Severin de Wit

Trust and Government by Judges

> "In truth, man is not made to be trusted for life, if secured against liability to account" (Thomas Jefferson, third president of the US, speaking about judges in a letter to Monsieur A. Coray[1])

Ernst and I have two events in common, although neither of them took place in the same period: both of us were attorneys at the (then) The Hague law firm Buruma Maris* and both of us were members of the editorial staff of the IER. When I founded IER, together with Charles Gielen and Remco de Ranitz in 1985, we expressed the hope, in affable spirits, that we would increase the interest in intellectual property:

> "IER aims to meet a need while at the same time creating said need. It aims to widen the circle of those interested in intellectual property and by doing so, broadening the intellectual baggage of current subscribers. (…) This Journal is not yet the best, nicest and most topical legal magazine, but attempts in that direction are being taken".

Thanks to the efforts of many, including Ernst, IER has become just that: "the best, nicest and most topical" of legal IP journals in The Netherlands.
When I thought of a subject for the Album Amicorum for Ernst, intellectual property seemed like a logical subject, as I spent most of my life in this area of law and it is also where the interest of Ernst and myself meet. I decided not to do that. Rather, the subject of this contribution is driven by two events. The first being the recent discussion started by a Dutch politician, Thierry Baudet, about "dikastocracy"[2] or "government by judges" and the second one being my fascination for "trust".[3] The discussion about government by judges is sparked by rulings of courts in The Netherlands, among others, on government nitrogen policy or whether IS children must be brought back to the Netherlands,[4] as well as a famous judgment of the Supreme Court of The Netherlands – the court of which Ernst has been a Vice-President – in the Urgenda case.[5] The debate following those judgments touches upon the existence of a dikastocracy or "government by judges" and the trust people have in the role of judges.
Given the large amount of publications on trust and "government by judges" as well as the closely related term "judicial review" – especially in US literature – I will devote some words in this contribution to analyze what makes up trust in judges and how this relates to growing criticism in many countries, among which The Netherlands, that courts overstep their boundaries in adjudicating "political" cases.[6]

Discussions about trust (or confidence[7]) are of all times. In her annual speech to the Dutch Association for the Judiciary[8] of December 2002, (former) judge Wil Tonkens-Gerkema raised the theme of trust in justice[9] and the importance of maintaining trust in the judiciary, speaking in that context of issues such as the use of deputy judges, the reasoning or justification of judgments, reporting of ancillary positions by judges, the appearance of partiality, all of which influence the degree of trust the public has in the judiciary, questioning if that trust is now threatened. There is a frequent discussion about the worrisome nature of cohesion in our society and the loss of authority of social institutions, she argued, so it is reasonable to suppose that judiciary is also subject to such a loss of confidence.

* at the time, "Buruma Maris Lely & Meijer".

1 "In werkelijkheid is de mens niet gemaakt om voor het leven te worden vertrouwd als hij is beveiligd tegen alle aansprakelijkheid", from: "*Words of the Founding Fathers, selected quotations of Franklin, Washington, Adams, Jefferson, Madison and Hamilton, with sources*" by Steve Coffman, (2012). The full quote by Jefferson (1823) fulminating against too broad powers by the Justices in relation to the US Constitution reads: "*At the establishment of our constitutions, the judiciary bodies were supposed to be the most helpless and harmless members of the government. Experience, however, soon showed in what way they were to become the most dangerous; that the insufficiency of the means for their removal gave them a freehold and irresponsibility in office; that their decisions, seeming to concern individual suitors only, pass silent and unheeded by the public at large; that these decisions, nevertheless, become law by precedent, sapping, by little and little, the foundations of the constitution, and working its change by construction, before any one has perceived that that invisible and helpless worm has been busily employed in consuming its substance. In truth, man is not made to be trusted for life, if secured against all liability to account."* The question whether judges should be appointed for life was questioned again almost a century later, e.g. by a famous Judge, Walter Clark, in his Address to Cooper Union in New York City in 1914: "*Government by Judges*", *see Note 70.*

2 Or sometimes called "kritarchy", or "kritocracy". Dikastocracy originates from the Greek dikastes (judges) and kratein (govern) , see also Floris Bakels, "*Er is leven na de Hoge Raad*", in this Album Amicorum, p. 240, par. 5.2.

3 I have started a podcast dealing with all aspects of trust, called "TrustTalk", www.trusttalk.co.

4 Dutch Supreme Court 26 June 2020, ECLI:NL:HR:2020:1148, "*Anonymous Minors vs. State of The Netherlands*".

5 Dutch Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41, State of the Netherlands/Urgenda. See: The Urgenda decision: The landmark Dutch climate change case, Leiden Law Blog Jan. 27, 2020 (https://bit.ly/LLB_Urgenda).

6 Although this question is not new: it was raised in the opinion ("pre-advies") of the Netherlands Legal Association (NJV) in 1975, *see* M.G. Rood, '*Heeft de rechter een taak in zogeheten politieke zaken?*', NJV Handelingen 1975, p. 45-57.

7 Trust, or "confidence", a distinction that Dutch – or French – language does not make ("vertrouwen"/"confiance").

8 Nederlandse Vereniging voor Rechtspraak (NVvR).

9 Tom van der Meer in "Rechtstreeks", 2004, nr. 1, "*Vertrouwen in de rechtspraak: empirische bevindingen*".

When the public questions the boundaries of what judges can or should decide, that fact alone justifies taking an active approach to seeing how trust is being affected.[10] If therefore representatives of the people question whether judges govern where that should be left to the Parliament or politicians, and dikastocracy or "government by judges" is brought up as an issue, all parties involved should take that seriously,[11] as the ability of judges to fulfill their mission and perform their functions is based on the public's trust and confidence in the system. In large part, the judiciary earns that trust by faithfully performing its duties, adhering to ethical standards and standards of integrity, and effectively carrying out internal oversight, review and governance responsibilities. However, no judge is free from opinions, influence from his personal history and environment, anyway. Criticism of judges, attacks sometimes, is or are – as Harvard law professor Noah Feldman pointed out – often driven by the "*imagined ideal of the cloistered monk-justice, innocent of worldly vanities, free of political connections and guided only by the gem-like flame of inward conscience*".[12]

Some have immediately dismissed the idea of government by judges as irrelevant and non-existing. However, we live in a time where trust is won and lost within society on the battleground of media and public opinion. Trust in judges is inextricably linked with judicial independence because the people's trust in the judiciary and its effectiveness depends heavily on whether judges are trusted to be independent and beacons of integrity.

