Administering Courts and Judges

Rethinking the tension between accountability and independence of the judiciary

An exploration of the administrative, political and public accountabilities of the judiciary in a media mediated society

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Administering Courts and Judges, *Rethinking the tension between accountability and independence of the judiciary*

An exploration of the administrative, political and public accountabilities of the judiciary in a media mediated society[1]

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Mr. Chancellor, Mr. President of the Utrecht District Court, Ladies and Gentlemen, students of this faculty!

I deliver this lecture in English for the benefit of our esteemed guests - my friends and colleagues from Italy, Portugal, the UK, Hungary, Switzerland and Germany. With this lecture I am taking part in the discourses that have emerged in the cooperation with my foreign colleagues and I mention especially the Institute for Research of Judicial Systems in Bologna, with which we today celebrate a cooperation which has already lasted for 10 years. It is also to show that the subject of my lecture is not only a Dutch concern, but a subject that has drawn the attention of scholars, policymakers, court managers and judges from Europe and beyond. I refer to the Commission for the Efficiency of Justice of the Council of Europe, to the Venice Commission for the highest courts, but also to the International Association for Court Administration[2] and the international networks of councils of state and of councils for the judiciary.[3]

Introduction

We do live in a society that has become obsessed with security. Security of the public space, but also the security of the private space and of the body as a private dominion. The state – and in particular the political domain – is constantly being addressed by victims of crime and citizens via many different channels, that often reinforce and enlarge the message publicly into gigantic and inescapable proportions. Fear for terrorism and violations in the public and

[1] This is the extended version of the spoken text (the largest font) of my inaugural lecture. I am grateful for the comments of Ton Hol and Gio ten Berge on an earlier version of this text, and for the corrections to the English version of the spoken text by Peter Morris of the Wiarda Institute of Utrecht Law School..
[2] www.iaca.ws.
[3] http://www.encj.eu/encj/

private domain, fear for robbery and assault and fear for sexual abuse are broadcasted widely every day in all kinds of media – and in part this fear is fed by implicit messages of the government – the coordinator of combating terrorism.[4]

This also touches upon the functioning of the judiciary. Courts and judges become vulnerable as if they fulfill a role in the political domain of elected office holders and holders of governmental offices – they risk to be drawn into the political and societal domains where they have to face the alleged consequences of their actions. In principle, in a constitutional state, the political role of judges, if any, is limited. But judges taking decisions with some public and political impact is inevitable at times. The position of courts and judges will remain exposed. Transparency of public institutions will increase, not lessen, and this also applies to the courts.

To date, courts and judges are being more and more vehemently and publicly criticized. Citizens are openly declaring their distrust concerning a certain judge and judges in general on several websites because of alleged and real miscarriages of justice.[5] They refer e.g. to the unexplained change in a panel of judges at Haarlem district court in the case of Chipshol company against Schiphol Airport.[6] An advocate has declared in public that the Minister of Justice has interfered in the composition of the panel of judges sitting in the case of survivors of Srebrenica against the Dutch state. There is a YouTube clip where a journalist (Micha Kat) broadcasts his hate against the judge he openly accuses of corruption. There are clear (web) links with the court watch group that operated 15-10 years ago, with Paul Ruys at the forefront.[7] These groups are no longer marginal. Recent experience shows that the media engage in a virulent hype against the courts and judges from time to time, especially in the field of criminal law.[8]

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[4] Illustrated by Menno Zandbergen (an appeal court judge), Wie weinig weet heeft meer angst, nrc.next 29 september 2009.

[5] www.rechterwestenberg.com

[6] LJN: BA1882, Rechtbank Haarlem 28 03 2007

[7] Stan de Jong, Rechters kunnen goed liegen, HP de Tijd, 16 april 2004; www.courtwatch.nl; www.klokkenluideronline.nl (‘om juristen in de gaten te houden’).

[8] Stavros Zouridis, head of the strategy department at the ministry of justice told a journalist his amazement on the political reaction - an emergency debate in the lower house- on the Schiedammerpark murder: „I cannot understand the operational urgency of such an emergency debate .. because even if this would be a crisis of the rule of law, you do not deal with it by an emergency debate, do you? I had expected more distance between administration and hypes. Now the political logic outstrips the civil servants. Reacting on signals from society

Read e.g. the reactions on the internet to the excellent lecture of Journalist Willem Breedveld on *Media and justice obsessed by evil*, held at the latest SURRF conference in May 2008.[9] SURRF is the name of the committee that organizes the cooperation between Utrecht Law School and Utrecht District court. There are many more of these opinionated expressions against the judiciary to be found on the internet.

The most recent example of such a hype is the temporary leave granted to Saban B, held in custody while awaiting his appeal against his conviction by the district court. He was granted temporary leave by the Arnhem appeal court in order to visit his wife and new-born child. However, he was convicted of trafficking girls, their forced prostitution of and abusing them. And his conviction was based on the testimony of his victims…, his wife originally being one of the victims. And, he went into hiding. The Arnhem appeal court was blamed for this, and the court's president appeared in the media to apologize for the (alleged) error.

As an initial reaction to the decision of the Arnhem Appeal Court, and the suspect subsequently fleeing, the Dutch Minister of Justice, Hirsch Ballin, stressed the independence of judges and therefore did not want to react to the content of the decision, and, of course, he said that he regretted the escape. The media hype concerning the issue of whose fault it was: the prosecutor's, the judge's or both, lasted for a few days. A few days later the minister announced that from now onwards such decisions would be better taken by prison governors, and not by judges. Proposals of that nature would soon be sent to Parliament.

This message marks an important change in the relation between courts and judges and the Minister of Justice. Indirectly he seemed to deliver the following

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and politics has become more important than adequacy. The risk is, that the way in which professionals need to do their jobs will be *swayed by the issues of the day*" Interview, NRC, 19 juli 2006

[9] Media en rechtspraak in de ban van het kwaad. http://www.trouw.nl/nieuws/nederland/article1813875.ece

message: I will no longer defend the judiciary in public, they must do that themselves.

