COURTS IN QUEST FOR LEGITIMACY: A comparative approach[1]

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1. Introduction

Let me open this paper with a statement. The legitimacy of the judiciary is at risk, in several countries for similar reasons. In my own country – the Netherlands - the whereabouts of the judiciary and adjudication are subject of permanent attention of the public media. A criminal case of judicial error – an innocent man appears to have been imprisoned for 4 years – has raised serious questions about the functioning of criminal justice. Criminal lawyers plead for a more adverserial criminal trial.[3] A member of parliament has even gone so far as to plead for the (re)introduction of laymen in the criminal justice system.[4] The functioning of the civil judge too, is at stake in the public media. The complaints are that the judiciary is too slow and too expensive to be a serious option for conflictresolution. With some exaggeration one can say that civil adjudication is only for large corporations and other repeat-players.[5] Lastly, the administrative judiciary is in discussion because of the somewhat shady borderline it shares with politics. The separation of administrative justice from the government is always an issue, because the judiciary has to manoeuvre between formalism and activism. On the institutional level, the combination of administrative adjudication and legislative advise within the Council of state is hard to reconcile with article 6 ECHR (fair trial).[6] All this raises questions of a more general nature for the judiciary. How can independence be reconciled with accountibility? How can judicial quality be combined with efficiency and productivity? What does the cry for transparancy mean for the principle of open justice? And what do authority and legitimacy mean in present society?

What we know is that there is a steady decline in the public trust in the judiciary in Western European countries. From 1980 to 2000 onwards this gradual decline of trust has been the strongest in Belgium (minus 24%), and in the Netherlands and the United Kingdom (minus 16%).[7] The latter two do not belong to the weakest countries in this respect, though. Essentially, one can distinguish three clusters of countries. The first consists of Sweden, Germany and the Netherlands, where a clear majority of the population considers the judiciary to be trustworthy. The second consists of the United Kingdom, Italy and Spain, where about 50% of the people put their trust in the judicial organs. The third is formed by France and Belgium, where a minority of the people consider the judiciary to be trustworthy. In Belgium, of course, the famous Dutroux case and its follow up have been damaging for the public trust in the judiciary and its functioning.[8] When we turn from the facts to the

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[3] Jan Sjöcrona, Eerlijkheid in geding, over recht in fatsoen in strafzaken, in: Trema november 2005, nr. 9, p. 373-380.

[4] NRC-Handelsblad 7 november 2005.

[5] See Rechtspraak op tijd, G.R. Rutgers and H.E. Bröring (eds.), The Hague 1999.

[6] ECHR 28 september 1995, JB 1995, 251 (Procola), and ECHR 6 may 2003, nr. 39343/98, 39651/98, 43147/98, 46664/99 (Kleyn)

[7] Source: European Value Studies 1981, 1990, and 1999, cited from: Rechtstreeks 2004, nr. 1, Vertrouwen in de rechtspraak: empirische bevindingen, p. 18.

[8] Source: Eurobarometer 48.0, 51.0, 54.1, 55.1, 56.2, en 57.1, cited from: Rechtstreeks 2004, p. 17.

explanation the causes are not always easy to find. In the literature various explanations can be found, varying from demografic explanations (educated older men appear to show more trust), to psychological explanations (a positive correlation between public trust and the satisfaction on democracy and political selfesteem, and a negative correlation with political cynism and anomy), and explanations from criminal policy (a positive correlation with the conviction that the judiciary is "soft on crime"). None of these explanations is however capable of identifying the causes or reasons of the gradual decline of public trust in the judiciary.[9] The question why the legitimacy of the judiciary is at risk seems to be a persistent and a troublesome one.

The problem to be adressed then is the quest for legitimacy of the judiciary and adjudication. What are the sources of legitimacy for different courts? Before investigating these questions, two preliminary questions need to be answered, namely the what and the how questions: what do we mean by the "legitimacy" of courts, and how is this phenomenon to be invesigated? First, the question into the concept of legitimacy. The concept op legitimacy is of course connected with that of justification; the jusitification of the position and functioning of the courts or the judidiciary as a whole, both for the parties involved, the citizens, or the society at large.[10] Legitimacy is not the same as public trust, it is rather the whole of factors justifying that trust (the grounds of public trust). Let me explain the difference with an example. It is not very probable that the introduction of a judicial code in a legal system will enhance public trust, but it will improve the grounds for such public trust and is as such an instrument for enhancing legitimacy. Legitimacy is thus partly a normative concept, depending on theoretical presuppositions and normative convictions. One of my presuppositions is that the legitimacy of the judiciary is to be regarded in terms of the organization of the judicial debate being part of the moral and political debate by which a society shapes itself. Court organization and proceedings will be compared as different ways of structuring procedural justice, as part of the wider democratic process.[11] I will come back to this in my conclusions. One final conceptual remark has to be made. In this paper I will make the distinction between input-legitimacy and output-legitimacy, referring to the input- and the output-factors determining legitimacy respectively. Input-factors are, for example, the recruitment and selection of judges, the independence of the judiciary, the management of the judicial organization, and the institutional factors in general. Output-factors are, for example, the decisions and their motivation, the production of the courts, the communication with the parties involved. This will prove to be a useful distinction to characterize the different sources from which different courts draw their legitimacy.

