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## The Ebb and Flow of Judicial Leadership in the Netherlands

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### Introduction

In this paper I analyse the loss of traditional authority by the Dutch Supreme Court (*Hoge Raad*).<sup>1</sup> This court is traditionally seen as the highest court of the Netherlands, but after decades of applause and admiration, today the court finds itself in a marginal position. The court failed to keep in touch with its environment and did not react adequately to some relevant changes, such as the rise of contenders like the Council of State (*Raad van State*) and the Council for the Judiciary (*Raad voor de rechtspraak*), the introduction of New Public Management (NPM), the complexity as a result of the creation of a European legal order and the debates about constitutionalism. In its splendid isolation the *Hoge Raad* thought – until recently – that these changes would leave its superior position at the top of the Dutch judiciary unchallenged.

I analyse the causes of this loss of responsiveness of the court and suggest a broad form of modern judicial leadership as a means for the *Hoge Raad* to regain some of its lost territory.

### 1. Those were the days: 1988

1988 was a celebratory year for the *Hoge Raad*, for long the leading court in the Netherlands. The court celebrated its 150th jubilee. An academic symposium collection was published under the subtitle ‘*changes to the role of the Hoge Raad as law-maker*’, which was full of laudatory remarks.<sup>2</sup>

The civil chamber especially was seen as a kind of innovative Dutch Warren Court, praised by legal academics because of its progressiveness and responsiveness. From 1984 on it was acknowledged that the *Hoge Raad* was not simply applying existing laws. If, in a concrete case, application of the rules would lead to an unjust result, the *Hoge Raad* would decide on the basis of open or vague norms and equity. This was the period of creative judicial lawmaking on the basis of ‘good faith’ and ‘reasonableness’.

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1 In this paper I build upon my introduction ‘From legitimacy to leadership’, in N. Huls et al.(eds.), *The legitimacy of highest courts rulings. Judicial deliberations and beyond*, 2009, pp. 3-30; and N. Huls, ‘The Dutch Hoge Raad as a political pathfinder’, in D. Kapiszewski et al. (eds.), *Consequential Courts: Judicial roles in Global Perspective*, 2012 (in print).

2 B. Baardman et al. (eds.), *De Hoge Raad der Nederlanden. De plaats van de HR in het huidige staatsbestel*, 1988.

The leading role played by the *Hoge Raad* in a number of contested cases for which politics had no answer (the right to strike, euthanasia) led Iens Verburgh, member of the *Hoge Raad*, to characterize the court as a 'deputy legislator'. Many civil law professors praised the autonomous role of the *Hoge Raad* in developing the law.

In this period the finishing touches were put to the New Dutch Civil Code (*Nieuw Burgerlijk Wetboek*, NBW) by Wouter Snijders. While serving as a judge in the *Hoge Raad*, he was at the same time the principal author of the texts and explanatory notes to the NBW in his capacity as Government Commissioner. His main co-worker was Arthur Hartkamp, Advocate General in the *Hoge Raad* and a leading author of private law textbooks.

In this period the *Hoge Raad* was an enthusiastic ambassador for the European Convention on Human Rights. Not only was the *Hoge Raad* willing to overturn its own case law when the Strasbourg court had ruled otherwise, the court also created a body of case law in which the recently revised Dutch legislation in the field of family law was tested against the European Convention on Human Rights (ECHR). In response, the Government had to review and change the recently adopted Book 1 of the NBW on family law. For example, a broad interpretation of 'family life' in Article 8 ECHR led to a revision of the statutes regarding, amongst other things, the legitimacy of children, joint custody if parents are not married, equal rights of homosexuals and more.

The legislature followed later and amended the recently introduced Book 1 (family law) of the NBW in order to make it compatible with human right standards. The enlightened judicial circles believed that this development fitted in well with the spirit of the times, i.e. emancipation and equality.<sup>3</sup>

Not only the legal elite, but also socio-legal scholars were enthusiastic about the functioning of the *Hoge Raad*. In his PhD Freek Bruinsma<sup>4</sup> adopted a critical approach to the power of the civil division of the *Hoge Raad*, but after his empirical research in his conclusions he referred to a network of quality and an 'incorruptible elite'. Kees Schuyt praised the *Hoge Raad's* precision and saw the prudent deliberations in chambers as a superior form of decision-making compared with many political debates. Erhard Blankenburg called the *Hoge Raad* a neat and petite court of justice when compared with the German Federal Court of Justice (*Bundesgerichtshof*), able to avoid legal immobilisation and legal fragmentation because of its scholarly character.