1. The meaning of "trust"

Before we dive a little further into the question of how trust in the judiciary is being viewed in relation to "politics",[13] we should start by looking into more detail about what "trust" in fact means and especially what trust in judges or the judiciary[14] entails.

The concept of trust appears on an almost daily routine on the internet, news outlets, TV, and social media. To date, there is no universally accepted scientific definition of trust,[15] yet trust is a concept widely studied (and contested) across many disciplines, including political science, sociology, cultural anthropology, economics, and psychology. All political and social institutions are based on trust, on the expectation that human behavior can be relied upon: that the restaurant I dine in meets health and safety standards and that those standards are appropriate, that my bank is not engaged in fraudulent transactions, that the car approaching the crosswalk I am walking on will stop. We all have our gut feeling on what "trust" means: that you can trust a person or an institution or politician to do the right thing, that you can trust the source of your food or trust that the water you drink is pure, you trust that teachers have the best in mind for your kids. There are plenty of seemingly reasonable truths that we all accept without seeing. To believe that "the economy has grown by X%", or that "newest medical advances will eradicate disease Y", we take various things to be true on the basis of trust in the merits.

But what is meant exactly when using the word "trust" depends on who you ask. Ask an estate lawyer and he will point you in the direction of a (financial) trust or trust company (which is entrusted with assets of third parties). Or a banker might just think of a "trust bank" (a bank that combines the functions of a commercial bank, depository institution, and a trust company), a psychiatrist might think of trust as causing an increase in the hormone and neurotransmitter oxytocin in our brain, and so on. So, "trust" resembles the serpentine in Greek and Roman mythology, Lernaean Hydra, a multiple headed monster.

So what exactly is trust? The closest to a definition of trust comes from the belief or hope that human behavior will conform to expectations. Unlike faith, it is a strategic relation between humans as well as between a person and an institution. On the other hand, it implies an uncertain situation: trust can be betrayed.[16] Trust and law are extensively researched by psychologists.[17] In a study by two psychologists[18] on the relationship between public trust and law enforcement, they found that American's trust in the police and courts is declining. Furthermore, the results

10 Former Chief Justice of the US Supreme Court William H. Rehnquist, "*On Doing the Right Thing and Giving Public Satisfaction*" in the Special Issue on Public Trust and Confidence in the Courts of "Court Review", the Journal of the American Judges Association, p. 8-10. *See further* in that same Special Issue of Court Review, David Rottman and Alan Tomkins, "*Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges*", p. 24-32.
Further: listen to Justice Rehnquist, speaking about the need to maintain and build the public trust in the justice system (1999), (https://bit.ly/Rehnquist_Trust).

11 Not all do, e.g. the former President of the Council of State ("Raad van State"), Herman Tjeenk Willink refused to take part in a working group of the House of Representatives (Tweede Kamer der Staten-Generaal") on dikastocracy, or those who immediately denied the relevance of the discussion like political parties D66 and CU, members of the Dutch government coalition. *See* Tjeenk Willink about dikastocratie "*Doet de rechter nog recht?*" in De Groene Amsterdammer, Jan. 29, jrg. 144, nr. 5.

12 Noah Feldman, New York Times opinion, "*Sometimes – Justice can play Politics*", NYT Feb. 12, 2011 (https://bit.ly/op-ed_NYT_Feldman).

13 See Note 526 of the Opinion of the Advocate-General in the *Urgenda case* – https://bit.ly/Urgenda_Supreme-CourtNL – referring to the statements by the (Dutch) State which makes a distinction between "a political case" (a case with pollical consequences) and "a case dealing with "a political question".

14 We will for the remainder of this article phrase it as "trust in the judiciary".

15 Denise Rousseau *et al*., "*Not So Different After All: A Cross-discipline View of Trust*" in The Academy of Management Review 23(3) (1998).

16 Éloi Laurent, "*Measuring Tomorrow: Accounting for Well-Being, Resilience, and Sustainability in the Twenty-First Century*", Part II, Chapter 8 "*Trust*", Princeton University Press.

17 The Russell Sage Foundation published a series of publications on trust, "*RSF Series on Trust*", https://bit.ly/RSF_Series_on_Trust.

18 Tom R. Tyler and Yuen J. Huo, "*Trust in the Law, Encouraging Public Cooperation with the Police and Courts*", Russell Sage Foundation (2002).

of their research show that the more people are treated fairly and with dignity and respect, the more trust they show in the legal process (in this case: police and law enforcement) and the judiciary. This is in line with legal literature which focuses on *procedural justice*. Dutch authors found that litigants who perceive the judge's treatment as fair are more likely to trust the judiciary.[19]

2. Trustworthiness

The closest most European authors as well as institutions come to defining "trust" is that it equals "trustworthiness",[20] leading to a high probability that someone who is considered "trustworthy" will perform an action that is beneficial or at least not detrimental to someone to consider engaging in some form of cooperation with him".[21] Other legal publications focus on judicial trust specifically in the context of the international courts (e.g. the CJEU), putting forth a definition of judicial trust as "the national judges' belief about whether the CJEU will follow an expected course of action under conditions of uncertainty".[22]

In the process that causes the public to trust the judiciary, attorneys also have to play their role in maintaining trust in the judiciary, as was expressly stated by a judgement made by the European Court of Human Rights in the case *Schöpfer vs. Switzerland*:[23]

> "Moreover, the Court has already held that the courts – the guarantors of justice, whose role is fundamental in a State based on the rule of law – must enjoy public confidence.[24] (…) "the key role of lawyers in this field, it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein."