For now there is one important question left unanswered: how are we addressing the question of the legitimacy of the courts? A promising attempt has been undertaken recently by Mitchel de S.-O.-L'E. Lasser, who compares from this perspective the French *Cour de cassation*, the US Supreme Court, and the European Court of Justice (ECJ), thus drawing experiences from different legal systems.[12] What I find attractive in his approach is the fact that he combines

[9] Rechtstreeks 2004, nr. 1, p. 20-54.
[10] Therefore one can conceptually distinguish between three meanings of "legitimacy", namely (1) the public trust in the institutions, (2) the attitude of voluntary submission to the judicial system, and (3) the act of voluntarily complying with judicial rulings (P.J. van Koppen, Verankering van rechtspraak, over de wisselwerking tussen burger, politie, justitie en rechter, Deventer 2003, p. 15). I am referring in this context to the first meaning of public trust in the judicial institutions.
[11] This position is elaborated in Anthony Hol and Marc Loth, Reshaping justice, on judicial reform and adjudication in the Netherlands, Maastricht 2004, p. 97-137, and is inspired by, inter alia, Stuart Hampshire, Justice is conflict, Princeton 2000, and Paul Ricoeur, The just, Chicago and London, p. 127-133.
[12] Oxford 2004.

the discursive and the institutional dimensions of the courts under investigation, showing us connections which were hitherto left unnoticed. When I tried to extend his analysis to the European Court of Human Rights (ECHR) however, I found that one important aspect of legitimacy is lacking in his approach: the functional one. One cannot consider the legitimacy of courts seriously without taking into consideration the actual role they play in the legal order and in society at large. Our frame of analysis then has to give due attention to three different dimensions of legitimacy: the discursive, the institutional, and the functional aspects of legitimacy (or, in other words, the argumentative, organizational, and social aspects of legitimacy). The specific arrangements that are responsible for the legitimacy of a legal system at hand can be analyzed as specific combinations of discursive, institutional and functional variables. To corroborate this hypothesis I will examine different courts from this perspective. First I will address two opposites: the French *Cour de cassation* and the US Supreme court (paragraph 2), followed by an examination of the two European courts as in-betweens (paragraph 3). After a short summary (paragraph 4), I will turn to the sources of legitimacy for lower courts, also from a comparative perspective (paragraph 5). Next, I will discuss the recruitment, selection and appointment of judges from the perspective of legitimacy (paragraph 6). Finally, I will draw some tentative conclusions (paragraph 7).

2. Two opposites: *Cour de cassation* and US Supreme Court

2.1 Cour de cassation

It is not unusual among comparatists to present the French *Cour de cassation* and the US Supreme Court as opposites.[13] The *Cour de cassation* is held to be rather formalistic, because of its short decisions, both syllogistic in structure and magistral in tone. The US Supreme Court on the other hand is considered to be pragmatic, because of its extensively motivated decisions, more dialogical in structure and personal in tone. These differences are there, not to be ignored, but the picture is more complex than this simple opposition suggests. Lasser relativizes this opposition from both sides. On closer inspection it seems rather unfair to depict the French judiciary as formalistic (which is, after all, not a very pleasant qualification in legal context). The reason is that there is, besides the official portrait of the judicial decisions, an unofficial discourse which is constituted by the opinions of the Advocates-General, the annotations of legal scholars, and the reports of the reporting magistrates.[14] Though the results of this discourse are not always published – they are discussed nowadays in a public hearing - it is here that the real debate takes place. In this (partly) hidden discourse an intense debate is being held on grounds of equity, substantive justice, and contemporary needs of society. This debate is channelled through the recognized legal forms, such as precedents, interpretations, opinions of scholars, etc. This is in any case an open-ended, equity-oriented and personal debate, in which all the arguments that are lacking in the official discourse are exchanged. As such it provides a necessary complement to the official discourse, which could not exist in the form it does without the sheltered debate in the unofficial discourse. The reason is it provides the insights, arguments and points of view, from which the *Cour de cassation* chooses the ones preferred. These authorized interpretations of law reappear in the decisions in their typical formalized, syllogistic, and ritualized forms. Actually it is an established division of labour between the two spheres of discourse that makes the system run, attributing the material debate to the unofficial discourse, and reserving the authorized decisionmaking to the *Cour* itself. It serves the

[13] For the background of the different legal systems I recommend H. Patrick Glenn, Legal traditions of the world, Oxford 2000, p. chapter 5 and 7.
[14] Lasser, ibidem, chapter 2.

efficiency of the system, in any case, because it makes it possible for the *Cour de cassation* (162 judges and 27 Advocates- General) to deal with a caseload of 30.000 to 35.000 cases a year.[15]

Does it also serve the legitimacy of the system? From what sources does the *Cour de cassation* draw its legitimacy anyway? The French system draws mainly from institutional sources to generate judicial legitimacy.[16] Lasser explains that the judicial system is firmly anchored in the political system by which French society shapes itself. Several of these anchors can be mentioned. First, there is the strict separation of the judicial system from the political system, secured by the separation of powers, the theory of sources of law which secures the supremacy of legislation, and a methodology of strict law application. Of course this separation is backed by a rather positivistic legal theory, in which a strict division between the domain of the facts and that of the values is upheld.[17] Second, there is a practice of a state-formed elite of magistrates (and law professsors, for that matter), selected and educated on a meritocratic basis (solely on quality, open to all and free of charge). They form, so to speak, the human flesh on the skeleton of the judicial system. Thirdly, this elite has a republican ethos of service to the state, in the name of the general public interest. This ethos presupposes a right answer to difficult legal questions, to be discussed, discovered and authoritively given by the state-formed elite of judges and magistrates (almost like "king philosophers", in the sense of Plato).[18] This socio-institutional arrangement has provided judicial legitimacy thus far, as Lasser has shown, but it can be questioned whether it will continue to do so in the foreseeable future.