Finally, the Government Commissioner for a new Administrative Law Act, Michiel Scheltema, expected that the *Hoge Raad* would become the highest administrative law court in the foreseeable future.

In sum, at the age of 150 the *Hoge Raad* was a vital institution that was regarded highly in academic circles for its intellectually high-standing lawmaking role in civil law matters. Politically, the court acted as a scout for the legislature in solving nasty political issues and by instituting a human rights discourse that led to law reforms that reflected the 'moral signs of the times'.

The *Hoge Raad* has acted in the past as a scout for the politicians and explored controversial territory as a kind of advance observer. Cooptation, rather than separation, of powers occupies centre stage.

In an interview the President of the *Hoge Raad* said that he had no problem in positioning his court as a state court in a federal Europe.<sup>5</sup> However, the bright future that was generally predicted did not turn into reality.

## 2. Five questions marks

In the decades that followed some cracks in the wall of the *Hoge Raad* became visible and its top position began to dwindle.

### 2.1. Unpredictability and uncertainty

The first attack came from academia. In his PhD thesis in 1992 Maurits Barendrecht opened an intellectual attack on the court's casuistic legal decision-making method on the basis of vague norms, whereby

3 See e.g. J. de Boer, 'A whole code of family law, boek 1 getoetst aan het EVRM', in K. Blankman & W. Roberts (eds.), *Het EVRM en het Nederlandse en Belgische personen-, familie- en jeugdrecht*, 1987.

4 F. Bruinsma, *Cassatierechtspraak in civiele zaken* (PhD dissertation, Utrecht University), 1988.

5 Interview with H.E. Ras by F. Bruinsma and N. Huls, *Nederlands Juristenblad* 1988, pp. 1574-1579.

ultimately the application of rules succumbs to an ex post moral equity-based judgment. The author had been a practising member of the Bar for many years and criticized the unpredictability of equity-based case law for practising lawyers and legal uncertainty for their clients.

In a follow-up study in 1998 he went a few steps further in his criticism, demonstrating how the *Hoge Raad* engaged in a considerable number of trivial issues.

### 2.2. A first contender: the Council of State

Secondly the Council of State, which had successfully opposed the integration of the highest courts, has become a contender for the top position of the judiciary, namely in the field of administrative law (with the exception of tax law and social security law), a new task of the Council since 1976.

This new judicial function was added to the task that the Council of State performed traditionally with regard to legislation. Before Government introduces a bill in Parliament, it must obtain legal advice from the Council of State. This advisory report also examines whether the bill is consistent with European law. The report is not judicial review as under the American model, but a form of judicial preview.<sup>6</sup> In general, politicians, both the Ministers and Members of Parliament, take this advice into account. The legislature, however, has the last say. The Council of State cannot issue a veto.

### 2.3. A second contender: the Council for the Judiciary

The reorganization of the administration of justice by the judiciary marks a third turning point. The developments within the independent third branch of Government towards a professional judicial organization required a transparent form of control based on NPM principles.<sup>7</sup>

A new organization, the Council for the Judiciary, was given an important part to play here because, among other reasons, the *Hoge Raad* refused to participate in the modernisation. As a result a major task, which traditionally had belonged exclusively to the *Hoge Raad*, namely that of safeguarding the unity of the legal system, was taken by the Council for the Judiciary. The Council cannot, of course, decide in individual cases, but it plays a vital role in streamlining judicial procedures both in procedural and material respects, in order to achieve unity.

### 2.4. Old fashioned civil procedure

A fourth form of criticism was made by a Review Committee, a triumvirate of law professors who reassessed the law of civil procedure.

I consider it to be inevitable that the separation of law and fact will be rigorously abandoned. In today's modern private law literature this separation no longer has any role to play whatsoever. I quote Daan Asser,<sup>8</sup> a member of the civil chambers of the *Hoge Raad*:

'Because the law cannot exist without facts, the judgement of facts in the context of applying the law cannot be excluded, not even in appeal. It is thus logical that there is so much talk about the facts in the judges' council chamber. Here much more assessment and judgement is made in the factual field than, given the restrictions imposed by the system, can be found in the ruling. This is actually a shame because it means that part of the motives upon which a ruling rests remains concealed.'