There is an interesting parallel between the developments of the public debate on courts and judges about 10 years ago in Australia and the current debate in the Netherlands. In 1998 The Attorney General of the Australian Federal Government published an article in a magazine titled: "Judicial Independence". The message of the article left no room for misunderstandings as to where mr. Williams stood in his relation with the Australian judiciary. He stated that courts and judges should no longer leave the defence of their interest and points of view to the Attorney General. They were left to defend themselves against the sometimes vehement attacks on the Courts by then conservative politicians and media. Those attacks were related to earlier judgments of the Australian Supreme Court on the right to strike and land rights of Aboriginals. A major subject of the rhetoric against Australian Judges was that they are too soft on crime, neglect the interests of victims of crime, judges are pampered and lazy. The Australian judiciary was pushed in the corner of blame.

For a judiciary it is quite difficult to respond to such allegations, right or wrong, and claim space in the public domain.[10] In this lecture I try to explain why it is difficult for a judiciary to respond to political and media attacks, but also why some response is necessary.

[10] Pamela D.H. Schulz, Courts on Trial: Who appears for the Defence?, PhD Thesis, University of South Australia, Adelaide, 2007. Also see: Justice Michael Kirby, IMPROVING THE DISCOURSE BETWEEN COURTS AND THE MEDIA, 8 May 2008, Victoria law Journal.

An allegory of Justice

This picture is an allegory of justice.[11] It was made by Dirck Volckertsz Coornhert[12] (the maker; and Adriaen de Weert, the designer), and it dates back to the16th century.

We see a woman with a wheelbarrow. The wheelbarrow is carrying the world. The woman is pushing the barrow in the direction of an abyss, on the left, and there you see fire. At the forefront to the right we see a naked lady, hands and feet bound, lying on the ground. In the background, on higher ground, we see a winged figure, running, hands together in a praying or a hand wringing gesture. (the wings indicate the flight, not that she is an angel) By her feet, we see a pair of scales and a sword which has fallen on the ground. The woman with the

[11]
[12] Coornhert was a catholic humanist philosopher, playwright and graphic artist in the 16th century who supported William of Orange in his struggle against the king of Spain.

wheelbarrow is Opinio, the bound lady is Truth and the winged figure in the background is Lady Justice.

Under the graphic is a text, stating:

“De waarheid leidt op straet gebonden in gequelle. Rechtuaer dicheit vlucht, Waen cruidt de Werlt nade helle”

In English: Truth (Veritas) lies bound and hurt on the street. The judge (Justitiae) flees, and delusion - public opinion (Opinio) wheels the world to hell.

What we see here in this allegory of Justice is that truth is violated and bound (on the street) whereas delusion (public opinion) wheels the world to hell. Justice has fled, scales and sword lie useless on the ground. She is wringing her hands, unable to act.

The picture shows that if Opinion takes control of the World, the Truth will be violated and Justice cannot act. The risk is that the world will end in disaster. Apparently, the makers of this graphic depiction wanted to warn us against Opinion, that is, if we do not want to go to hell. Then Justice needs to unbound Truth. But this is only possible if Justice is able to handle the scales and the sword.

The question for this lecture is who is responsible for the relationship between Justice and Truth? Who must enable Justice to use the scales and the sword? And how is Justice then to relate to Opinio? There are severe restrictions to the answer to these questions. E.g. currently, freedom of speech is one of our most cherished – if not hyped - civil rights.

I try to answer those questions as follows:

First, I will describe the institutional position of the judiciary between the legislature and the executive, on the one hand, and society on the other.
Second, I will describe the position of the Dutch judiciary as part of the Dutch constitutional state, and the way the courts and judges relate to the political domain.
Third, I will consider the perception of the judiciary as a possible cultural risk factor.
Fourth, I will sketch the current questions for the judiciary in the Netherlands to (further) shape its public accountability.

The institutional position of the judiciary and the courts

The judicial organization, the judiciary and the court organizations, are not just another state agency. They constitute the third state power. From a constitutional perspective, it is essential that they play their part in the checks and balances between state powers, and between state and citizens. From a societal perspective, it is essential that they can play their roles as conflict resolvers in last resort, and this presupposes non-interference by the executive branch in individual, concrete cases. That is what we call judicial independence. Non-interference from a powerful party in a court case, but also absence of judicial prejudice in any other sense, we call judicial impartiality. Judges must not appear biased. These are basic conditions, but they do not give enough information on how the relationship between court-organisation, court administration, the judiciary and society, and between court organization, court administration, the judiciary and politics should be given shape. In a parliamentary democracy 'politics' refers to the office holders in the executive and legislative branches of government.

On the continent, the institutional position of the judiciary has evolved from tension between politics and the judiciary. It was a slogan of the French Revolution, only 220 years ago, that judges should be subjected to the general rules of Statue Acts – as an expression of the Volonté Générale. In the French revolutionary ideology judges were seen as instrumental to the execution of legislation that was the expression of just that – the will of the people. That was one of the main innovations in the State design of the French Revolutionaries. Of course, courts cannot function without interpretation, but the existence of a court of cassation and first instance judges striving for similar judgments in similar cases within a court, but also nationwide, are still features of judicial organizations inspired by French Revolutionary design. This still is visible in the

design of the current 1958 French Constitution and in the relation between the French judiciary and French politics.[13] Absence of judicial power to control legislation against constitutional norms fits that picture. [14]

Guarnieri and Pederzoli write about the increased power of judges in Western democracies. The relation between courts and judges and the political domain is complex, because of the tension between independence and accountability. Even so, a judiciary cannot function in splendid isolation. Also a judiciary needs democratic legitimacy. An important aspect of this connection is the involvement of the executive power (ministry of justice, president, government) in the appointment of judges. As Italians, their mind frame is set by the institutional position of the Italian judiciary, which is absolutely autonomous. The appointment (and promotion) of Italian judges is entirely an affair of the Italian council for the judiciary. Promotion effectively takes place without a thorough evaluation of a judge's accomplishments. They can achieve the rank of a cassation court judge without being appointed to that court. Guarnieri and Pederzoli indicate this isolation also leads to a separation between legal scholarship and the courts and that Italian judges do not care very much about comments on jurisprudence or the judgments of the Corte di Cassatione. Instead, judges take the political domain as a point of reference.[15]