To explain this we have to take his analysis beyond the discursive and institutional level to the functional aspects. From this perspective I see three possible risks for the French answer to the question of judicial legitimacy. The first is that the separation of the judicial and the political system is increasingly difficult to upheld in modern West-European legal systems.[19] As Guarnieri and Pederzoli have shown in an extensive comparative study the judiciary plays an increasingly important political role, which of course raises new issues of legitimacy (such as "who guards the guardians?").[20] This places the judge in West-European legal systems, including France, more in the forefront of controversial political issues. The second risk is that in a pluralistic society it is increasingly difficult to build legitimacy on a shared conception of substantial justice, to be discovered by a legal elite. Modern citizens are less inclined to put their trust in a legal elite. Besides, in a pluralistic society it is increasingly hard to strive for legitimacy on a shared conception of substantial justice. For this reason, it is maintained, we should strive for procedural justice, not for substantial justice. What is considered to be the right outcome of legal proceedings is not so much the right answer that the experts have discovered, but the result of a fair trial in which all have had their due. Finally, it has been noticed that citizens in modern society put their trust not so much in input-

[15] www.courdecassation.fr (L'activité de la Cour, statistique année 2004). The 162 judges, 27 advocates general, and 18 legal writers, are divided over 6 chambers : 3 civil chambers, 1 commercial, 1 social, and 1 criminal chamber.
[16] Lasser, ibidem, chapter 6.
[17] This was the prevailing legal theory in the days of the formation of the Code Civil (1804), which is until this day the most important legal source for the Cour de cassation and the French judiciary in general.
[18] Lasser, ibidem, chapter 11.
[19] The same applies to its different parts, such as the seperation of powers, the methodology of law application and the positivistic seperation of facts and law.
[20] Carlo Guarnieri and Patrizia Pederzoli, The power of judges, a comparitive study of courts and democracy, Oxford 2002, p. 1-18, 185-197.

legitimacy anymore, but more and more in output-legitimacy.[21] If this is true, it means that judicial legitimacy depends less on factors like institutional independence or the selection, recruitment and training of judges, but more on factors like the quality of the proceedings, decisions, motivations, communication, and the like. It is the performance of the judiciary that counts, not so much its position. Of course, this relativizes the French institutional answer to the question of legitimacy.

2.2 US Supreme Court

Let us turn now to the other opposite, the US Supreme Court. Characteristic for the US system is that it is a unified, integrated discourse in the form of the judicial opinion. It is well known for its anti-formalism. Just take a look at the decisions of the Supreme Court. The sheer length of the decisions – which take some 20 or more pages – suggest an extensive argumentation in a dialogical form. Characteristic of these decisions is moreover a heavily fact-oriented analyses, in which the judges make a lot of work of (the description of) the circumstances of the case. Not just as a starting point for the application of the law, but also as an exemplification of a realistic orientation in the law, in which legal consequences depend to a large extent on their purposes and effects. The practical consequences of the decisions, more than their grounds, seem the determining factor in the decision-making process. This is all written down in a very personal style, in which the legal ethos of the judge can easily be recognized. This individual judicial responsibility is strengthened, of course, by the personal signature of the judge under the majority decision, as well as the possibility of concurring and dissenting opinions. Each judge is accountable for his or her personal decisions as wel as his or her arguments in each individual decision. Therefore it is in the first place the judge speaking, not the court or the judiciary.[22] On the other hand, it is not sheer pragmatism, because policy arguments are channelled through formal means, such as judicial tests, rules of thumb, legal principles, precedents, etcetera. To blame an American judge of engaging in politics is as serious an accusation as to blame him or her of formalism. The Supreme Court is notorious for its ethos of independence. Well-known is the statement of president Esenhower: "During my presidency I have made two mistakes, and they are both sitting in the Supreme Court", which says it all. This reminds us, by the way, that the Supreme Court (as against the *Cour de cassation*) plays an outspoken political role because of its power of constitutional review.[23] The discourse in which the judiciary participates can be characterized as both anti-formalistic and anti-policy, or – the other way around – it has both formal and pragmatic aspects. The judicial discourse is to a large extent an autonomous one, being a separated interpretive, argumentative, hermeneutic discourse.[24]

From what sources does the Supreme Court draw its legitimacy? The Supreme Court draws mainly from discursive sources to generate judicial legitimacy.[25] Several anchors root this practice firmly in the judicial system, as Lasser has shown. First, there is the doctrine of case law, which supplies each judicial decision with a recognized legal status. In that sense, the legislator and the judiciary are "partners in the business of law". The emphasis is not so much on the doctrine of the separation of powers, but rather on that of the balance of powers

[21] Wetenschappelijke Raad voor het Regeringsbeleid (WRR), De toekomst van onze nationale rechtsstaat, The Hague 2002, p. 110.
[22] The high profile of the 9 judges of the Supreme Court is illustrated by their curricula vitae on the site of the court (see www.supremecourtus.gov)
[23] Which in France is attributed to the *Conseil constitutionnel*.
[24] Which deals with an increasing caseload : 1460 cases on dock in 1945, 2313 in 1960, and more than 7000 nowadays (according to the website of the Supreme Court).
[25] Lasser, ibidem, chapter 11.