The doctrine that in appeal the *Hoge Raad* rules on the law but not about the facts is an obstacle for this court if it wants to regain its position as the leader of the judiciary. If the court wants to continue to play a central role in the review process in criminal cases it must make broad integral judgements and this is when the separation of law and fact becomes a thorn in the side. The narrow and formalistic aspects of cassation techniques are a severe hindrance.

6 T. Koopmans, *Court and Political Institutions, A Comparative View*, 2003, p. 43.

7 E. Mak, 'The European Judicial Organisation in a New Paradigm: The Influence of Principles of "New Public Management" on the Organisation of the European Courts', 2008 *European Law Journal*, 14, no. 6, pp. 718 -734.

8 D. Asser, *Cassatie in civiele zaken*, (Preadvies Vereniging voor de vergelijkende studie van het recht van België en Nederland), 2007, p. 209.

### 2.5. Criticism from other disciplines

In the fifth place scientific disciplines have begun to take an interest in the *Hoge Raad*. The socio-legal scholar Freek Bruinsma demonstrated in *The Hoge Raad from below*<sup>9</sup> that in some famous civil cases the *Hoge Raad* had ruled on the grounds of incorrect facts. The untenability of the fact and law separation was again convincingly demonstrated.

After a number of miscarriages of justice in criminal cases, some psychology of law scholars fundamentally criticised the way in which lawyers collect and verify facts. They argued for a Criminal Cases Review Board outside the judiciary like the United Kingdom model.<sup>10</sup>

In sum, the undisputed top position of the *Hoge Raad* was challenged from both an academic and a societal perspective. In the beginning the *Hoge Raad* did not find it necessary to respond to the critics, but in due course that turned out to be a wrong strategy.

## 3. Three failures

In this section I will demonstrate that the abstinent role of the *Hoge Raad* has undermined its position as the top court of the Dutch judiciary. The *Raad* failed to address properly New Public Management (NPM), Europe's legal complexity and the need for constitutionalism in a period of populism.

### 3.1. The *Hoge Raad*'s 'no' to New Public Management

A fierce and arrogant attack in 2000 by President Martens and the Procureur General Ten Kate on the advent of the Council for the Judiciary<sup>11</sup> contained not only the clear message that the court was hostile towards NPM principles, but also that the *Hoge Raad* refused to take responsibility for the backlog of cases in the lower courts. This crusade against the modernisation process was detrimental to the *Hoge Raad*'s position.<sup>12</sup>

For instance, in an attempt to expedite procedures and to create equal treatment, lower courts invented forms of legal cooperation on the workfloor. In different categories of bulk cases (alimony, debt rescheduling, collection costs, severance pay) lower courts designed guidelines, formulas etc. in order to achieve legal equality, but the *Hoge Raad* did not recognise these forms of judicial cooperation as legally binding. The *Hoge Raad*'s formalistic approach – i.e. court arrangements are non-statutory within the meaning of Article 79 of the Judiciary (Organization) Act (*Wet op de rechterlijke organisatie*) – was prompted, among other things, by the desire not to be inundated with legally uninteresting cases.

As a consequence the lower courts have taken matters into their own hands and take little account of *Hoge Raad* rulings in these areas of law. Members of the Working Group on Alimony Standards consider deviating *Hoge Raad* rulings as exceptions to their own rules.<sup>13</sup>

In consumer mass claims the *Hoge Raad* took an abstinent attitude. In the *Dexia* affair, a mass tort claim case involving 400,000 'victims' of a financial complex product, the lower courts designed several mechanisms to speed up the process in the form of 'decision modules'. These were not accepted by the *Hoge Raad*. And when, after a long period of individual proceedings, a collective settlement was reached by the Amsterdam Court of Appeal, the *Hoge Raad* decided later that it was not bound by the collective decision of the lower court.

The *Hoge Raad* abandoned the lower courts in their endeavours to process the different flows of mass cases. The *Dexia* case marked the Waterloo for this 'hands off' mentality.

The quality of the courts is determined by three factors according to Zuckermann.<sup>14</sup> In the first place comes rectitude of decision, so judgements must be solid; in other words the right rules must be applied to the relevant facts and by independent and expert courts. In the second place the courts must

9 F. Bruinsma et al., *De Hoge Raad van Onderen*, 2010.

10 W.A. Wagenaar et al, *De slapende rechter: Waarom het veroordelen van burgers niet alleen aan rechters overgelaten kan worden*, 2009.