In France, the appointment and career decisions are considered a main instrument to keep the judiciary in tune with the law[16], and, also in the current situation Guillaume Delaloy raised the question if the French Judiciary should be considered the third state power or just the judicial institution mentioned in the constitution. He acknowledges that the actual development would need a further development of professional, ethical and political accountabilities of judges.[17] Where organization development takes place accountabilities (administrative, political and public, societal accountabilities for courts next to judicial accountability for judgments) develop as well. It is because the increased responsibilities of the French judiciary in civil, administrative and criminal cases that he asks for a reinforced constitutional position of the judiciary in France. So far, this suggestion was not followed by any legislative changes in the institutional position of the French judiciary.

Fabian Wittreck has explained for Germany that a court organization where a minister of justice is politically accountable for the functioning of the courts, while maintaining judicial independence is the best solution for a judicial organization in a representative democracy in order to achieve democratic legitimacy. [18] In general, there is respect between politicians and the judiciary, even although ministerial efforts to enhance efficiency is not always

[13] Guillaume Delaloy, Le Pouvoir Judiciaire, Paris, PUF 2005.
[14] J.H. Merryman, The French deviation, American Journal of Comparative Law. issue 44, 1999, p. 113-114.
[15] Carlo Guarnieri and Patrizia Pederzoli, the power of judges, a comparative study of courts and democracy, Oxford 2002, p. 54-59.
[16] See e.g. John Bell, Judiciaries within Europe, Cambridge University Press, 2006, p. 54-55, 67-68.
[17] This is confirmed by Emmanuel Jeuland in his book 'Droit Processuel', where he in the first part elaborates on the organisational arrangements of the French courts, the court administration, before he starts to explain French procedural law.
[18] Fabian Wittreck, Die Verwaltung der Dritten Gewalt, Mohr Siebeck, Tübingen 2006.

appreciated. [19] The reason is that an autonomous judicial organization guided by a council for the judiciary will lack a clear and visible democratic legitimacy, because the ministry of justice will no longer be able to account for the functioning for the courts as organizations, and the democratic legitimacy of other court administrators (like a council for the judiciary) remains unclear. In his book Die Verwaltung der Dritten Gewalt (The administration of the third power) he refers to the peculiar constitutional setting of the German Federation, where the states are responsible for the justice administration and the administration of courts and judges takes place in close cooperation between the court administration of the ministries of justice and the Superior appeal courts 'presidencies'. [20]

The French and Italian judicial organizations show extremes in the ways in which the tension between politics and the judiciary is mediated institutionally. The point of departure is that the tension between the judiciary and society is to be considered normal, but the tension may also lead to radical changes in institutional settings, with or without rolling heads. Maintaining a balance between politics (the government and the legislature) and the judiciary depends on the willingness of both state powers to do so, also where the media play a dominant role, as they do in the field of criminal law.[21] This willingness appears to be present in the German democracy, it is absent in Italy, and France and Belgium are societies where the trust in the judiciary is contested to some degree. In Belgium the judiciary has evolved into a blame catcher following the Dutroux affair.

Judges must apply the law. A court cannot refuse to take a decision. But at the same time judges apply legal reasoning in a context where precedents, decisions of higher courts and of peers as well as legal comments on case law - doctrine - are present. The personal view of the judge in a case is literally 'ruled out' in the decision-making process. Consistency in judging within the state territory is a prerequisite for legal equality and legal certainty. This is a core business in any judicial system. Developing new jurisprudence may be difficult, but is inevitable, given societal and technological developments. Cases begin in a first instance court – so the judges of these courts cannot ignore the need for innovation in some cases alongside the doctrinaire application of the law in clear standard cases.

[19] John Bell, op.cit. p. 133-134
[20] John Bell, op. cit. p. 148
[21] On this topic, also see: R. Foqué, Gematigdheid en rechtsstatelijkheid. *Trema. Tijdschrift voor de Rechterlijke Macht*, 2006(3), blz. 97-106

Even if IT enables automated decision making – like electronic fining for violations of traffic regulations, in the most salient cases automated judgments are neither likely nor desirable.

Therefore, in any constitutional state, the relationship between the law and jurisprudence, between statutes and judicial decision-making may be problematic at some time. Being exposed to criticism or to a judgment being amended or overturned on appeal may therefore be inevitable. Political criticism of judgments therefore also cannot be avoided. In conclusion, a certain tension between courts, judges and the political domain is a natural phenomenon.

Even so, a judiciary needs to be facilitated. Courts need buildings and a budget, including the competence to spend money on the organizational functioning of the courts. This presupposes a willingness on the part of the legislature and the government to actually spend money on the functioning of the courts.[22] In the public debate on political questions of law or on the functioning of courts and judges reluctance is required concerning both the judiciary and the politicians. Maintaining a balance between politics (the government and the legislature) and the judiciary depends on the willingness of both state powers to do so, also where the media play a dominant role as they do in criminal law.

It takes a professional organization to deal with recurring tensions between courts & judges and politics, and between courts& judges and the general public. If there is purpose in organization development and quality management in court administration, it lies in developing the abilities to act and react in these relations between courts and judges and the political domain and between courts and judges and the general public.

[22] M. B. Zimmer (2006) , in: "Judicial Independence in Central and East Europe: The Institutional Context," *Tulsa Journal of Comparative and International Law* Volume 14 number 1 53-85, shows that this is not self evident at all.