("checks and balances"). Second, there is the theory and practice of explaining and justifying case law by argumentative means, to an ever increasing level of detail. This contributes not only to the understanding and acceptance of the decision by the parties, but also to a context of judicial accountability and transparence towards society at large. In broader terms, this "good reasons approach" serves both an informational and educational purpose, and forms an exemplary illustration of what judicial decision-making and responsibility can and should be. The discourse of the Supreme Court is an integrated discourse with a plurivocal cacaphonic sound, since each judge has its own voice. This system exemplifies the ideas of pratical rationality and procedural justice in a democratic system, showing that there is not one right answer (to be discovered and authorized by a judiciary elite), but that there are several options that can be defended on good grounds. In a democratic society this seems preferable, simply because more people recognize their views and convictions in the motivations of the courts.

Are there no drawbacks for the American system then? According to Lasser there are, because there is no alternative discourse as in France.[26] There are no Advocate-Generals opinions, and the academic commentary is banished to the law reviews. I don't consider this an important matter, because there is enough occasion for divergence of opinion within this integrated discourse itself (most important, the possibility of concurring and dissenting opinions). Again we have to take the analysis a step further to understand the real problem which is, in my opinion, the vulnerability of the judicial discourse in relation to politics. The ongoing debate on judicial restraint or activism shows permanent awareness of the political role of the Supreme Court. This is reflected in the political character of the appointment of judges in the Supreme Court. Because of this, the independence of the judges is dependent on their ethos, which is not a very strong safeguard when the going gets tough. The case of *Bush vs. Gore* turned out to be the demasque of the Supreme Court, since the court was in fact divided according to lines of party politics. This shows that the judicial discourse has to be firmly rooted in a strong institutional setting. Where the Supreme Court is strong in discursive sources of legitimacy, it is weak in institutional sources; with the *Cour de cassation* it is just the other way around. That is why, from this perspective, they can be regarded as opposites.

3. The European courts as in-betweens

3.1 European Court of Justice (ECJ)

Both the European Court of Justice and the European court of human rights take an in-between position between the opposites already discussed, but each in a different way. The ECJ is characterized by Lasser as a hybride, originated as an offspring of its example the *Cour de cassation*, but with Anglo-American overtones.[27] As in the French example the ECJ encompasses two discursive spheres: the official discourse of the decisions of the ECJ, and the unofficial sphere of the opinions of the Advocate-Generals and the annotations of legal commentators. As in the French case, the distinction is based on a division of labour between authoritive decisionmaking and substantial debate. The rulings of the ECJ are the result of collegial decision-making, they suggest a logical impulsion, and are written in an impersonal style. Lasser stresses that they differ from the decisions of the *Cour de cassation* however, in that they use purposive arguments on the macro level of the EU treaties as a whole, such as

[26] Lasser, ibidem, p. 340.

[27] The ECJ consists of 25 judges (1 per member state of the EU) and 8 Advocate Generals, organised in chambers of 3 or 5 judges, or a grand chamber of 13 judges. In 2004 they dealt with 665 cases, 531 new ones, and 840 pending (in 2000: 526, 503, and 873 respectively) (see www.curia.eu.int). The court of first instance is not taken into consideration.

the effectiveness of community law, the requirements of legal certainty and uniformity, the legal protection of individual community rights, and finally: the system of the treaty. Thus, the ECJ tries to improve the French example on the discursive level, by more extensive motivations. In this respect it resembles the US Supreme Court, but there is a fundamental difference. Because of the dialogue with precedents and its factual character the motivation of the decisions of the Supreme Court reaches an ever-increasing level of detail, while the motivations of the ECJ remain at a rather abstract level. The responsibility of the ECJ was different, of course, building a legal system on the provisions of the Treaties. As Tim Koopmans writes: "The Court had to feel its way. It did so by deriving some basic rules from the multiplicity of technical provisions, by interpreting these rules in the light of the aims of the treaty, and by slowly developing a system of case law on that foundation".[28]

Bengoetxea has drawn a similar, but more precise picture than Lasser. The ECJ is in his words "very Dworkinian", "taking the European Community project seriously and making the best and most coherent story of European integration which is embodied in that project".[29] The ECJ makes use of different kinds of methods of interpretation and reasoning, mainly (i) semiotic or linguistic arguments (divergence between different language versions, ordinary language), (ii) systematic and contextual arguments (in situations of gap or antinomy: the sedes materiae argument and quasilogical arguments such as the argument per analogiam, a fortiori, a pari, lex specialis, lex superior, a contrario, conceptual arguments, and teleo-systematic arguments), and (iii) teleological, functional or consequentialist arguments (the apagogic argument, the weighing and balancing of principles, policy arguments).[30] In general, preference is given to systematic-functional criteria ("a systematic-cum-dynamic-interpretation"), as is shown for example in *Van Gend and Loos* (in which the object of the Treaty and art. 177 justify the conclusion that Community law has an authority which can be invoked by their nationals, from which it follows that if the Treaty imposes obligations on individuals and Member States, it must also confer rights on individuals). The frequent appeal to the system of the Treaties and the aims they pursue makes us aware that "in doing so the Court is engaging in a special form of social action, furthering the aims of the Treaties by recourse to dynamic criteria and reconstructing the EC law into a coherent and consistent whole by recourse to systematic criteria".[31] This is done in favour of the overall objective of obtaining legitimacy for the EC and its law: "Using contextual and systematic criteria of interpretation can thus be seen as a form of social action whereby the Court seeks to obtain legitimacy and adherence to a body of norms".[32] The legitimacy looked for extends of course not only to the law of the EC, but also to its institutions, including the Court itself: "The relevance of the Court's justification of its own decisions lies in the attempt to achieve legitimation amongst the audiences to which such justifications are addressed. The legitimation of the European Community project of an ever closer union is thus an internal legitimation assumed by the judges of the ECJ before their audiences".[33] From this we can conclude that the discursive legitimacy that the ECJ seeks to establish in its rulings is closely connected to the formation of the European community as a whole, which means, to the project of European integration. Recent developments have shown that this makes the ECJ vulnerable when the project of European integration becomes unpopular or even suspect. At