11 S.K.Martens & Th. ten Kate, 2000 *Nederlands Juristenblad*, no.1.

12 This was admitted by Martens' successor, Haak, in his farewell interview with Caroline Lindo in 2001 *Nederlands Juristenblad*, no. 15.

13 B. Dijksterhuis, *Rechters normeren de alimentatiehoogte. Een empirisch onderzoek naar rechterlijke samenwerking in de Werkgroep Alimentatienormen (1975-2007)* (PhD dissertation, Leiden University), 2008, pp. 80 et seq.

14 A. Zuckermann (ed.), *Civil Justice in Crisis. Comparative Perspectives of Civil Procedure*, 1999.

act promptly, because *'Justice delayed is justice denied'*. In the third place, access to the courts must not be too expensive making it only affordable by the rich.

These three factors are directly related to the *Hoge Raad* with its hyperindividualistic case-by-case approach which concentrates solely on the first aspect, leaving case management and issues of the administration of justice to others.

### 3.2. Failing to show the way in European law

The Netherlands likes to present The Hague as 'the legal capital of the world' which fits with the Dutch self-image as a leader in peace and justice for the world.

In the 1960s in Europe the Netherlands was in the vanguard from where we could advance Dutch legal concepts. Our judge in the ECJ, A.M. Donner, exported 'direct effect' to the EU and other member states, in the *van Gend & Loos* judgment, a vital part of the legal revolution that created the primacy of EU law. In those days the Netherlands was 'the least problematic country' in Europe in terms of building a real European legal system.<sup>15</sup>

The *Hoge Raad's* progressive interpretation of the ECHR in the 1990s resulted in a huge expansion of the judicial domain. Numerous policy fields that had previously belonged to the exclusive domain of the legislator and the administration, are nowadays subjected to judicial intervention. This development has led to a tremendous juridification of society and it has made the task of the judge both more complicated and political.

The so-called denationalisation of the law is taking place in almost every legal field. The traditional system of national legal Codes is being interfered with by European legal innovations and invasions.

The time when the Europeanization of the national legal order was seen as a laudable and progressive movement seems to be over. Lower courts are faced with insurmountable legal complexities that make judging very difficult. Ordinary judges fear the denationalisation of their laws<sup>16</sup> and they need unequivocal expert guidance.

Here it is extremely problematic that the design of our national judicial system is so outdated. At present the Netherlands has four highest courts: the Supreme Court (*Hoge Raad*), the Council of State (*Raad van State*), the Central Appeals Tribunal (*Centrale Raad van Beroep*) and the Trade and Industry Appeals Tribunal (*College van Beroep voor het Bedrijfsleven*), which all have primacy in their own legal field. These courts interpret and apply European law and the European Convention on Human Rights in an autonomous way. There is no hierarchy between these courts and the Netherlands does not have one single court that guards the core values of the Dutch Constitution in a European perspective.

The *Hoge Raad* assumed for a long time that its legal excellence constituted both a necessary and sufficient condition for its leadership role. This obviously is not an accurate assessment of its position anymore. From a European perspective the *Hoge Raad* is just one of the many state courts. This puts the court at a disadvantage in the judicial networks that are active at the European level.<sup>17</sup> For instance, the *Hoge Raad* is not allowed to participate in the Conference of European Constitutional Courts (CECC).

Academics pay a lot of attention to judicial dialogues, networks and conversations at the international level that move beyond the traditional distinctions of hierarchy and primacy.<sup>18</sup> The rosy picture of wise judges deliberating in an informal setting about hard cases and eager to learn from each other is appealing to the international observer, but in reality the *Hoge Raad* has to compete with its rivals for the number one position at the European level. Open competition between highest courts is not an easy option, given the culture of aloofness among judges, as the following example shows.

15 See M. Claes & B. de Witte, 'Report on the Netherlands', in A.-M. Slaughter et al. (eds.), *The European Court and national courts – Doctrine and Jurisprudence. Legal change in its social context*, 1998.

16 R. Barents, 'De denationalisering van het strafrecht', 2006 *SEW: tijdschrift voor Europees en economisch recht*, pp. 358-374.

17 See the paper by Claes & de Visser in this issue (M. Claes & M. de Visser, 'Are You Networked Yet? On Dialogues in European Judicial Networks', 2012 *Utrecht Law Review* 8, no. 2, pp. 100-114).

