that the whole case had to be repeated again with three different judges. Part of the case concerned the indictment of the higher order judge, who ordered the prosecution of Wilders, for having tried to influence a witness for the defense during an informal dinner.

3.3. The decline in legitimacy of the judiciary in the Netherlands is however not only a reaction to the increasing power of especially European judges, but is additionally fueled by some specific domestic trends and incidences, notably:

- A number of recently highly publicized and very serious judicial mistakes, which have become evident only years after the suspects were convicted. The mistakes were discovered thanks to new techniques for evaluating evidence (dna), confessions of others that they were the ones who committed the crime, and the efforts of leading public figures - a.o. a well-known psychologist of law, lawyers of the convicted, journalists, pollsters, and even entertainers - who took up the cause of a convict they considered might have been convicted wrongly. Apparently, the earlier convicting courts suffered from group-think.
- Paradoxically enough, the mistakes may have also been caused by a hidden desire of the judges to show that they are indeed trying to be tough on crime, i.e. they could be a reaction to criticism, whose outcome has incited even more criticism.
- Yet another paradox might be involved: the strong increase in litigation has increased the workload on the relatively small number of judges and produced pressure to handle cases quick (even if a bit ‘dirty’, but then Dutch jurists have been much less legalistic than e.g. German ones and were already familiar with an often used short and rather informal summary proceeding

('kort geding')). This pressure has been institutionalized through a reorganization of the judiciary about a decade ago under the influence of New Public Management ideas, complete with performance measurement (how many cases did you handle this week?), decreasing norms in time and money made available for cases, and even standardization, if not even Taylorization, of the judicial work processes.

3.4. The reaction of the courts to this increased criticism has been diverse, and not always so successful.
- A first, very common reaction to criticism in the Netherlands has been: 'reorganization'. The formerly more or less autonomous 19 district courts, 5 regional appeals courts, and a few specialized courts, e.g. for under the control of the Justice department were placed at arm's length from the department and a new overarching management structure, the Council for the Judiciary (Raad voor de Rechtspraak), was createdin 2002 for all these courts. This organization was also meant to manage the courts in a more professional way, which varied from introducing a centralized electronic register of court cases and decisions (hitherto these were often still handwritten in a 'big book') to applying sound financial management and NPM-style measures such as performance measurement, which included developing procedural standards. It furthermore evaluates performance, commissions research, advises on legislative bills regarding the judiciary, and takes care of a more professional PR for the judiciary.
- Secondly, the judiciary is trying to increase its accountability, while defending its performance, both to the general public and to politics. It has engaged in a charm offensive and has gone even so far as to allow camera's in the courtroom, which supply the hesitant beginnings of 'Court TV' programs. However, so far that has not been very successful. For one, viewers are often disappointed. They know the courts from American movies which portray the more vivid adversarial court procedure. By contrast, the inquisitorial procedure is boring, particularly in the Netherlands, where, unlike e.g. in he UK, Belgium or Germany, much is handled in writing before the court sessions. The participants refer to this information, which is unknown to the viewer and often rather technical, full of legal jargon, and they can do so also because there is no laymen jury to be informed, as the Dutch legal system does not know jury trial. All that makes it difficult for the uninitiated viewer to follow the case.
- By tradition and law, court cases are public events. People can come in and watch how the public interest is taken care of by judges in individual cases. However, it was only rarely that spectators showed up, and then mostly for more spectacular cases. The size of the public gallery in the courthouses testifies to this: not many viewers are expected. With the new openness and the introduction of television cameras the public character of court sessions has become more real, and judges have to get used to this. As the conversation tends to be more informal in Dutch courtrooms than what we are used to from American TV, several judges made mistakes or even slip-of-the-tongues (now recorded), and were challenged by the defense to be biased. Between 2005 and 2009 the number of such challenged increased from 159 a year to 288 (Van Dongen 2011). This adds to the adversarial dimension of the inquisitorial procedure. It has had a number of consequences. If the challenge is refused (in 90% of the cases) the defense is confronted with a more irritated judge. Furthermore, judges will get more careful, more risk-averse, that is, more formal and more bureaucratic. Finally, judges in prominent televised cases such as that against right-wing politician Wilders were taught - like soccerstars, popidols, and politicians, how to deal smart and smooth with the media.
- To summarize: the new openness of the courts could very well backfire: So far it does not seem to have reduced distrust and lack of legitimacy, while it does seem to make the court procedure more formal and bureaucratic.
- Finally, as to the substance of enforcement, the call for tougher punishment seems to have led to a move away from a more particularistic conception of rule enforcement to a more universalistic one. There is an increase in the severity of punishment meted out, in the size prison population, and a turn away from the old philosophy in Dutch criminal law that crime is no

intentional bad behavior, but a disease, which calls for healing rather that for punishing (as the Dutch do also with drug addiction).

4. Imbalances

More fundamental and principle consequences of the increased importance of the judiciary are several, largely unintended, shifts in power relations that create new imbalances in the political system..

a- ***Within the trias politica from*** the two democratically legitimated powers, ***the legislative and executive, to the judiciary*** which owns its legitimacy only to its expertise and independence, that is, ***from democracy to the rule of law***. The judiciary increasingly invalidates decisions of the other powers and/or instructs them often even to take certain measures, e.g. in the interest of the protection of citizens' rights.

In principle the legislative and executive could counterbalance the power of the judiciary by enacting new treaties and regulations in which judicial decisions are being overturned or annulled. However, the judiciary - and notably the high court - is a smaller and more homogeneous group and can easier reach decisions. Also because it decides usually in private, allowing for more give and take, in case judges would need to negotiate. By contrast, the democratically legitimated institutions have more difficulty reaching decisions as they have to represent the many different interests and opinions among the demos.