[28] Tim Koopmans, Courts and political institutions, a comparitive view, Cambridge 2003, p. 89.
[29] Joxerramon Bengoetxea, The legal reasoning of the European court of justice, towards a European jurisprudence, Oxford 1993, p. vi and 99.
[30] Bengoetxea, ibidem, p. 233-270.
[31] Bengoetxea, ibidem, p. 234.
[32] Bengoetxea, ibidem, p. 98.
[33] Bengoetxea, ibidem, p. 99.

the end of the day, the legitimacy of the ECJ shares the fate of that of the other EU institutions and even the political process of European integration, embedded as it is in the institutions and the formation of the European Community.

3.2 European Court of Human Rights (ECHR)

Although the ECHR had to build a legal discourse from scratch, as the ECJ, the starting-point was rather different. In the wording of Tim Koopmans: "The provisions of the European Convention are not very technical, but rather general and vague. In order to make the provisions workable, the European Court had to break them up into three or four 'sub-standards' which were practicable and which could, in their turn, lead to further ramifications".[34] The ECHR succeeded in creating a lively and effective discourse on human rights, and the question arises how this can be explained. One of the explanations is perhaps that the human rights discourse of the ECHR is, in terms of Lasser, a unified discursive context. The majority decisions of the Court, dealing with the alleged violation of one of the provisions of the European treaty on human rights, speak with one voice. They are the result of collegial decision-making and are formulated in an impersonal tone ("the Court"). The rulings of the court are rather long, containing extensive descriptions of the procedure, the facts (that is: the circumstances of the case and the relevant domestic law), and the law (that is: the applicants complaints, the alleged violations, and the courts assessment), resulting of course in the decision. Debate is stimulated by the possibility of concurring and (jointly or partly) dissenting opinions, which display a more personal tone ("I", "we", "in my view", "in our view", etcetera), arguing why the majority decision is supposed to be wrong. There is no institute as the Advocate-Generals advising the court, but there is a lively tradition of legal scholars discussing the case law of the Court, both on a national and an international level. All in all, the discourse organizes a rather lively discussion on the meaning and extension of the human rights provisions of the treaty.

The ECHR owes its legitimacy partly to the transparency and the accountability of its rulings, that is, to the fact that they are published and motivated by good reasons. If the ECJ can be characterized as "a Dworkinian Court", then the ECHR surely can. In building a human rights discourse on the basis of a single treaty, Koopmans writes, "the European Court thereby explicitly accepted the idea of legal evolution in the area of human rights protection, and the role of the judiciary in drawing conclusions from it. That attitude may have contributed to the more or less activist character of much of the European Court's case law".[35] Only recently the ECHR confirmed its conviction that the Treaty is a living document, to be interpreted in the light of present-day opinions.[36] Although it has been said that the ECJ too plays an activist role, there is a notable difference. Starting in the economic area the ECJ has built a new legal system of a somewhat technocratic nature, which has not attracted a lot of public attention.[37] The ECHR on the other hand, created a discourse on human rights with remarkable results, which did arouse a lot of public attention and even support. Besides, the case law of the ECHR has proved to be a vehicle for social, legal and political change in most of the members of the Council of Europe. The case law of the ECHR has initiated major legal reforms in the Member States, in private law, criminal law, as well as in administrative law. This, more than anything else, has contributed to the legitimacy of the ECHR. The success of the ECHR can be measured by the enormous growth in the case load, which increased from some 5979 cases

[34] Koopmans, ibidem, p. 90.
[35] Koopmans, ibidem, p. 91.
[36] ECHR 13 july 2004, nr. 69498/01, NJ 2005, 508.
[37] Bengoetxea, ibidem, p. 99-103.

in 1998, to 13.858 cases in 2001.[38] Proposals for judicial reform are in discussion now, intended to rescue the court from its own success. Another risk is that certain Member States of the Council of Europe seem to develop an attitude of non-compliance to the rulings of the court (notably Russia). This could of course weaken the legitimacy from the perspective of an attitude of compliance. Lastly, it should be noticed that the input-legitimacy of the ECHR is rather weak. The judges are appointed from the 45 Member States by the Parliamentary Assembly, for a period of 6 years.[39] For both the ECJ and the ECHR the idea and practice of national representation does make the legitimacy of the courts vulnerable. In hard cases citizens could respond to the rulings of both European courts with the question: why should we accept a ruling that is given by some politically appointed judges from until recently unknown countries? The future will teach us whether the European courts can afford to ignore this criticism, or whether institutional reform will be necessary.