3. Trust and legitimacy

If asked what makes up trust in the judiciary, words come up like "impartial", "trustworthy", "transparent", "independent", "autonomous" and "accountable".[25] According to the ENCJ,[26] "accountability" of the judiciary comprises three elements: transparency about the functioning of the judiciary, involvement of civil society in judicial governance, and the existence of mechanisms to promote and maintain the ethical standards of the judiciary. An accountable judiciary is important for several reasons. First, an *un*accountable court system has an arduous time being perceived as legitimate and maintaining the trust and respect of the public.[27] Lacking public trust, the judiciary, dependent on other branches of government to enforce its orders and fund its operation, cannot properly fulfill its role.[28] Decline in trust and respect for a court system may ultimately lead to the loss of *legitimacy*[29] in the eyes of the public and other branches of government.

4. Trust and Independency

It is also generally accepted that the judiciary, in order to maintain trust, must have a high degree of independence[30] to decide on matters based on their interpretation of the law and facts presented before it. An independent judge[31] is free to decide cases fairly and impartially, relying only on facts and the law. This means that judges are protected from political legislative, special interest, media, public or financial pressure.[32] There was an impressive deal of attention in the Dutch media and publications on the question to what extent judges (in office or otherwise) may express a critical opinion about social and political developments, or about the judiciary and its organization. These discussions touch on objectivity and neutrality of

19 Hilke A.M. Grootelaar, Kees van den Bos, "*How litigants in Dutch courtrooms come to trust judges: the role of perceived procedural justice, outcome favorably and other sociolegal moderators*", Law & Society Review 52 (1) (2018).

20 Elaine Mak, Niels Graaf, Erin Jackson, *'The Framework for Judicial Cooperation in the European Union: Unpacking the Ethical, Legal and Institutional Dimensions of "Judicial Culture"* ' (2018) 34(1) Utrecht Journal of International and European Law p. 24-44.

21 Diego Gambetta, "*Can We Trust?*" In: Diego Gambetta (ed), *Trust: Making and Breaking Cooperative Relations* (Basil Blackwell Ltd 1990).

22 Juan A. Mayoral, "*In the CJEU Judges We Trust: A New Approach in the Judicial Construction of Europe*", Journal of Common Market Studies, volume 55 issue 3 (2017) and Anke Grosskopf, "*Learning to trust the European Court of Justice, lessons from the German case*" (https://bit.ly/Anke_Grosskopf).

23 Schöpfer v. Switzerland, judgment of 20 May 1998, Reports of Judgments and Decisions 1998-III, pp. 1052-53, §§ 29-3.

24 See *De Haes and Gijsels v. Belgium of 24 February 1997*, *Reports of Judgments and Decisions 1997-I*, p. 234, § 37, *NJ* 1998, 360, ann. EJD.

25 On accountability, transparency and the way courts are providing sufficient information to the public, *see* Wim Voermans, "*Judicial Transparency Furthering Public Accountability for new Judiciaries*", Utrecht Law Review no. 1 (2007) 148-159. The Code of Conduct for the Judiciary of the Dutch Association of the Judiciary (Nederlandse Vereniging van Rechtspraak, NVvR) describes the core values of the judiciary in a democratic society as "independence, impartiality, autonomy, integrity and expertise". "Trust" does occur in the code, but only in relation to private conduct and the public expression of private opinions which, according to the code, "may damage trust in the judiciary". *See* on this subject, Egbert Dommering, "*De Europese informatierechtsorde*", p. 152-155, deLex (2019).

26 European Network of Councils for the Judiciary, Indicators and Surveys, leading to a process of positive change", ENCJ Report 2018-2019, https://bit.ly/ENCJ_Juridiciary_2018-2019.

27 Frances Kahn Zemans, "*The Accountable Judge: Guardian of Judicial Independence*", South California Law Review 72 (1999) 625-655.

28 David Brody, "*The Use of Judicial Performance Evaluation to Enhance Judicial Accountability, Judicial Independence and Public Trust*", Denver University Law Review, Vol. 86.1, 115-118 (2008).

29 E. Mak, *De rechtspraak in balans. Een onderzoek naar de rol van klassiek-rechtsstatelijke beginselen en 'new public management'-beginselen in het kader van de rechterlijke organisatie in Nederland, Frankrijk en Duitsland* (diss. Rotterdam), Nijmegen: Wolf Legal Publishers 2007, p. 307.

30 International Commission of Jurists (Geneva, Switzerland), "*International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors* (2007). See also: Richard Mohr, "*Reconciling Independence and Accountability in Judicial Systems*", Utrecht Law Review 3, no. 2 (2007) 26-43.

31 David Brody, "*The Use of Judicial Performance Evaluation to Enhance Judicial Accountability, Judicial Independence and Public Trust*", 86 Denver University Law Review, 115-118 (2008).

32 David J. Beck, "*Judicial Independence: Woe to the Generation that Judges the Judges*", 71 Texas Bar Journal. 572 (2008), Brody, *supra*.

judges and on their (objective) impartiality and independence.[33] Public trust in the judiciary and independence are intrinsically connected and both are in danger of losing ground if judges are being asked to give their opinions on sensitive, political matters. Or, as a member of the UK House of Lords, Lord J. Leslie Scarman, put it:[34]

> "Great judges are in their unique ways judicial activists. But the constitution's separation of powers, or more accurately functions, must be observed if judicial independence is not to be put at risk. For, if people and Parliament come to think the judicial power is to be confined by nothing other than the judge's sense of what is right (…), confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application. Society will then be ready for Parliament to cut the power of the judges. Their power to do justice will become more restricted by law than it need be or is today."