The Dutch Judicial system

The Dutch judicial system originally followed the French model, with civil and criminal codes, and originally no independent administrative law jurisdiction. In the Netherlands, apart from the Constitution, the provisions of one of the oldest statute acts in force in this country, the Act with 'General Provisions', dating back to 1829, do confirm this. They hold on strongly to French Revolutionary ideology. It binds the judiciary to their task and to the law. The relevant provisions are the following.

The judge must adjudicate according to the statutes; he may not assess the inner value or the appropriateness of the statute in any way.

In cases subject to his decision, no judge may decide by means of general regulation, disposition or rules.

The judge who refuses to decide a case, pretending the silence, the darkness or the incompleteness of the statute, may be prosecuted because of denial of justice

These rules not only mirror the rejection of prerevolutionary judicial arbitrariness, they also intend to enhance legal certainty by confirming a Montesquieu type separation of powers. Legal certainty is guaranteed by statutes, and judges just represent the statutes and are only its mediators when a case is brought before them.

Regarding the allegory of justice, this shows that the allegory does not reflect current law, because judges are not allowed to flee. They cannot refuse to decide a case.

Experiences with the tension between courts and judges, on the one hand, and politics, on the other, are mixed. Some 150 years ago, the Dutch court of cassation affirmed the requirement of the legality of delegated legislation. This affirmation was partly reversed in the Constitution of 1887[23] A fairly extensive volume of Dutch law has been developed by judges, e.g. in the fields of industrial action and euthanasia in the civil and the criminal law domains, but earlier also by the development of principles of proper administration.
Recent examples of cases with political implications include the decision by the Amsterdam Appeal court (in reaction to a complaint) that Geert Wilders should be prosecuted for inciting hatred against Muslims.[24] Other cases include the position of The Hague appeal court, affirming the action of human rights organizations against the State for a violation of women's rights by subsidizing a reformed protestant political party and thus allowing discrimination against women within that party.[25]; there is also a decision by the Den Bosch appeal court quashing prosecution based on the regulation that prohibits smoking in bars and restaurants.[26]

Following the introduction of the General Administrative Law Act in 1994, politicians exerted pressure on the judiciary to put a cap on their responsibility.

Even although the General Administrative Law Act was acclaimed by all parties in parliament in the beginning of the nineties, local authorities did not like the way the newly appointed administrative judges assessed and quashed their decisions. Irritations were high, and in 1997 already a special report appeared, claiming that admin judges were crossing the separation of power divide.[27]

[23] Meerenberg, HR 31-01-1879
[24] LJN: BH0496, Gerechtshof Amsterdam, K08/0309, K08/0374, K08/0277, K08/0444, K08/0310, K08/0328, K08/0329, K08/0330 en K08/0353, 21-01-2009.
[25] LJN: BC0619, Gerechtshof 's-Gravenhage, 05/1725, 20-12-2007.
[26] LJN: BI3572, Gerechtshof 's-Hertogenbosch, 20-001211-09, 12 mei 2009.
[27] Commissie Van Kemenade, Bestuur in geding, Haarlem 1997.

Since then, the Judicial Division of the Council of State has led administrative jurisprudence in the direction of restraint regarding the way administrative decisions are assessed.

Several laws (anti Not In My Backyard Legislation) have passed parliament since that time in order to make certain that admin law proceedings would not delay large infrastructural projects concerning water management and the Betuwe railroad, by a concentration of proceedings in a short period of time at the Council of State. In short, (admin) court proceedings have been defined by quite a few politicians much more as obstacles to reaching their goals, than as a way for citizens to have their rights protected.[28] Of course, under certain conditions such restraints on procedural rights may be justified.

The standing of interest groups in civil and in administrative cases, as granted in this country, makes it inevitable that courts and judges deliver judgments that are likely to be part of political debate. In conclusion, judges cannot avoid taking decisions that will displease a certain party or a societal group. And sometimes the legislature corrects jurisprudential law by statute act.

The Judicial Organisation Act of 2002 establishes a new institutional connection between courts and judges, on the one hand, and the ministry of justice, the government and parliament on the other,

The Dutch government has been aware of the juridical and societal need to modernize the judiciary. Juridical, because of Strasbourg demands on timeliness of judgments and on judicial independence, especially in the administrative jurisdiction. Societal, because of the increased visibility of the courts and the need for more efficiency and better consistency. And this involves not only speed, but also the capacity to deal with cases arising from technological innovation, the involvement of European law, and the constant stream of new legislation. The Dutch judiciary started a far reaching change trajectory 15 years ago, inspired by the new public management. The group of judges that did this was aware of the increasing intensity of the public exposure of courts and judges, and of the tension between courts and the political domain. The reason to do this was to create a more robust and societal, responsive judiciary, that would be able to withstand political and media exposure, and that would also be able to live up to demands of timeliness in its case management and of legal certainty in its judgments. After the judiciary had made up its collective mind, the change movement was – necessarily – taken over by politics with a new judicial organization act, the

[28] On this issue: Ben Schueler, Het zand in de machine, Kluwer, 2003.

introduction of a council for the judiciary, management boards for the courts, an output based financing system in connection with a nation-wide system for quality management – and a considerable investment in money in the courts.[29] Albert Koers described the process adequately in his inaugural lecture in ten years ago.[30]

Essential in this relationship is the financing system in combination with the system of quality management. Based on production and quality registries the ministry is informed of the functioning of the judiciary. The council delivers a draft budget for the judiciary and the minister of justice incorporates the (adapted) budget for the judiciary in the budget bill for the justice department. The council also delivers an annual report, giving insight in the functioning of separate court organizations. The courts administration is in the hands of the council for the judiciary and the management boards of the courts, the minister of justice is responsible for delegated legislation for the judicial organization. At the same time, the legal position of judges is safeguarded by the Act on the legal position of judicial civil servants. The council and the management boards of the courts are accountable for their management to the ministry and the council respectively. They have legal competences to enhance the quality of judicial work, but they may not interfere with individual concrete cases.

This system is based on an analytical distinction between administrative, political accountabilities on the one hand and judicial and public or societal accountabilities on the other. A basic question is, how these distinctions work out in practice.