4. Summary so far

The results thus far show several differences that are relevant from the point of view of the legitimacy of the courts under scrutiny. First, we contrasted the rather formalized, short, syllogistic, magistral decisions of the French *Cour de cassation*, with the pragmatic, long, dialogical, personal decisions of the American Supreme Court justices. The French system seems to rely on input-factors as dominant sources for judicial legitimacy (institutional legitimacy), while in the Supreme Court draws its legitimacy from discursive means (discursive legitimacy). This situation is strengthened by a different organisation of the debate. The French system displays a bifurcation with an emphasis on the unofficial discourse as context for the real debate, while in the American system the debate takes place within the court itself (as is shown by majority and minority opinions). For us Europeans the difference is relevant, because the French system is copied in the ECJ, while the American system is copied in the ECHR. As has been argued, the last system seems preferable in a modern democracy, where substantial justice and social elitism gave way to procedural justice and meritocracy.

The European courts seem to take in-between positions, as they each display an unique mixture of output- and input-legitimacy. The ECJ built a legal system on the basis of the EU Treaties, interpreting them and other EU provisions in a Dworkinian fashion in the best possible way to advance a coherent European integration. As Bengoetxea writes, “the ECJ has ‘une certaine idée de l’Europe’”. The consequence is that the legitimacy of the ECJ is connected with that of the idea of the European integration as a whole, which is not without risk, as recent developments show. The ECHR has developed a human rights discourse on the basis of the Treaty of Rome (1950), also interpreting it in a Dworkinian fashion. Its activism has been more succesfull than that of the ECJ, because the topics dealt with speak more to the mind (are less technocratic), have had a large positive impact on the legal systems of the Member States, and arouse a lot more public attention and support. The legitimacy of the ECHR is not to be taken for granted however, because the Court deals with serious problems of caseload and compliance. Finally, there is the issue of national representation of the judges appointed in the courts, which is a serious risk for both European courts.

5. Lower courts

[38] European Court of Human Rights, informatienoot van de griffier 2004, p.3 (see www.echr.coe.int).
[39] There are as many judges as parties in the treaty, that is 45. They are organised in 4 sections formed for 3 years, each of which contains committees of 3 judges for 1 year. Besides, there are chambers of 7 judges, and the grand chamber of 17 judges (www.echr.coe.int).

Working on legitimacy is also important for lower courts. Let us start with the output-factors of legitimacy, and deal with the input-factors in the next paragraph. In the daily practice of the lower courts their legitimacy depends to a large extent on rather mundane factors, such as their production and efficiency, the daily contacts with the parties, the media, et cetera. It is not very farfetched to presume that the legitimacy of the lower courts depends less on the judicial quality (of the session, the ruling, its rationale) than is the case with the higher courts. Besides that, other aspects of quality ask for attention here, such as speed, responsivenes, uniformity, et cetera. Headlines in newspapers (as in the Netherlands) that – despite all the efficiency measures taken – civil and administrative courts deal with a backlog of some 200.000 cases are not very conducive for their legitimacy.[40] These delays cause damage in the form of the delay and disposal of activities, uncertainty, higher costs of the proceedings, the continuing damaging activities of third parties, rising compensations for damage, lower productivity, and above all: emotional damage.[41] These consequences on a macro scale erode the legitimacy of the judiciary considerably. On a micro scale other factors are relevant. Explanations of the declining public trust in the judiciary show that one's "day in court" is extremely important for the appreciation of the judiciary in general. One can imagine that this extends from the first telephone contact with the call center of the court, to the communication with the administration, the appearance in the court session itself, the very approach and tone of communication of the judge, to the delivery of the ruling in its written form.[42]

Also for lower courts, the motivation of the decisions is relevant. In recent research a comparison was made between court decisions in criminal (murder) cases in different Western European countries.[43] The researchers compared 91 court decisions: 35 from Belgium, 9 from France, 29 from Germany, and 18 from the Netherlands. These decisions were compared from the viewpoint of (1) the structure of the court decision, (2) the relative amount of attention paid to justification, (3) the level of narrative versus the use of standard formulae, (4), the consistency (absence of contradictions), (5) the completeness ("a self-contained document"), and (6) the comprehensibility of the court decisions. These decisions were analysed by the researchers, and afterwards evaluated by a panel of 31 Dutch students. In this way, the researchers tried to establish a connection between the character of the decision, and the legitimacy it establishes. The French decisions from several *Cour d'Assisses* were found to be very brief, containing a large number of standard formulae and phrasings, mainly directed to other authorities within the legal system, and very hard to understand for lay people. The German decisions from several *Landesgerichte* on the contrary, were well-written, accessible, elaborate, detailed, complete and comprehensive, containing no standard phrasings and little jargon. The narrative character of the decisions – they told the story of the delinquent from their youth up until the crime at hand - contributed highly to their readibility and accessibility, but had its drawbacks. The story was told by the judge and therefore rather subjective, it contained redundant information and, more importantly, the origin of the

[40] It seems that 1 of 10 cases cannot be dealt with in a timely manner in 2006; in 2008 the same goes for 1 of 4 cases. For these problems compare Héctor Fix-Fierro, Courts, justice and efficiency, a socio-legal study of economic rationality in adjudication, Oregon 2003.

[41] F. van Dijk, J.J.M. van Dijk en R. Teijl, Rechtspraak en rechtshandhaving: maatschappelijke effecten van verbetering, Ministry of Justice, Den Haag 1998, cited from: Rechtstreeks 2005, nr. 2, Versnellingsbeleid in de rechtspraak: resultaten en reflecties, p. 59.