5. Trust in judiciary and populism

According to some authors, distrust in the judiciary is a direct consequence of the rise of populism. Populists have a tendency of instrumentally exploiting the law and manipulating legal institutions, notably courts.[35] They argue that the rise of populist parties in Europe that are hostile to the legal constitutional architecture is putting the rules of the trias politica democracy under increasing pressure.[36] According to Dommering, the indicators of this trend are visible: rejection or disregard for democratic decision-making rules, denial of the legitimacy of opponents, tolerance of violence at demonstrations, an anti-fundamental rights and anti-media attitude, and hostility to the judiciary.[37] Attempting to dominate the courts is, in the view of populists, not anti-democratic but rather pro-democratic, reflecting the will of the people which the "elitist judges" serve only to hinder.[38]

It should come as no surprise that a representative of a Dutch populist party[39] would enjoy ruffling a few feathers by stating that judges sit too much in the chair of politics, which immediately provoked a fierce debate on the political role of judges. He mentioned the word "dikastocracy".[40] The Council of State[41] intervened in the debate advocating 'a critical reflection on judicial decisions' but warned that the subject of "dikastocracy" does not entail 'questioning the judge as an institution on principle'.

6. Public trust and government by judges

So the question of how trust and "government by judges" relate to each other and how this plays a role in The Netherlands arises. Although the words "government by judges" were not used by the Advocate-General in the *Urgenda* case,[42] the AG was clear about the relationship between trust and the question how far judges may go without crossing the boundaries of the separation of powers:[43]

> "If the legislature is already creating a regulation, and the subject permits some delay, courts will almost always wait for the legislature. In the event of an impending violation of the fundamental rights of individuals, courts are sooner forced to provide effective legal protection. As the risk of a violation of fundamental rights increases and the consequences of the feared violation become more serious, the expectations of judicial intervention also increase. On the other hand, there is a risk that the judiciary will lose authority and public trust if it goes too far in an area that the constitution reserves for the legislature".

And "crossing the boundaries of the separation of powers" is exactly what "government by judges" or dikastocracy means. Dikastocracy or government by judges can be easily dismissed as a concept alien to the Dutch legal culture and the Dutch system of parliamentary sovereignty (or legislative supremacy), as is it not possible for any Dutch court to test the validity of legislative acts with the Constitution.[44] This Dutch constitutional tradition significantly differs from that of other countries in Europe[45] and the US. However, given the above-described relationship between public trust in the proper functioning of the judiciary and its accountability towards that same public, the relevance of "government by judges" – in Europe, but also in The Netherlands – should not be overlooked. Nor should it be diminished in light of one manifestation of a trend developing over the years: a declining trust in institutions.

33 Janneke Gerards, book review of "*Onafhankelijkheid van de rechter in constitutioneel perspectief*" by Pauline van den Eijnden, diss., Kluwer (2011) in Tijdschrift voor Constitutioneel Recht (TvCR) Oct. 2011, p. 450, note 3.

34 Gareth Jones, "*Should Judges Be Politicians? The English Experience*", Indiana Law Journal, Vol. 57, issue 2 article 1 (1982).

35 Nicola Lacey, "*Populism and the Rule of Law*", Working Paper, Annual Review of Law and Social Science, Vol. 15, p. 4 (2019).

36 Egbert Dommering, *supra*, par. 8.5.2, p. 432-433.

37 "*Populists are consciously suspicious of judges. That is dangerous*", argues Marc de Werd, Judge at the Court of Appeal Amsterdam, in Volkskrant, Feb. 3, 2020 https://bit.ly/Marc_deWerd.

38 "*The Global Implications of Populism on Democracy*", Taskforce 2018, The Henry M. Jackson School of International Studies, University of Washington, evaluated by Sarah Repucci.

39 Thierry Baudet, Forum voor Democratie (FvD).

40 In Dutch: "dikastocratie".

41 Highest Dutch advisory body of government and parliament, which is also the highest administrative court.

42 The question before the court was whether the Netherlands' State violates its positive obligations under Articles 2 and 8 ECHR if it does not reduce greenhouse gas emissions by 25% in 2020.

43 The Netherlands constitutional system of checks and balances aims to maintain an equilibrium between the legislative, executive and judicial branches.

44 Article 120 of the Dutch Constitution provides: '*The judge does not engage in the assessment of the constitutionality of laws and treaties*'.

45 Maartje de Visser, "*Constitutional Review in Europe, A Comparative Analysis*", Hart Publishing (2013).

7. Judicial Review and Activism in The Netherlands

Judicial review in The Netherlands is limited. Whether a piece of legislation is compatible with the Constitution is for the legislative (parliament) to determine. The courts do not review the compatibility of legislation with the Constitution.[46] They can, however, consider whether legislation is compatible with international treaties, which lay down citizens' fundamental rights.[47] In practice, this means that the courts can review legislation if it is compatible with, for instance, the European Convention on Human Rights and all EU legislation that has direct effect. Whether formal laws should be subject to constitutional review is a regular topic of discussion in the Netherlands.[48]

Is any court in The Netherlands "politically active"? A cautious note is in order here, as "politically active" is not a very accurate term. A judge can be involved in cases that have political impact, but that does not mean that the court in which he serves is "politically active". Semantics are important here. Van Koppen called the Netherlands Supreme Court a "highly politically active highest court".[49] However, a court is not politically active because the court rules on politically sensitive, controversial subjects like abortion, the right to strike, or whether or not the Dutch government must repatriate IS children from Syria.[50] The opposite seems to be more correct: the "judicialization" of politics, the reliance on courts and judicial means for addressing moral predicaments, public policy questions, political controversies[51] or political inertia.
To give broader support for the question on the reach of the judiciary in issues that provoke fierce, societal uproar and resistance from some parts of the political spectrum, Parliament in The Netherlands debated the subject in a round table before members of the Dutch House of Representatives.[52] Academics and interested parties – among which former President of the Supreme Court of the Netherlands, Geert Corstens – were encouraged to file position papers.[53] The Dutch Senate discussed the same subject a few days earlier.[54] The various views expressed in those position papers[55] touch upon the heart of the functioning of the judiciary and whether the electorate has sufficient confidence in the system. So, this justifies a further search into the interaction between trust and the existence of a dikastocracy or "government by judges", or "judicial review".