From a traditional constitutionalist position, one could argue that the actual separation of powers has come to apply within the court organization between the management board and the judges, between judges and non-judicial court staff, and within the judges' minds between their roles as civil servants within the court organization and as judicial office holders as members of the judiciary. That intermingling between court administration, case management and judicial decision-making is inevitable was a point of departure in the current design of the organization.

One could argue, that where managerial and judicial responsibilities inevitably interfere, Dutch judges are not independent from the executive branch.[31] I think this reasoning goes a little bit too fast.

[29] For the chronicles of this change process: Edo Brommet, Van Rechterlijke macht naar rechterlijke organisatie, Ministerie van Justitie, Den Haag 2001.
[30] A.W. Koers, Drie maal is scheepsrecht, oratie, 1999.
[31] Bovend'Eert, 2008, p. 30-31.

Judges are obliged to adhere to organizational orders from the court management board. However, if judges feel that the measures of the court's management board, or of the council for the judiciary, interfere with their case management or their assessment of a case, they, as civil servants with a special status, are entitled to address the Central Appeals Court in order to have these measures quashed. However, judges never do this.

From a formal perspective, they can do this easily: judges are appointed for life and can only be dismissed by the Court of Cassation. But in reality the relation between judges as professionals and their management is not bound by clear case law of the Central Appeals Court.

The evaluation study on the functioning of the administration of the courts by the Council for the Judiciary (carried out with Miranda Boone and KPMG) and by the management boards of the courts showed that tensions between judges and court sector management were mentioned mostly in interviews, but did not follow from the questionnaire.

From our research we concluded that judges did not give in to pressures to confirm their judgments to policies concerning the content of their decisions (policy aim: consistency in decision making), but that they gave in on pressures for consistent application of rules of procedure. This is confirmed by subsequent court user satisfaction inquiries where consistency of judgments scored quite low, and still is considered problematic by the council for the judiciary.

Peer pressure is very much real, but so is the judicial evasion of managerial pressure for the sake of consistency.[32]

A conclusion is, that actual judicial independence in the court organization depends on judicial attitude, and that judges so far did not experience such tensions to an extent that they felt forced to address the Central Appeals Court.

Dutch judges are pretty independent minds!

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[32] Miranda Boone et al., *Financieren en verantwoorden, het functioneren van de rechterlijke organisatie in beeld*, BJU, Den Haag 2007, p 214-216.

From an organization development perspective and from administrative, political accountability[33] perspectives the introduction of the new judicial organisation act, within the courts and the council for the judiciary was a success.[34]

The new judicial organisation act established a new interface between the judicial organization of the courts and the judiciary, on the one hand, and the government on the other. According to the evaluation study it has proven to be functional.

The only doubt one could have is that the system of quality management did not (yet) help the courts to act responsively and pro-actively on societal and political incidents in the media.

However, it took the Deetman evaluation to somewhat ruffle the judicial organisation. I fear that this was a sign of an inward orientation by the judicial organization and the judiciary.

If I am right, this may be considered quite a risk for the public trust and thus for the legitimacy of the courts and the judiciary in the current conditions, where the courts and the judges fulfill their function under transparency conditions of a virtual – and sometimes real-glass house. On top of that, the willingness of politicians to respect the judicial responsibility seems not self-evident anymore.[35]

Can the judiciary become a cultural risk factor?

There appears to be a growing discontent amongst the Dutch public about the choices they have to make. In private, everybody is quite happy, but there are concerns about where we want to go in the future. This has to do with the perception of immigration, the demography of an ageing population and a feeling of economic uncertainty, even although we have attained very high levels of wealth.[36] There may also be a relation with the ways in which professions are managed in this country: in schools, in hospitals, in homes for the elderly, in insurance

[33] I use 'political' and 'administrative' accountabilities in one term, because they are closely connected.
[34] Report of the Deetman committee, Rechtspraak is kwaliteit, Den Haag December 2006.
[35] This is supported by the research presented by the research of
Hendrik Gommer, Edwin Woerdman en Joris Lammers, De bemoeienis van politici met rechters: een empirische analyse, in: Recht der Werkelijkheid 2008, nr. p. 35-50. They conclude that the lack of reluctance of politicians results from distrust in the quality of judicial decisions.
[36] http://denationaledialoog.nl/upload/content/21minuten/21minuten_samenleving.pdf (2009)

companies.[37] There is also an increased inclination to heavily criticize judicial decisions, especially in the field of criminal law. But only 2 years ago, there also was a considerable trust in the Judiciary: 60% of the population considers the judiciary as trustworthy, even although a large majority thinks judges are too soft on crime.[38]

What we the Dutch have in common with our Belgian and French neighbours is that we are completely lost when it comes to dealing with risks that realize themselves and show that not everything is under control. It does not matter if accidents or mistakes are of an economic, technical, natural or – that is what this lecture is about - judicial origin. A suspect escapes, or a prisoner on probationary leave commits another atrocity, or innocent person is convicted by a miscarriage of justice. Someone has to carry the blame (the scapegoat), we have to be mentally cleansed of the gaps in our collective illusionary façade that everything is under control.[39]

If I do understand the relation between risk and culture well, the message is that worldviews of a group is connected with one's position in society. The relation between central power and the groups at the borders of society represent dimensions of social hierarchy and social equality as dominant features of worldviews. The groups at the borders of society tend to follow sectarian reasoning, favoring both equality amongst themselves and radical solutions to perceived risks, but also making sharp distinctions between those who belong to the in-crowd based on their allegiance to the radical world views, and those who don't and therefore must be expelled. At the center, the hierarchy principle abounds in the worldviews of the persons living there, and rules and formal competences are ordering principles.

In the Netherlands, it seems that inclusion and exclusion of membership to certain groups has become an issue for both the radical left and the radical right based on the issues of immigration, religion, animal rights, delivery of public services, environmental issues, public morals, fighting crime and punishment on crime.