18 Ibid.



### 3.2.1. A concrete example: gambling law

In gambling law the Netherlands found itself in a strange situation. In a case in which the *Hoge Raad* had already made a previous ruling, the court submitted preliminary questions regarding the Dutch Gambling Act (*Wet op de Kansspelen*) to the European Court of Justice; these questions were partly the same as and partly different from questions submitted previously by the Judicial Division of the Council of State.

I have been involved in gambling law as an advisor to the Dutch Government.<sup>19</sup> One of the political hot potatoes is whether Europe has the authority to regulate on the topic. At the level of the European Council only the UK and Malta advocate one single gambling market. All the other Member States are in favour of restrictive national legislation. Gambling was explicitly excluded from the Service Directive. Nonetheless, there was a constant threat of ‘infringement procedures’ by the European Commissioner, Charlie McCreevy.<sup>20</sup>

The ECJ introduced in its *Gambelli* ruling of 2003<sup>21</sup> a ‘hypocrisy test’: national courts have to decide whether restrictive gambling legislation ‘really’ is serving legitimate goals such as preventing addiction and criminal activities. In *Placanica* (2007)<sup>22</sup> this approach was affirmed.

On 14 May 2008 the Judicial Division of the Council of State submitted the following three questions. The phrasing is my own:

- Does Article 49 EC Treaty mean that the Dutch authorities cannot prohibit an English licence holder (Betfair) from offering games on-line if Betfair is permitted to do so in the United Kingdom (mutual recognition)?
- Is the case law of the ECJ in concession cases (C-458/03, C-507/03 and C-231/03) also applicable if only one licence is issued?
- When renewing a licence for a monopolist (de Lotto), must other parties also be given the chance to seek a licence?

While this case was pending, the *Hoge Raad* submitted on 13 June 2008 the following questions in another case:

- Can a gaming policy still be referred to as ‘restrictive’ when the monopolist is allowed to advertise and present itself as an attractive alternative to the illegal offering of games of chance?
- In this case, does it make any difference if, in enforcing the gaming regulations, a Dutch licence holder (thus not the State) acts against a foreign competitor (Ladbrokes)?
- The same question as the first question of the Council of State above.

In its decisions of 3 June 2010 (C-258/08 *Ladbrokes* and C-203/08 *Betfair*), the ECJ answered all the questions of the two Dutch courts. Advocate General Y. Bots had written a conclusion in which he treated both cases jointly. The ECJ which, after its *Gambelli* decision of 6 November 2003 (C-243/01) and its *Placanica* decision of 6 March 2007 (C-338/04), has chosen to avoid an open conflict with the European Commission and the majority of the Member States in gambling matters, delivered a rather predictable decision, and a commentator rightly concluded that the preliminary references had not been necessary.

It has been said that asking these two sets of partly overlapping questions was a deliberate and coordinated action by the Dutch top courts to urge the ECJ to give clear guidance. The questions were discussed by the Assembly of Court Coordinators for European Law.<sup>23</sup>

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19 See N. Huls, ‘Dutch gambling law & policy: an untenable parochial approach’, in A. Littler & C. Fijnaut, *The regulation of Gambling. European and national perspectives*, 2007, pp. 69-80.

20 But were not continued by his French successor, Michel Barnier.

21 Case C-243/01, *Criminal Proceedings against P Gambelli and others* [2003] ECR I-13031.

22 Case C-338/04, *Placanica and others*, [2007] ECR I-1891.

23 See presentation by R. Winter, President College van Beroep voor het Bedrijfsleven, at the Conference ‘Constitutional perspectives on the EU – Germany and the NL’, Maastricht, February 2011 (e-mail messages M. Claes and M. de Visser to the author).

After the *Securitel* ruling<sup>24</sup> all the Dutch courts have appointed a specialist in EU law. These coordinators constitute a national network that facilitates the interaction between the national and the European legal order within the courts. The *Hoge Raad* and the Council of State participate in this network.

In this case it would seem that the *Hoge Raad* was wary of stepping on the toes of the Council of State which had made previous preliminary references. Consequently the two courts were involved in a game of running and dodging: neither of them makes authoritative decisions as the highest national judicial authority, but both submit more or less similar questions as to whether parts of Dutch gambling legislation are permitted by the ECJ. This is not an example of a sophisticated dialogue between courts, but of undesirable, timid, judicial retreat, which creates both a policy deadlock (nothing can be done while the Gambling Law is *sub judice*) and a lawyer's paradise.