It is often stated that the judiciary works differently from political institutions on a crucial point, as it is expected to make impartial, independent, and non-political decisions. However, the problem with this is that judges are often asked to step into "political vacuums", in cases that cause social upheaval and excitement and where the legislative branch of government does not act because of political disagreement about the solution to be chosen. When courts step in as a result of litigation started by individuals or "common interest" groups, the predicament that judges find themselves in is that as soon as "politics" come into play, the public seems to lose trust that the judiciary is the right institution to distinguish right from wrong. Judges are then easily seen as "activists", affecting the legitimacy of courts. In the US, critics of the judiciary often deride activist courts for involving themselves too heavily in matters they believe are better left to the elected legislative and executive branches. However, as US Justice Anthony Kennedy has said, "An activist court is a court that makes a decision you don't like".[56]

The terminology "judicial activism" used to describe the power of the courts to judge issues that are "political" mostly depends on where the user of the term stands on the political spectrum and the views held to allow judges to enter the "political space" in a democracy, by invalidating legislative or executive actions. According to Koopmans,[57] the description of judicial attitudes in terms of "activism" versus "restraint" is an American invention which was well explained in a dissenting opinion by Justice Frankfurter in a case concerning the compatibility of new legislation with the Constitution:

> "This legislation is the result of an exercise by Congress of the legislative power vested in it by the Constitution and of an exercise by the President of his constitutional power in approving a bill and thereby making it a law. To sustain, it is to respect the actions of the two

46 Article 120 of the Dutch Constitution provides: '*The judge does not engage in the assessment of the constitutionality of laws and treaties*'.

47 Article 94 of the Dutch Constitution provides: '*Legal provisions in force within the Kingdom shall not be applied if such application is incompatible with provisions of treaties and of acts of organizations under international law which are binding on everyone*'.

48 See for an overview the website "De Grondwet" ("*The Constitution*") https://bit.ly/Grondwet-Comissies.

49 Peter J. van Koppen, "*The Dutch Supreme Court and Parliament: Political Decision-making versus Nonpolitical Appointments*", Law & Society Review, Vol. 24, No. 3 (1990), pp. 745-780.

50 Court of Appeal The Hague, 22 November 2019, https://bit.ly/IS-kinderen.

51 Ran Hirschl, "*The Judicialization of Politics*", in: The Oxford Handbook of Political Science, ed. by Robert E. Goodin.

52 Tweede Kamer der Staten-Generaal.

53 House of Representatives, Vaste commissie voor Binnenlandse Zaken, Rondetafelgesprek "*Dikastocratie?*", 9 maart 2020. The position papers can be found on the website: https://bit.ly/EK_rondetafelgesprek.

54 Eerste Kamer (Dutch Senate), Verslag van de plenaire vergadering van 4 februari 2020 over dikastocratie en vrijheid van de rechter en de grondwettoetsing in het kader van de discussie van het Eindrapport Staatscommissie Parlementair Stelsel (https://bit.ly/EK_Dikastocratie).

55 For a summary of positions by participants of the round table, *see* https://bit.ly/summary-Round_Table_TK.

56 Richard Davis, "*Justices and Journalists: The U.S. Supreme Court and the Media*", p. XV, Cambridge University press (2011).

57 T. Koopmans, "*Courts and Political Institutions: A Comparative View*" par. 3.4 p. 51-52, Cambridge University Press (2003). *Idem:* T. Koopmans, "*Het gezag van rechter en wetgever*", in: "Vergelijkend Publiekrecht" p. 68-84 (Kluwer, 1986).

branches of our government directly responsive to the will of the people and empowered under the Constitution to determine the wisdom of legislation. The awesome power of this Court to invalidate such legislation, because in practice it is bounded by our own prudence in discerning the limits of the Court's constitutional function, must be exercised with the utmost restraint."[58]

Where politicians are unable or unwilling to address societal issues, judges are being addressed to provide guidance. Over time, the role of the judiciary and especially the issue of how "political" the judges are in their opinions on constitutionality of laws enacted by Parliament, has provoked the use of a multitude of terms, like "government by judges" or "dikastocracy", "judicial activism",[59] "judicial restraint" or "judicial review". The latter is a US constitutional concept to describe the power of the US Supreme Court to review actions taken by the legislative branch (Congress) and the executive branch (President) and decide whether those actions are legal under the Constitution.[60]

8. Judicial Review in the US

The debate on trust in judges and the proper limits of judicial accountability and judicial independence is not a recent development. In the US, the proper role for judges in the American system of government has been fiercely[61] debated for over 200 years.[62] Advocates of a strong, independent judiciary, including Alexander Hamilton, argued that the role of judges is to faithfully interpret the law and constitutions, without consideration of outside factors such as politics or popular sentiment.[63] The US Constitutional framers envisioned a government in which the Court played only a peripheral role. Montesquieu, in *The Spirit of the Laws*, claimed that the judiciary is "next to nothing" in comparison to the other branches of government. Years later, in *Federalist Paper 78*,[64] Alexander Hamilton declared that the judiciary has "neither force nor will, but merely judgement" and would have to rely on the executive and legislative branches to make policy decisions.