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[37] See a.o.Geert Mak, NIEUWE FLESSENPOST II - WIE BESTORMT DE BASTILLE?!, 3 oktober 2009, www.geertmak.nl

[38] Sociaal Cultureel Planbureau, P. Dekker en T. van der Meer 2007 'Vertrouwen in de rechtspraak nader onderzocht', p.14, 22-23.

[39] Anthropologist Marry Douglas and political scientist Aaron Wildavsky have described the process in their book *Risk and Culture*. Newspaper Editor in Chief J. Greven warned the Judiciary for this to happen already 13 years ago in: De media en de zittende magistratuur, in: A.W. Koers et al. eds, *Waar staat de ZM*, Utrecht 1996 p. 119-122.

Dutch society shows sectarian tendencies, and the political centre seems to lose the adherence of the majority. Populist politicians gain support from about one third of the electorate, whereas the traditional left-right divide seems to disappear when it comes to the relation between the centre of power and fringe groups. The monarchy, the traditional political elite and the judiciary are put under scrutiny in the overall media-mediated democratic process.

Gabriel van Brink has shown that more is at stake than the so-called punishment gap between judges and the general public.[40] He published his judiciary lecture 'Justice and credibility, About bridges built by judges' of last year also in English in the International Journal for Court Administration. Van den Brink makes a case for the division of the Dutch population in those who are in control of their life (the entrepreneurial) – he calls them 'active citizens', and those that are in effect locked out from profiting of public services and who bear a disproportionate part of the burdens of immigration and have difficulties to profit from public services. They feel victimized by "The System" and 'them' politicians and managers. Van den Brink calls them 'the anxious citizens'. Next to these groups he discerns what he calls, the 'awaiting citizens', as taking a position between active and anxious citizens. But the behavior of the anxious citizens on the right and on the left and their (political) spokesmen do support the idea of sectarian tendencies in the Netherlands. This goes hand in hand with symbolic inclusion ("people like us") and exclusion (those at the center, traditional political parties, but also suspects of crimes, terrorists, Muslims, aliens, and pedophiles).[41] In short, Van den Brinks' analysis supports the vision of Dutch society as an increasingly sectarian society, and this has consequences of how these groups will consider the risks for their security that, in their view, may be caused by the judiciary.

In the perception of these groups, the judiciary and the courts have become a risk factor itself, as the judiciary as a part of "them" causes risks sometimes to materialize, at the detriment of people like "us". You can attach visions of being the victim yourself to victims of other mishaps and accidents, and develop a equality based solidarity perspective.[42] And this invokes the apparent necessity of public scapegoating and reinforcement of the anxious citizens' voices by many media, as it has become a part of a collective magical cleaning ritual. The Cultural 'polluters' have to be excommunicated so to speak. It doesn't matter if they are criminal, immigrants, Muslims, drug addicts, pedophile, mink-breeder or judge. And there are

[40] H.Elffers and N. Keijser, De strafrechter en de burger: Zij konden bijeen niet komen…, Rechtstreeks 2007,nr. 2, p. 26-27. They suggest that there may be a punishment gap, but this is not a menace to the legitimacy of the courts, as long as judges live up to the demands of: justice, impartiality, independence and critical judgment.
[41] International Journal for Court Administration, see http://www.iaca.ws/mc/page.do?sitePageId=95527, for free download.
[42] E.g. J.Eerdmans and his committee of citizens against injustice. www.burgercommite.nl (victims of crime, but also 'angry fathers', or victims of alleged miscarriages of civil justice).

several politicians who play the sectarian solidarity - exclusion and blaming games also towards the judiciary.[43]

This may have undesirable effects for public confidence in and public support for the judiciary.

It was quite disappointing, therefore, to see the current minister of justice giving in to the scapegoating efforts of the media. Some politicians want to see judicial heads roll (Dismiss them!) and they tend to kick the ball of blame just that little bit further. They are asking for extra and extrajudicial controls on court decisions.
And the minister of justice has taken political position based on a similar assessment.[44]
From a separations of powers perspective, the minister is fully entitled to propose legislation in reaction to a decision of a court he disagrees with. But in this case there is an apparent distrust in the wisdom of the judges in the criminal law sectors.

The perception of certain judicial decisions as a societal risk thus has received political recognition. The answer to the question at the beginning of this chapter, therefore, unfortunately is: yes, the judiciary can become a cultural risk factor. That is quite a contrast with the positive outcomes of the Deetman evaluation study only 3 years ago!

Intermediate conclusion on the generation of legitimacy by administrative, political accountability mechanisms

An adequate measurement of caseload and output, of quality indicators in the courts, and the dutiful delivery of this information to the council for the judiciary and to the ministry of justice, as prescribed by the new judicial organization act, apparently does not guarantee the societal or political legitimacy of courts and judges.

Neither does the publication of annual reports. This does not only happen to the judiciary.[45]

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[43] For a similar analysis. See: Barbara Hudson, Justice in the Risk Society, Sage, London 2003, p. 51-53, 203-226.

[44] The President of the Dutch Court of Cassation, Corstens, announced earlier this month that the era of a self-evident, natural judicial authority is over. G.J.M. Corstens, Vertrouwen in de rechtspraak, Voordracht op jaarcongres NVvR 2009: Magistraat 2.0 – de update.

It was no doubt the original intention of parliament and the government to generate such legitimacy. But there are strong signs that many politicians no longer see this as their responsibility. They seem to have dispensed with the required reluctance. The econometric approach of the administrative and political accountabilities of the court organizations and the current measurement of quality indicators appears to be not adequately connected to the societal responsibility of the courts in terms of ethics, delivering reasoned decisions and the openness and responsiveness of the courts. [46]

The expectation that administrative and political accountabilities of the courts and judges does lead to an adequate democratic legitimacy for courts, judges and judicial decisions has not come true. Referring to the Australian example, one could even ask if, apart from guarantees of judicial independence, for the relation between politics and courts & judges, the institutional structure matters at all. The court administration and judges already need to balance political, administrative and judicial accountabilities concerning the content quality of their work.[47] For this they depend on a basis of mutual respect with representatives in the political domain. Where the political side of the balance loses respect or even attacks the judiciary, we need a judiciary and a court administration not only to balance administrative, political accountability for the court organization with professional judicial accountability. We also need a judicial organization to counterbalance the efforts for this balancing act with efforts to deliver adequate public accountabilities, in order for courts and judges to maintain legitimacy. To achieve this, the only way for the judiciary is to approach the general public by representatives of its own.