With its 'hands off' attitude the *Hoge Raad* has created a lame duck position for itself. Its authoritative position in gambling law was beyond dispute, but because it did not dare to decide the *Ladbroke* case (on which it had decided already in an earlier procedure!) it failed to hold the position of the leading court. Unlike the Council of State, which is also the legal advisor to the Government in gambling legislation, the *Hoge Raad* is in an excellent position to give an independent and impartial judgment about the Dutch Gambling Act. This comparative advantage has been given up voluntarily by asking questions instead of making a decision. I believe that the *Hoge Raad* shows a sign of weakness and of retreat instead of stepping forward and taking the lead in gambling law matters.

For me the example proves that in 2012 the judicial elite at the *Hoge Raad* has lost part of its prominence and prestige at the European level. The fact that this court has failed to exercise judicial leadership at home has led to it lagging behind in Europe as well.

### 3.3. Lack of constitutional clarity: the challenge of populism

The Netherlands, unlike Belgium, France and the UK, has not yet got a fully fledged Constitutional Court, despite the adoption by the Upper Chamber in February 2009 of the Halsema proposal, which opens the door for judicial review without mentioning a Constitutional Court. For the time being we must make do with the internal rebuilding of the Council of State and the *Hoge Raad*.

In 1988 the *Procola* judgment of the ECtHR,<sup>25</sup> in which the combination of the advisory and the judicial function of the Council of State of Luxembourg was criticized, was not yet an issue.

So Wouter Snijders could write a new civil code while sitting on the Bench.

The Council of State, however, has been wrestling with the *Procola* ruling of the ECtHR for some time now. In the recently adopted law, of course after the advice of the Council of State, the Government adheres closely to the 'institutional unity' of the Council and the possibility of a double appointment as legislative advisor and administrative judge.

The *Hoge Raad* intends to install chambers of selection. As a consequence, selection at this 'starting gate' will directly affect both the design of the judicial organisation and the relationship with the (cassation) bar. The proposal of a moderate kind of 'leave of appeal' system is at first sight a minor technical adjustment, but it affects a number of fundamental matters. In my opinion it is comparable to the 1963 law amendment when the violation of the *statute* was replaced by the violation of the *law*. A single word can make a great difference at the top of the legal pyramid in the Netherlands.

By selecting on the basis of the distinction between important and unimportant cases, the *Hoge Raad* will determine its own agenda in the future. In this way the development of the law becomes more a question of policy and less a question of coincidence.

#### 3.3.1. Populism

Like many other European countries, the Dutch political system is experiencing a wave of populism, which does not spare the judicial branch in its criticism of the elite, for instance on the escape of detainees during their probation leave. The sentencing climate in the Netherlands is getting tougher and soft

24 Case 194/94, *Securitel*, [1996] ECR I-2201.

25 *Procola v Luxembourg*, ECtHR Decision of July 1 1993 nr 14570/89.

judges are an easy target. Our new conservative Government has launched an ambitious criminal law programme.

So far the Netherlands does not have any political proceedings against corrupt politicians as there are in France and Italy, a fact that has polarised relationships in those countries. Political leaders like Giscard d'Estaing<sup>26</sup> and Berlusconi argue – in a populist vein – that they are only responsible to their voters and not to activist judges. This position is hard to maintain in a state under the rule of law (*rechtsstaat*).

Respect for the highest courts and respect for their discretion was, until recently, fairly high among the other branches of Dutch Government. However, due to a couple of highly publicized miscarriages of justice, the downfall of some judges because of improper behaviour (wife-beating, lying, child pornography) and an unflattering insiders book by an Appellate Court Judge (Rinus Otte<sup>27</sup>), this positive image has changed rapidly and dramatically.

The criminal procedure against Geert Wilders, the leader of the populist anti Islam party (*Partij voor de Vrijheid*, PVV), has led to a series of judicial blunders. Wilders has gained a lot of political power with his xenophobic program. He was accused of the criminal act of hate speech against Muslims. The public prosecutor did not want to challenge Wilders in court, but was ordered by an Appellate Court to do so. Wilders politicized the procedure and succeeded in removing the three judges from his case, because of their lack of impartiality. Obviously, this was presented as proof that the court did not give him a fair trial.