[42] Rechtstreeks 2004, nr. 1, p. 47.

[43] Marijke Malsch, Charissa Efstratiades, Hans Nijboer, Justification of court decisions in criminal cases: continental Western European countries compared, Rapport NSCR 2005-5.

information contained could not always be traced.[44] The Dutch court decisions were found to be very well structured, but did contain formulaic language, were not particularly narrative, seemed to be primarily directed at higher judicial officials within the court system, and were not very comprehensible to lay people. Furthermore, the choice of the evidence was not reasoned very well, except in special circumstances. The evidence consists of parts of the reports from the pre-trial investigation, but the choice of these parts is rarely supported with reason. The decision that the suspect is guilty therefore rests in last instance not on a "*conviction raisonnée*", but on a "*conviction intime*". Besides, the Dutch courts leave out the evidence completely for efficiency reasons until the convict appeals (the so-called "head tail verdicts"). It is as if the evidence is only relevant for the higher court, and not in the first instance for the convict. As a result, he or she has to appeal to know on what grounds he or she is convicted. This practice, sanctioned by the *Hoge Raad*, cannot have a positive effect on the legitimacy of the courts.

So far an analysis of the researchers, what about the evaluation of the panel? In general, participants were most positive about the German court decisions, less about the Dutch decisions, and most negative about the French decisions. In the report this evaluation is specified for the different perspectives for comparison, as mentioned above. The picture is that the following elements are regarded as positive elements in criminal court decisions: a narrative account of what happened, a clear structure, an overview of relevant aspects of the case, an explanation of legal provisions, clear language and minimal use of jargon, insight into the investigations done during the trial, and adequate reasons for the decisions made (excluding standard phrasings). This enumeration shows that there is room for improvement in the quality of criminal court decisions. As far as the motivation of the evidence is concerned, some elaboration is in order. The difficulty here is that a sequence of parts from the reports of pre-trial investigations is clearly not convincing, while on the other hand it must be acknowledged that the reasoning does end in a conviction of the judge that cannot be further motivated. How to improve the motivation in this respect? One possibility is to articulate the narrative story that combines the different parts and that makes this construction of evidence the most convincing one. In hard cases with a denying suspect, this narrative story can be compared to that of the suspect himself, from the viewpoint of the coherence of the story, and from the viewpoint of the anchoring of the story in proven facts ("anchored narratives"[45]). At the end of the trial the judge (or the jury, for that matter) must be able to motivate why he or she attaches more weight to the one story than to the other; that is all that can be expected from the motivation of the guilty judgment.

6. Recrutement, selection and appointment

Turning from the output to the input factors from which courts draw their legitimacy, the most important source is of course the independence of the judiciary, the courts and the individual judges. Although these three levels are to be distinguished conceptually – the macro level of the judiciary as a whole, the meso level of specific courts, and the micro level of individual judges – they are in fact interwoven. This is illustrated by the modernization of the judiciary in the Netherlands, which is meant to transform the judiciary from an aggregate of separate courts to one unified judicial organization. The introduction of a Council for the judiciary

[44] Stories are both necessary and dangerous, William Twining rightly says (Necessary but dangerous? Generalizations and narrative in argumentation about 'facts' in criminal process, in: Complex cases, perspectives on the Netherlands criminal justice system, M. Malsch and J.F. Nijboer (eds.), Amsterdam 1999, p. 69-99).
[45] See H.F.M. Crombag, P.J. van Koppen, and W.A. Wagenaar, Dubieuze zaken, de psychologie van strafrechtelijk bewijs, Amsterdam 1992, chapter 3.

('Raad voor de rechtspraak') attributed with the power to govern the judiciary has all kinds of consequences for the independence at the different levels. Though the Council is meant to strengthen the judiciary as a separate state power – and as such to strengthen its independence from the executive power – critics say that it makes the judiciary, on the contrary, more vulnerable for political influence. As yet, it is too soon to confirm this. On the other hand the governance of the Council reduces the autonomy of the directing boards of separate courts which in its turn affects the independence of individual judges.[46] The introduction in the judiciary of financial management, human resource management, knowledge management, and quality management (the unity of adjudication included) have a profound impact on both the culture of the organisation and the attitude of the judges.[47] The ethos of the Dutch judiciary is slowly developing from one of highly individual and independent decisionmaking to a more managerial ethos of organisational responsibilities.[48] This has its advantages of course – the judiciary as a whole improves in performance - but the risk is the erosion of individual judicial responsibility and a changing sense of judgment. In all institutional reform of the judiciary a core of independent judgment should be preserved. This core is framed in the following words of James Boyd White: "What happens today is not thought to be identical to what happened yesterday, as a bureaucracy would conceive it: you are entitled to show what is new and different about your case".[49]

Putting all constitutional safeguards aside, the maintanence of an ethos of independent decision-making comes down to the recruitment, selection and education of the right judges-to-be. But what is the meaning of "right" in this respect? How to find and select them? And who is in charge of the process? The answer to these questions can provide an important source for the legitimacy of the judiciary (input-legitimacy, of course). From a comparative point of view two models of judicial recruitment are to be dinstinguished. First there is the professional model (of the Anglo-Saxon systems), where the judiciary consists of professional judges in the higher courts and layman in the lower courts, the first being selected from the experienced and outstanding barristers. The characteristic career step is from the Bar to the Bench, where the judge retains his position until his retirement. Second there is the bureaucratic model (of the continental Civil law tradition), where young lawyers are selected to enter the judiciary where they will develop a specified career from the lower to the higher courts.[50] With regard to the question of the governance of the selection process, another distinction is relevant, namely that between systems where appointments are primarily controlled by political institutions, and that where they are appointments are governed by the judiciary itself (a form of cooptation or self-recruitment). Both systems have their implications for the legitimacy of the judiciary. The political model can provide for a strong democratic legitimacy – for example in the case of the election of judges – but has its drawbacks with regard to the independence of the appointed judges. The alternative is