This means that the public must be continuously informed about the very essence of judging and the functioning of the courts. If politicians actively attack the outcomes of judicial processes, the legitimacy of the courts and their judgments can only be upheld by publicly competing with these politicians for the attention of the general public. This means that the public must be continuously informed about the very essence of judging and the functioning of

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[45] John Seddon, Systems Thinking in the Public Sector, Triarchy Press, Axminster 2008.
[46] Much less important is that it does not live up to the ideal of courts taking a quality management based, prominent position in the public debate I aimed at 15 years ago in: P.M. Langbroek, De publieke verantwoordelijkheid voor rechtspraak, Trema 1994, p. 413.
[47] Elaine Mak has elaborated this theme extensively in her dissertation, De Rechtspraak in Balans, Rotterdam 2007.

the courts. If politicians actively attack the outcomes of judicial processes, the legitimacy of the courts and their judgments can only be upheld by publicly competing with these politicians for the support of the general public. This presupposes a balance between two kinds of efforts:

- Efforts to live up to the demands of political accountability for the functioning of the courts, and
- Efforts to realize an effective public accountability for courts and judgments.

The question is how to shape the efforts to inform the public and how interactions between courts, judges and the public can be constructed.

Realizing public accountability next to administrative, political accountabilities for the courts.[48]

It will not be easy for the courts and the judiciary to *expressly* manifest themselves more effectively in public. Judges have to uphold the law for the entire national territory, whereas a basic concern for any judge is the reaction of the party which has received a detrimental decision, in other words the decision has gone against him. [49] Public debate and opinion are not natural acquaintances for judges. Furthermore, we expect judges to guard their independence and impartiality and this calls for judicial reluctance in public. Being too outspoken on an issue in public may jeopardize the judge's appearance of impartiality in future cases.

The courts and the judiciary do need a strategy to address the risk of being blamed as a risk factor, especially in the criminal law domain. The president of the Court of Cassation has announced already that the courts need a different approach of the public.[50] However, acting

[48] Much of what will follow has been said already on TV last Sunday by the Chair of the Dutch Judges Association NVVR, Reinier van Zutphen. I have not been his ghost writer but we agree on quite some issues. I can tell you it gives one an immense illusion of (power or powerlessness) to hear someone else say what you wrote a few weeks earlier without being connected to each other! Also see his opinion in the Volkskrant of October 2, 2009.

[49] M.Shapiro. *Courts. A Comparative and Political Analysis.* Chicago 1981, The University of Chicago Press.

[50] G.J.M. Corstens, De derde macht, Lunchlezing voor de Wetenschappelijke Raad voor het Regeringsbeleid, 16 april 2009.

with openness and responsiveness towards citizens and society apparently is difficult, also outside the domain of criminal law.

Judicial reasoning is predominantly written, often is complex and will not be easily understood by untrained journalists and members of the public.

I do know that there are many projects going on in Dutch court organizations to improve the public relations of the judiciary, and to explain their function. This is a special point of attention in the Council for the Judiciary's plans for the next few years.

An example is the comic strip "Terecht" at the website of the Council for the Judiciary even although it has not been made very visible yet. There is also the rechtvoorjou (lawforyou) website.[51] There is an open day in the courts once every year. Experiments with video links between class rooms in Utrecht law school and the court rooms of Utrecht District Court are underway (Court TV). The courts have proven to be able to handle complaints proceedings openly (even although the ombudsman function for complaints against judges is given to the procurator-general at the supreme court, and not to the national ombudsman; I fear this does not enhance access, and the openness on the complaints and their assessment does not meet the quality of openness of the National Ombudsman[52]).

The question is whether these efforts will be enough.

There are five major issues concerning public relations that need to be (re)considered by the judiciary, in order to be able to take part in public debates on all aspects of organizational functioning, judicial integrity (independence and impartiality), legal debates and the content of judicial decisions.

First of all, there is the issue of the openness of the courts and their provision of information to the press and the public. Even though courtrooms, court hearings and judgments are an uncontested part of the public domain[53], courts have restrictive policies on admitting cameras and sound recording equipment to the courtroom and on access to judgments when it comes to showing who the

[51] www.rechtvoorjou.nl
[52] Hoge Raad, der Nederlanden, Verslag 2007 en 2008, p. 143-145;
[53] G.A.I Schuijt, Vrijheid van nieuwsgaring, BJU Den Haag 2005, chapter 9.

parties are. The names of the parties (private persons) are made invisible. The reasons mentioned are to:

- protect the privacy of the parties,
- safeguard witnesses from harm,
- prevent a person from seeking the limelight, and
- reduce the possibilities for journalists to give a manipulated account of the case.[54]

The judiciary is quite distrustful of journalists with cameras and sound-recording equipment in the courtroom. And therefore courts and judges take full responsibility for protecting the privacy of parties in court against media intrusion.
Thus members of the judiciary by their reluctance and by their press guidelines not only bind the hands of journalists, but also their own. And so it becomes difficult for them to demonstrate that justice is done and to take a visible position in the public domain regarding their work.

Furthermore, the Dutch justice system does not know of any dissenting or concurring opinions in jurisprudence.

The explanation lies partly with our perception of judicial impartiality and the subjugation of judges to the law: the professional norm that it should not matter who is your judge – but few people can be convinced that this is true. The secrecy of chambers still also is a legal norm. Shouldn't we let go of this, in order to give judges more public profile –and let themselves be better known? How will this work out? Will judgments become more or less persuasive?[55]

Also, judicial reasoning is predominantly written, is complex and will not be easily understood by untrained journalists and members of the public.