In the political turmoil that accompanied the Wilders trial, no representative of the Amsterdam Court of Appeal or of the Council for the Judiciary defended the court or the legal system. The President of the *Hoge Raad*, Geert Corstens was the only one who attacked Wilders' statement that 'a conviction by the Amsterdam Court would prove his voters that the Dutch judiciary is not politically neutral'.

In spite of immense efforts to create a professional judicial organization, the top rank of the judiciary has failed to demonstrate the ability to communicate with the public at large about thorny issues. In a full grown democracy the third branch of Government has to find answers to the tremendous challenges of populism for the rule of law.

#### **4. The answer: judicial leadership**

It is helpful to analyse the situation of a highest court such as the *Hoge Raad* in terms of leadership, a concept that is currently receiving plenty of attention from both political scientists and business administration scholars, but which as yet has hardly been applied to the judiciary.<sup>28</sup> At first sight, leadership is completely strange to a civil law judiciary, in which lower courts are not bound by decisions of superior courts. But I believe the *Hoge Raad* can profit from discussions on leadership within comparable (so-called *non-majoritarian*) institutions, which have an autonomous position vis-à-vis the politicians and which are crucial to the functioning of a democratic society.

In the Netherlands a few years ago the General Audit Committee (*Algemene Rekenkamer*) shook off its role as timid bookkeeper and demanded a fully fledged role for itself in the political debate. Comparisons with the leadership of Central Banks – for example during times of crisis – can also produce useful suggestions for leadership by the highest courts. The sociological distinction between organisations and institutions may be helpful here.

##### **4.1. The Hoge Raad and organisational leadership**

In the first place the *Hoge Raad's* leadership concerns the internal coherence of its own case law. But more important is that the *Hoge Raad* must demonstrate leadership to the lower courts. In this respect the *Hoge Raad* is expected to lead by playing a pioneer role with regard to substantive legal issues. I believe it is desirable that the *Hoge Raad* lines up with the Council for the Judiciary. I suggest it is desirable that, in

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26 See I. Prévost-Desprez (with J. Follorou), *Une juge à abattre*, 2010, pp. 123 et seq.

27 R. Otte, *De nieuwe kleren van de rechter. Achter de schermen van de rechtspraak*, 2010.

28 J. Kane et al., *Dispersed democratic leadership. Origins, dynamics and implications*, 2009.



the future, the office of President of the *Hoge Raad* and that of Chairman of the Council for the Judiciary are combined. A legal system is unable to function properly with more than one supreme commander.

As regards leadership the *Hoge Raad* is better qualified than the Council of State, which was criticized by the ECtHR both for institutional reasons (combination of legal advisor and judge<sup>29</sup>) and on material grounds in asylum cases.<sup>30</sup>

#### 4.2. *The Hoge Raad and institutional leadership*

The judiciary is not only a functional organisation that has to perform its tasks efficiently and effectively, it is also an institution, within which specific *values* are central.<sup>31</sup> It is the leadership's task to support the core values of the institution and to ensure that society is aware of them. The following three values are dominant for courts.

##### 4.2.1. *Independence and disinterestedness*

The *Hoge Raad* scores highly here. In comparison with the Council of State the distance from politics is great and this is an advantage from the point of view of independence and disinterestedness.

The *Hoge Raad* complies better with the norms laid down in the ECHR. The *Hoge Raad* is loyal when Strasbourg jurisprudence demands it and the functioning of the *Hoge Raad* as an independent court is not currently disputed, neither is this court troubled by the *Salah Seekh* problems.

##### 4.2.2. *Craftsmanship*

There are hardly any discussions about the quality of the judicial craftsmanship of the *Hoge Raad*. Unlike the state councillors, who have a big staff, the Justices write the (drafts of) their rulings themselves.

The embedding of the *Hoge Raad's* work in a network of a specialised Bar, highly qualified Advocates General and annotators creates a strong legitimacy. This is the premise of Mitchel Lasser<sup>32</sup> to whose work we dedicated a conference in Rotterdam, in which a number of Justices of cassation courts participated.<sup>33</sup>

In comparison with other courts of appeal in Europe the *Hoge Raad* does not do badly at all with regard to motivation culture and powers of persuasion. For example, in terms of social acceptability the Dutch *Baby Kelly* ruling was much more convincing and effective than the *Peruche* case of the French *Cour de cassation*.<sup>34</sup> The *Hoge Raad* has also always been well equipped to perform the coordinating function between the national legal order and Europe.