This imbalance is particularly great in the European Union, as Scharpf (2001, 2010) has pointed out. The European judicial power engages in supranational decisionmaking, which is much easier to realize (high 'problemsolving capacity'), though it lacks legitimacy. By contrast, its counterbalance, the legislative corrections of the judiciary, are to be made by the democratic institutions of the EU, the European Council and the European Parliament and here decisionmaking is much more difficult due to the fact that a kind of consensus has to be reached among representatives of now 27 different countries, with ever so many different interests and opinions. In Scharpf's terms their legitimacy may be higher, but their problem solving capacity, read decisiveness, is much lower.

As long as both balance each other out there is no problem: The court being careful, bound by legal precedent, protecting basic values as legal certainty, legal equality, *and, yes, also democracy*, but also decisive; Parliaments being more adventurous and innovative, oriented to policy problem solving albeit having more difficulty with it, being less decisive but more representative. However, that balance threatens to get distorted, and exactly because of these differences of the legislative and judiciary: courts can easier correct parliaments than parliaments courts. In the EU, but also in nation-states.

The increasing dominance of the guardians of the rule of law over democratic institutions a, if intentionally, or even tolerated, also reflects a distrust of democracy. Apparently checks are needed. That might be perhaps understandable where democracy has still to demonstrate its stability, as in former authoritarian regimes (communism, autocracy in the Middle East, or Latin America). Therefore, most newer Latin American constitutions have followed the US example and introduced judicial review; as did Germany after the Second World War, given the end of the Weimar Republic. But it would be less of a necessity in countries where democracy has proven its stability over a long period of time, like in the UK, Switzerland, or The Netherlands.

b- Secondly, there is a shift ***from democrats to bureaucrats***: More litigation produces more formalization. First of all in the courts itself, but it has also effects on politics, society and the economy. The threat of lawsuits makes politicians, civil servants, business organizations and interest associations more careful. That fuels litigation avoiding formalization in all kinds of

organizations, such as attempts to draw up more complete contracts; and further specification of all kinds of other regulations

c- Thirdly, ***from the collectivity to the individual***. The rights revolution, sanctioned by the judiciary, tends to give more power to the individual, to the detriment of the collectivity. In my town Utrecht, a single individual, a Ralph Nader kind of guy, who knows his way in the courts, is currently blocking already for several years the complete reconstruction of an awful high rise folly of the 1970s in the old city center, by time and again finding new possibilities to appeal the decisions of the municipal government. Similarly, road construction to alleviate serious traffic congestion problems is hindered of not blocked by a few individuals who appeal continually to the administrative courts, in part by referring to EU standards for maximum dust particle concentration in the air. No matter what one may think of the substance of the case: the fact that a single individual can block collective decisions of democratically elected and legitimated representatives seems to be a bit out of balance. It reduces the power democratic institutions.

d- ***Between the past and the present***. Via the courts, our past generations, who produced the currently existing body of law, including the constitution, rule over the present generations of people. That makes for strong path dependency. The positive side is legal predictability, certainty, and security , possibly legal equality, as well as perhaps input or process legitimacy. The downside is inflexibility, rigidity, and lack of output legitimacy, as the legislative and executive powers are increasingly bound and restrained by the legal outcomes of past decisions, such as the enactment of specific constitutional law, the decision to join the European Union, or to sign international and EU-treaties. The larger the body of law produced by the past generations becomes, the greater the constraints on the present ones, in particular if the past generations have also made it difficult to change the basic legal parameters such as constitutions and treaties. Lazare (1996) has analyzed this for the US and calls it a ‘ frozen republic’, incapable of finding effective solutions to new problems, as the policymakers are bound - via the courts - by the legal inheritance of the past. Citizens seem to be often more aware of this threatening rigidity caused by constitutions than their politicians. Hence less and less governments seem to dare to put new EU decisions and treaties up for a popular referendum.

Three Paradoxes (?)

I conclude with three paradoxes:

I- The ‘rights revolution’ has given citizens more individual rights, notably ever more protection by the rule of law, that is, de facto by its servants, the courts. Yet with that very measure it has also reduced other citizen rights: their democratic rights, their rights to partake in the sovereignty of their state. In the EU, such rights might have been motivated to ‘appease’ the citizens and their concern about the European ‘democratic deficit’. But what was meant to enhance citizen’s participation, seems to turn into its very opposite: it reduces the power and influence of the democratically elected bodies in favor of the judges.

II. The self-extension - in part - of the authority of the judiciary at the detriment of democracy has contributed to the rise of right wing populist parties, who have fiercely criticized the undemocratic nature of the emerging lawyocracy. The growth of these parties has however made many less extreme democrats hesitant to give in to their rightful legitimate complaint to readjust the balance between the rule of law and hence lawyers on the one hand and democracy on the other: for fear of a populist take-over of the state. Suddenly such moderate democrats see in the judiciary, whose growing power they also lament, a protection against those populist parties.

III. The fiercest opponents of the increasing power of the judiciary are often right-wing parties of a conservative liberal background. Yet the phenomenon that they are concerned about is largely caused by liberalization: domestic political, social, and economic liberalization, and in particular those forms pushed by the EU.

And as bonus paradox:

IV. More rights are meant to give citizens more freedom. However, the enforcement eventually produces more formalization and bureaucracy. Just as more power to the judges reduces the freedom of citizens, so does the increasing formalization and bureaucratization.

But perhaps: we should see also the bright side of that picture. Is it perhaps becoming ‘time to rediscover bureaucracy’, as Johan Olsen (2005) recently argued?

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