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[54] Persrichtlijn (February 2008).
[55] Wim Voermans, Judicial transparency furthering public accountability for new judiciaries, in *Utrecht law review*, Volume 3, Issue 1, June 2007, p. 148 -159

Next, there is the issue of who should represent the judiciary and the judicial organization in public.

Maybe it is possible to transpose the outcome of Fabian Wittreck's inquiry into the question: 'is an independent and autonomous judicial organization desirable?' to the Dutch context, indicating that there should be a clear point of reference for the public accountability for both the organizational functioning of the courts and the content of judicial decisions. In a system with a ministerial court administration, this point of reference naturally is the minister of justice. This can be easily explained by the fact that a minister of justice while being held to account for the functioning of the courts towards parliament also *represents* the court organizations. This symbolizes the connection and unity of the courts and the judiciary with the legislative and executive powers in the state. However we have left that path in 2002, with the new judicial organization act.

In the Dutch judicial system, administrative responsibilities are shared by the minister of justice, the council for the judiciary and the management boards of the courts. Judicial responsibilities are shared in the judicial hierarchy from the first instance court to the court of cassation and several of the highest administrative courts. Therefore, the point of reference for the public accountability for the courts' functioning and for judicial decisions is not very clear.

Nick Huls reasoned 5 years ago already that the judicial organization needs an apex for both content of judicial decisions and organization and the only way to achieve this is to create the double office of president of the court of cassation and president of the council for the judiciary.[56] Until this personal union of offices will be achieved, coordination on public presentations between the council for the judiciary and the presidency of the supreme court is necessary. This does not contradict the formal autonomy of the local court organization.

The question is who *represents* the court organizations and deciding judges in public. And with that question comes the question when national media representation is indicated and when local media representation can be considered appropriate. It is not the formal division of competences but other factors that should guide these issues of media representation for the judiciary.

[56] Nick Huls, Rechter ken uw rechtspolitieke positie!, Lemma, Utrecht 2004, p. 69-71.

The fact that the chair of the judges association has taken the lead in this may eventually lead to a much more powerful position for this association in the field of administration of courts and judges. After all, it is a private organization outside the lines of accountabilities of the institutional players. This may have consequences for the role and functions of the council for the judiciary.

Furthermore, who can represent judges in a public debate, without jeopardizing their impartiality in current and future cases? A solution, much admired in Australia[57], has been the institution of a briefing judge (the media judge) at each court, who is responsible for briefing the media, in neutral terms, concerning the judicial decisions delivered by that court.

In this task she is aided by a public relations specialist, who is employed by the court. Research suggests neutrally informing the media may be an effective approach.[58]

From time to time, however, a judgment evokes wider debate on the content of the law. In this regard there is a need for representatives of judges who can demonstrate judicial dilemmas concerning the content of a case in public, on tv, in talkshows and documentaries, but also on the internet, in you tube film clips and in weblogs. Engaging in debate with members of the general public means to make your (professional) self known in interactions.

Last but not least, there is a need for a more active explanation of the morality of the law. Courts and judges work every day with the legal norms that form the moral backbone of our society. Where the general public is often not well informed concerning the content of the law, whose task might it be to provide the inhabitants of this country as citizens, with the basic values of the rule of

[57] Pamela Schulz, op cit. p. 28-29
[58] Lieve Gies, The Empire Strikes Back: Press Judges and Communication Advisers in Dutch Courts, *Journal of Law and Society*, Vol. 32, No. 3, September 2005, pp. 450-472

law? Explaining the morality of law to the general public may be a task for the judiciary, but there is certainly also a task for scholars in the law faculties to participate in an ongoing public debate about justice outside of their scholarly magazines.

I now come to a conclusion. Let us return to the Allegory of justice by Coornhert and Van de Weert. Post-revolutionary judges cannot flee from Opinion or leave Truth bound on the streets. Dutch courts, judges and the judicial organisation have already taken the first steps to acting in public. Much more of this is necessary. The question is how the tableau will change if the judiciary will loosen their hands from their constraints. The question is also how the tableau will change if we as citizens and scholars engage together with judicial representatives in the public debate on the rule of law. Thus, the balance between administrative, political and public end judicial responsibilities of courts and judges may be regained. I do hope that the result will be that Opinion changes directions as far as Lady Justice is concerned, so that she can continue to carry and use the scales and sword of reason and bring the naked Truth back to her feet again.

My dear guests, mr. Chancellor, Mr. President of Utrecht District Court, Ladies and Gentlemen, students of this faculty!

In the years to come my program is to study the ways the institutional checks and balances for the judiciary best serve the rule of law. Court administration and case management both from juridical and organization perspectives, IT, quality management, judicial ethics and interactions between courts and citizens and between courts and the media are subjects that fit that framework. Their meanings are shaped especially in the contexts where the tasks for court organisations and the judiciary are defined by their administrative, political and

public and professional, judicial accountabilities. These subjects need a multidisciplinary and an empirical approach.

The discourse on the administration of courts and judges has become a European and an international one. The Montaigne Center for Justice and Conflict Resolution of this faculty seeks to combine the expertise of our colleagues within this university and our colleagues abroad, and has managed to organize projects for Hiil, the Council of Europe, Utrecht District Court and the Council for the Judiciary, the Ministry of Justice, and we participate also in the European Arrest Warrant project conducted by the Observatory of Justice of Coimbra University. My dear colleagues, you are invited to participate in this virtual community!

Our cooperation with Utrecht District Court in the SURRF Committee has been a valuable asset for both our faculty and for Utrecht district court, in education and in research. I will maintain and develop this cooperation, and link our local experiences to national and international forums and vice versa. We are going full speed ahead with a major research project on the motivation of court decisions and a symposium on the development of ICT for the courts next November 18.

Thank you for your attention.

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