##### 4.2.3. *Autonomy towards other disciplines*

Having the final word gives the *Hoge Raad* a special responsibility in safeguarding the autonomy of the legal system in the face of criticism from 'hard' disciplines. The call of law psychologists like the late Willem Wagenaar and others for a Criminal Cases Review Board outside the judiciary has still failed to get serious attention. The Minister of Justice has drafted a proposal in which the Procureur General at the *Hoge Raad* has been given the lead and he will be able to engage the assistance of experts. The *Hoge Raad* can be assured that interested outsiders will keep a close eye on the chosen path by which primacy remains with the lawyers.

## 5. Concluding remarks

The safeguarding of the integrity of the legal system in a multi-layered legal order requires a lot of judicial inventiveness. It is pre-eminently the *Hoge Raad's* task to lead here.

29 See *Procola v Luxembourg*, supra note 25, and *Kleyn and others*, ECtHR 6 May 2003.

30 *Salah Sheekh v the Netherlands* ECtHR 11 January 2007.

31 P. Selznick, *Leadership in administration. A sociological interpretation*, 1957.

32 M. Lasser, *Judicial Deliberations. A comparative Analysis of Judicial Transparency and Legitimacy*, 2004.

33 N. Huls et al. (eds.), *The legitimacy of highest courts rulings. Judicial deliberations and beyond*, 2009.

34 M. Loth, 'Courts in Quest of Legitimacy: A Comparative Approach', in Huls et al., supra note 33, ch. 18.

Preserving the unity of the legal system is an undisputed task of highest courts. With changes rapidly following one another in criminal law, for example, the coordination of various laws with each other is sometimes less than perfect. It is then up to the highest court to specify the interrelationship between laws. Currently, the judiciary is faced with the task of establishing the boundaries of the new, largely European law combating criminality and terrorism. These are politically contested and judicially highly complex problems.

Furthermore, this coordinating role applies to the relationship between private and public law, too. As the guardians of the judicial system's coherency, highest courts have become important legal political actors.

Through the denationalisation of major legal fields as a result of the European Union, coordination of the national and international legal order is an important judicial task. The signals given by the ECJ and the ECtHR are not always explicit, adding impetus to the need for national legal coordination.

As ambassador for human rights the *Hoge Raad* has a better reputation in Strasbourg than the Council of State. This gives the *Hoge Raad* a comparative advantage and makes this court suited to give substantive leadership to the Dutch judiciary, both because of the composition (input legitimacy) of the court and because of the content of its rulings (output legitimacy).

The political abstinence of the *Hoge Raad* need not necessarily remain the case. Former President Davids was the Chairman of the Committee investigating the Dutch Government's involvement in the war in Iraq. The appointment of Geert Corstens as president – contrary to the seniority principle – is also a sign that the *Hoge Raad* is serious about increasing its external orientation. In the past Corstens has drawn attention by referring to the legal limits in the fight against terrorism and by calling for a more prominent place for the *Hoge Raad* within the judicial organisation. He recently called upon politicians to stop making disparaging remarks about judicial rulings.

As regards the European influences on the national legal order, the *Hoge Raad* has the best credentials as a competent ambassador for Europe. At the same time the *Hoge Raad* is well positioned to protect the position of citizens against excessive influences from Europe in the fields of criminal and anti terrorism laws. The *Hoge Raad* clearly operates at a distance from the Government.

Judicial review by a Constitutional Court might well appear on the political agenda in the near future. It is no secret that the Council of State considers itself as a strong candidate for that position as well. However, from a constitutional point of view, the Council of State is too close to politics and the *Hoge Raad* is a better candidate for this new job. The leadership of the *Hoge Raad* must therefore take a step forward into the political arena.

Judges do not live in a conflict-free world among themselves. There is a lot of hidden competition, polite rivalry and latent conflict between courts. The rendering of binding decisions in competing claims and conflicting interests is the core business of judges in every legal system.<sup>35</sup> We need national judges who have the courage to decide in controversial areas with an international dimension. Referring thorny issues to their big brother in Luxembourg or Strasbourg does not strengthen their legitimacy at home.

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35 N. Luhmann, *Das Recht der Gesellschaft*, 1999.