The active debate in the US about the boundaries between judicial reach and the "will of the people" led French political scientist and historian Alexis de Tocqueville to express his bewilderment about the role of American judges, after his nine-month study visit to the US (1840):[65]

> "Ce qu'un étranger comprend avec le plus de peine, aux États-Unis, c'est l'organisation judiciaire. Il n'y a pour ainsi dire pas d'événement politique dans lequel il n'entende invoquer l'autorité du juge; et il en conclut naturellement qu'aux États-Unis, le juge est une des premières puissances politiques. Lorsqu'il vient ensuite à examiner la constitution des tribunaux, il ne leur découvre, au premier abord, que des attributions et des habitudes judiciaires. À ses yeux, le magistrat ne semble jamais s'introduire dans les affaires publiques que par hasard; mais ce même hasard revient tous les jours."[66]

and

> "Il n'y a pour ainsi dire pas d'événement politique dans lequel il n'entende invoquer l'autorité du juge. Le juge américain ressemble donc parfaitement aux magistrats des autres nations. Cependant, il est revêtu d'un immense pouvoir politique."[67]

In the early years of the US Supreme Court, division marked most of the Court's opinions. All but one of the original justices left the Court after a relatively brief period.

58 *Top v. Dulles*, 356 US 86 (1958) and US Congressional Record, Volume 104-Part 9 (1958).

59 The term "judicial activism" is said to have been coined by the American historian Arthur M. Schlesinger, Jr., in a 1947 article in *Fortune*. It was subsequently used to criticize the decision by the Supreme Court in *Brown v. Board of Education of Topeka, Kansas* (1954) ruling that separating children in public schools on the basis of race was unconstitutional. It signaled the end of legalized racial segregation in the schools of the US, overruling the "*separate but equal*" principle set forth in the *Plessy v. Ferguson* case (1896). The ruling even led to threats to impeach judges. During the 1990s, the terms "judicial activism" and "judicial activist" appeared in an astounding 3,815 journal and law review articles (Keenan D. Kmiec, "*The Origin and Current Meanings of "Judicial Activism"*, California Law Review, Vol. 92, No. 5 (2004), pp. 1441-1477).

60 The concept is majestically described in a classic study by Mauro Cappelletti, "*Judicial Review in the Contemporary World*" (1971).

61 For a very strong, ultra conservative, opinion against judicial review by the US Supreme Court, Robert H. Bork, "*A country I don't recognize: the legal assault on American values*", with some unflattering descriptions of "politically active" judges (Bork was widely seen as originator of what became known as "originalism", a very strict interpretation of the US Constitution). For a compilation on liberal and conservatist views on judicial review: Jack Balkin, "*Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*", Texas Law Review, Vol. 98, No. 215 (2019).

62 William H. Rehquist, "*Judicial Independence*", 38 University of Richmond Law Review, 579, 582-583 (2004).

63 Charles Gardner Geyh and Emily Field Van Tassel, "*The Independence of the Judicial Branch in the New Republic*", 74 Chicago-Kent Law Review 31 (1998); Lino A. Graglia, "*Judicial Review on the Basis of "Regime Principles": a prescription for government by judges*", 26 South Texas Law Review 435 (1985), p. 435.

64 Writing as "Publius", https://bit.ly/Federalist_Papers_78. J. Kleidosty & J. Xidias "*The Federalist Papers*", Taylor and Francis (2017).

65 Tocqueville, "*De la démocratie en Amérique*", 14ième édition, Tome Premier, Chapitre VI (Flammarion, Paris, 1864).

66 "*What a foreigner has the most difficulty understanding in the United States is the judicial system. There is virtually no political event in which there is no intention to invoke the authority of the judge; and he naturally concludes that in the United States, the judge is one of the leading political powers. When he then comes to examine the constitution of the courts, he discovers, at first glance, only judicial powers and habits. In his view, the magistrate never seems to enter into the public space except by chance, but that same chance comes up every day*."

67 "*There is virtually no political event where he does not want to rely on the authority of the judge. So the American judge is very similar to judges in other countries. However, he is clothed with immense political power*".

While on the Court, several justices vigorously took part in partisan political activities. Unsurprisingly, the Supreme Court possessed neither public trust nor a prominent role. Congress suspended the Court's term so it could not consider certain cases, and many of the most prominent statesmen – Thomas Jefferson and James Madison included – argued that the states, rather than the Court, should finally determine certain constitutional issues.[68] The Court responded to criticism of political activism by exercising judicial review extremely cautiously.

The oldest reference to the term "government by judges" can be found in an "Address" by the famous[69] Chief Justice of the US Supreme Court of North Carolina, Walter Clark, given at Cooper Union, New York City, on January 27, 1914.[70] In his "Address" he referred to the landmark decision of the US Supreme Court in *Marbury v. Madison* (1803)[71] introducing the legal principle of judicial review – the ability of the US Supreme Court to limit Congressional power by declaring legislation unconstitutional. Walter Clark reflected on the "Will of the People" and was adamantly opposed to the broad powers the judges, as non-elected functionaries, conferred upon themselves:

> "This power when assumed by the judges in Marbury v. Madison was without a precedent (…) It had never been deemed of before (…) that the judges would assume governmental functions and negative the action of the men who were intrusted with the lawmaking duties. It had been attempted only once in England, and then they very promptly hung the chief justice (Tressilian) and exiled his associates (…). In England for a long time the judges were removable at the will of the King, and when that was abandoned they were made removable by a majority vote of Parliament without trial and without cause shown. This is the law in England to this day. (…). The doctrine[72] was shrewdly set forth in an obiter dictum (…) for he[73] knew that Thomas Jefferson, then President, would not recognize the validity of the opinion nor put it into execution. (…) A few years later (…) when the court, through the same chief justice, held an act unconstitutional (…). Andrew Jackson, then President pithily said: 'John Marshall has made his decision, has he? Now let us see him execute it.' It was accordingly never executed, and to this day has remained a blank piece of paper."

After its *Marbury v. Madison* decision, the Supreme Court did not declare another national law unconstitutional until 1857, in the *Dred Scott* decision.[74] It was only during the decades following the Civil War that judicial review gained the legitimacy which led the Supreme Court to more aggressive exercise judicial review.

9. The Political Question Doctrine

In American judicial review, although formulated broadly, the court's power is, in practice, conditioned by several doctrines designed to distinguish "the *judicial* function" – the settlement of legal disputes – from "the *political* function" – legislating. American separation of power notions – which rest on the formal equality of the executive, legislative and judicial branches of government – both enable and restrict the exercise of judicial review.[75] The "*political question doctrine*" is one of those restrictions. The term was extensively used in the Opinion of the Netherlands Advocate General before the *Urgenda* case of the Dutch Supreme Court, seemingly as a synonym for "judicial review",[76] which in fact it is not, as it is a *limitation* on judicial review.

The term "political question" was used to describe the case law of the Supreme Court following *Baker v. Carr*[77] in denying judicial intervention when the case at hand might show insufficient respect for other branches of government, or when a judicial decision might threaten the integrity of the judicial branch. The case provided six independent factors that can present "political questions". These factors include both constitutional and prudential

68 Sandra O'Connor, "The Majesty of the Law, Reflections of a Supreme Court Justice", Random House (2003), p. 71.

69 Walter Clark was an active judge, forceful supporter of woman's suffrage and served as legal adviser to the North Carolina League of Women Voters. He defended labor's right to organize and favored workmen's compensation laws and the eight-hour working day. He called for the abolition of the poll tax and an end to lynching. Clark approved municipal ownership of utilities and advocated nationalization of coal mines, oil reserves, and waterpower sites. (*see* Aubrey Lee Brooks, "*Walter Clark: Fighting Judge*", Chapel Hill University of North Carolina Press (1944).

70 Walter Clark, "*Government by Judges*", available via Harvard College Library, 2 May 1916, doc. US 1105.51 (thanks to the US Senate who decided to publish the full text in its Annals).

71 US Supreme Court 5 U.S. 137 (1803), *see* full text https://bit.ly/US-SupremeCourt-Marbury-Madison, for a brief summary of the case *see* https://bit.ly/Marbury_vs_Madison.

72 Of judicial review in *Marbury v. Madison*, *SdW*.

73 Chief Justice Marshall of the US Supreme Court, *SdW*.

74 Formally "*Dred Scott v. John F.A. Sandford*", in which the U.S. Supreme Court on March 6, 1857 ruled that a slave (Dred Scott) who had resided in a free state and territory (where slavery was prohibited) was not thereby entitled to his freedom; that African Americans were not and could never be citizens of the United States; and that the Missouri Compromise (1820), which had declared free all territories west of Missouri was unconstitutional. The decision added fuel to the sectional controversy and pushed the country closer to civil war.

75 Alec Stone Sweet, "*Governing with Judges, Constitutional Politics in Europe*", p. 32, Oxford University Press (2000).

76 In *Oetjen v. Central Leather Co.* (1918), one of the earliest examples of the US Supreme Court applying the political question doctrine, the Court found that the conduct of foreign relations is the sole responsibility of the executive branch. As such, it found that cases which challenge the way in which the executive uses that power present "political questions". Thus, the Court held that it cannot preside over these issues. The Court broadened this ruling in *Baker v. Carr* (1962), when it held that federal courts should not hear cases which deal directly with issues that the Constitution makes the sole responsibility of the executive branch and/or the legislative branch.

77 Baker v. Carr, 369 U.S. 186 (1962) edit: Rob Bakker, A.W. Heringa, F.A.M. Stroink, "*Judicial Control: Comparative Essays on Judicial Review*".

considerations, but the Court did not explain how they are to be applied.[78]

The references to the "political question doctrine" in relation to judicial review in the AG opinion before *Urgenda*[79] is, as some argue,[80] not as relevant anymore. Others even say that the "political question doctrine" is "an unfortunate misnomer".[81]

10. Government by Judges in Europe

In Europe, a "new constitutionalism" emerged and was widely diffused after World War II.[82] Constitutional courts were created in Austria (1945), Italy (1948), France – though limited – (1958), Germany (1949), Portugal (1976), Spain (1978), Belgium (1988), and after 1989 in most Central and Eastern European countries.[83] In Germany, the case law of the Federal Constitutional Court in Karlsruhe did much to banish the old idea that the problems of real importance can only be solved by legislation and never by the courts.[84]

Europe's highest court, the ECJ, has over the years, via court rulings, established key principles as the supremacy of EU law over national law and the right of citizens to have EU law enforced in their domestic courts. Just as the decisions of the Supreme Court caused the expansion of federal power in the US, the ECJ helped to establish a "federal" legal order in Europe. The Belgian professor and European University Institute Chairman Renaud Dehousse[85] has shown how the ECJ has taken advantage of opportunities, when they have arisen in the European political process, to "constitutionalize" the EU treaties and to exert a strong influence on policy decisions and explains why the Court's active role has not encountered greater opposition.

11. France

The first reference in Europe to "government by judges" can be found in a book, published in 1921, by Edouard Lambert, a professor of law in Lyon, France, "*Le Gouvernement des juges et la lutte contre la legislation sociale aux Etats-Unis*",[86] in which he referred to the term in order to denote an unconstrained system of judicial review which could not be limited, even by constitutional amendment. The phrase quickly entered the vocabulary of French public law reflecting the historical French aversion to a strong judiciary.[87] It was not until 1903 that leading public law scholars in France were mounting what would become a noisy campaign to import judicial review American style. The movement would span three republics and as many generations of scholars. In the end, it failed. The major political parties, invoking the specter of an American style "Government of Judges", consistently blocked proposals to allow judicial review. They did so in the name of democracy, to secure the sovereignty of the People's Will, as expressed through parliament.[88]

The Constitution of the Fifth Republic of 1958 established a Constitutional Council, but its purpose was to guarantee the dominance of the executive (the government) over a weak Parliament. Beginning in 1971, however, the Council asserted its independence in a case, striking down a government bill that seriously restricted freedom of political association. For the first time, it declared a government-sponsored law unconstitutional on the grounds that the law violated constitutional rights.[89] This decision paved the way for incorporating a Charter of Rights into the 1958 Constitution, a charter that the Council took upon itself to enforce.[90] Even after introducing a Constitutional Court in France in 1958, the term "government by judges" dominated both legal and political discussions on the role of the French Judiciary.[91]

12. United Kingdom

Historically, in the UK many scholars have held a long-standing view on judicial review as being contrary to the parliamentary system in their country, arguing that the law can never be the substitute for politics. Written constitutions and Bills of Rights take political decision out of the hands of politicians, who can be kicked out of office, and place such

78 *See* par. 5.7 of the Opinion of the Advocate General before the *Urgenda* case of the Dutch Supreme Court (footnote 5). It has been argued that the "political question doctrine" appears to have been restricted in *Zivotofsky v. Clinton*, 566 U.S. 189 (2012), *see* Jared P. Cole, "*The Political Question Doctrine: Justiciability and the Separation of Powers*", Congressional Research Service Report nr. 7-5700 (2014).

79 *Opinion*, chapter 5, *see* Note 5.

80 T. Koopmans, *supra*, par. 5.1 p. 101 argues that the political question doctrine seems to have slowly vanished from the case law of the US Supreme Court since the reapportionment cases of 1962-64.

81 Rachel E. Barkow, "*More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*", Columbia Law Review, Vol. 102, No. 2 (2002), pp. 237-336 "the term political question doctrine (is) an unfortunate misnomer (p. 244).

82 Martin Shapiro and Alec Stone Sweet, "*Introduction: The New Constitutional Politics*", Comparative Political Studies, 26, p. 397-420 (1994).

83 Czech Republic, Poland, Hungary, Romania, Slovakia and the Baltics and in several states of former Yugoslavia.

84 T. Koopmans, *Protecting human rights: The European Dimension*" (1988), studies in honor of G.J. Wiarda, p. 383.

85 "*The European Court of Justice: The Politics of Judicial Integration*", Macmillan (1998).

86 "*Le gouvernement des juges et la lutte contre la législation sociale aux Etats-Unis - L'expérience américaine du contrôle judiciaire de la constitutionnalité des lois*" (1921).

87 Michael H. Davis, "*A Government of Judges: An Historical Re-View*", The American Journal of Comparative Law, Vol. 35, No. 3 (summer, 1987) p. 559, p. 564.

88 Alec Stone Sweet, "*Why Europe rejected American judicial review and why it may not matter*", 101 Michigan Law Review, p. 2744-2745 (2003).

89 Décision no. 71-44 DC, Journal Officiel du 18 Juillet 1971, at 7114, Recueil, at 29, also, by some, hailed as the "Marbury v. Madison of France", George D. Haimbaugh, Jr., "*Was it France's Marbury v. Madison?*", Ohio State Law Journal, Vol. 35, p. 910-926 (1974).

90 Alec Stone Sweet, "*Governing with Judges, Constitutional Politics in Europe*", supra, p. 41.

91 For an extensive history of the fierce debates and legal struggle to find the proper role of judicial review in France, *see*: F.L. Morton, "*Judicial Review in France: A Comparative Analysis*", The American Journal of Comparative Law, Vol. 36, No. 1, pp. 89-110 (1988).

decision into the hands of judges, who (in practice) cannot.[92] As John Griffith puts it: "To require a supreme court to make certain kinds of political decisions does not make those decisions any less political."[93]
However, *Brexit* has caused a debate in the UK about the desirability of the opening up of judicial review. The Conservative Party's Manifesto of 2019 included the promise of reform:

> "We will ensure that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays".

13. **Finale**

Ernst, with his twenty years' experience as a judge and nine as a Vice-President of The Supreme Court of The Netherlands, the Hoge Raad, has never expressed his views on the reach of the judiciary when it comes to what we described in this essay as "judicial review" in politically charged matters. From a rare interview[94] with Ernst it seems that he is in favor of a constitutional revision of the national laws, although he leaves how this revision need to be organized, open. I would not be surprised if he would fully endorse the view of Vranken[95] on the modern relationship between legislative and the judiciary. He pointed to (private law) doctrines, which consisted mainly of case law,[96] because the law had a gap, or the legislator had explicitly left the lead of legal development to the courts. Vranken did not believe that there would still be any academic or lawyer left who would seriously dispute that the judge has a seminal legal role. This, he argued, was particularly true of the Hoge Raad. He used striking vocabulary to describe this court: "deputy-legislator" and "co-legislator". Ten years later, Vranken was even more strongly worded:[97]

> "In fact, judicial formation of law is a must. The contribution of the judiciary to the development of the law is considered indispensable in a modern society. (…) Legislation and jurisprudence are and should be "partners in the business of law"."

With the above, I hope to have clarified that trust in the judiciary is largely linked to the supremacy of the Supreme Court's awareness of its role as co-legislator and to convince the public that this role is taken on only if the legislator itself defaults and there is an urgent social need or need for judicial intervention.

I do hope we see Ernst find a proper forum to continue what he did as a judge: by approaching the issues brought before him with wisdom, wit, and creativity, as will be the case, no doubt, even after his retirement as Vice-President of the Hoge Raad.

92 Gareth Jones, "*Should Judges Be Politicians? The English Experience*", Indiana Law Journal, Vol. 57, issues 2, p. 228 (1982).
93 J.A.G. Griffith, professor of Public Law, London School of Economics, in: "*The Political Constitution*", The Modern Law Review, Vol. 42, No. 1, p. 16 (1979).
94 Interview with Beatrijs Deconinck and Ernst Numann, "*Cassatierecht in beweging*", De Gerechtsdeurwaarder nr. 1 (2014) p. 2-8.
95 J.B.M. Vranken, "*Algemeen deel*" in Mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht" (Asser-serie) W.E.J. Tjeenk Willink (1995).
96 C.J.H. Jansen & C.J. Loonstra, "*Grenzen aan de rechtsvormende taak van de rechter in het privaatrecht en het arbeidsrecht*", Arbeidsrechtelijke Annotaties 2012 (11) 1, p. 3.
97 J.B.M. Vranken, "*Algemeen deel. Een vervolg*", (Asser serie), Kluwer, p. 9-10, nr. 9 (2005).