[46] See for example P.P.T. Bovend'Eert, De modernisering van de rechterlijke organisatie: integraal management als staatsrechtelijk probleem, in: A.K. Koekkoek (ed.), Organisatie van de rechtspraak, Deventer 1999, en L.F.M. Verhey and K. Wagner, De onafhankelijkheid van de rechter, preadviezen voor de vergelijkende studie van het recht van België en Nederland, Deventer 2001.

[47] This is not an exclusively Dutch development, of course. For a comparitive (over)view see The administration of justice in Europe: towards the development of quality standards, Marco Fabri et al. (eds.), Bologna 2003.

[48] See further A.M. Hol, Wijsheid of efficiency? Over de spanning tussen rechtspraak en management, in: P.M. Langbroek et al. (eds.), Kwaliteit van de rechtspraak op de weegschaal, Deventer 1998, p. 255-269, and M.A. Loth, Rechtspraak in verandering: over de Contourennota en de cultuur van de rechtspraak, in: Trema 1999, p. 242-248.

[49] James Boyd White, Justice as translation, an essay in cultural and legal criticism, Chicago and London 1990, p. 216.

[50] Carlo Guranieri and Patrizia Pederzoli, The power of judges, a comparative study of courts and democracy, Oxford 2002, p. 18-78.

regarded to be a safeguard for the independence of the judiciary, but runs the risk of being criticized for its elitist and secretive character. In the present climate of transparancy and anti-elitism this system runs serious risks of public criticism on the alleged closed and elitist character of the judiciary. Looking for input-legitimacy then, is finding a balance between these opposite systems, adjusted to the requirements of the time and place.

Two years ago I conducted a research into the selection of judges in the Netherlands, which can be presented as an example.[51] Judges are recruted from two sources: young, recently graduated lawyers who choose for a career in the judiciary, and lawyers with relevant experience who transfer to the judiciary at an elderly age. Both are selected by a national selection committee, admitted by a specific court, and – if everything turns out well for the candidate - appointed by the Ministry of Justice. The selection process by the committee consists of a psychological assessment and interviews by the committee, which are based on a profile of core competences a judge is supposed to have. In the light of the problems "choosing elites" encounter[52], I investigated three different aspects: the objectives of the selection, its efficacy, and its legitimacy.[53] The overall objective is to select the "right" candidates – "the people at the right side of the curve", Klitgaard calls them – in terms of whatever competences we are looking for. In order to sketch a profile of the desired judges, we can investigate the behavioural codes that have been drafted so far.[54] After doing this I got a picture of judges of "ability, integrity, and efficiency", that is judges with craftman's competences (legal competence, communicative competence), moral competences (integrity, courage), and managerial competences (effectiviness and efficiency in caseload management). This picture was more complete than the profile that was used in the process of selection, since that one-sidedly stressed the requirements of craftmanship. Clearly, the profile of the ideal judge – the one to be selected, "at the right side of the curve" - had developped over time. For the legitimacy of the judiciary it is of evident importance to keep it updated.

Another aspect investigated was the efficacy of the selection. The problem here was the lack of reliable data on the methods and results of the selection. Being a member of the selection committee myself, I identified a risk for the interviewers, namely a tendency towards the middle of the curve. It seems a natural tendency to try to minimize the risks when selecting a future judge, which means that the more outspoken, high profile candidates are in a systematic disadvantage in comparison with the the more moderate, low profile candidates. As a result the judiciary is composed of more "grey", middle of the road candidates than it should be. This of course tells us as much of the candidates as it does of the (members of the) selection committee itself, and here we touch upon the legitimacy of the selection process. One of the most important dangers for the legitimacy of the selection, and thus of the judiciary itself, is the image of co-optation; an elite of magistrates which is itself responsible for the selection of new members. At the time two-thirds of the selection committee consisted of judges and one-third of others (lawyers, professors, journalists, etcetera). One of the

[51] For a similar research in the UK I refer to Peach committee, Department for constitutional affairs, Judicial appointments in England and Wales, Equality of opportunity and promoting diversity, octobre 2001 (www.dca.gov.uk/judicial/judequal.htlm).
[52] Robert Klitgaard, Choosing elites, New York 1985, p. 4-12.
[53] M.A. Loth, Met goddelijk goud gemengd: investeren in het menselijk kapitaal van de rechtsstaat, in: Trema 2003, p. 247-256.
[54] My sources were: the international charter of the judge (international association of judges, Taipee 1999), basic principles on the independence of the judiciary (UN conference Rome 1985), the Bangalore draft code of judicial conduct (UN, transparancy international, Bangalore 2001), the European charter on the statute for judges (Council of Europe, Strassbourg 1998), the recommendation on the independence, efficiency and role of judges (committee of ministres 1994), and several codes of conduct USA.

recommendations was that this should be corrected to a more-balanced half of judges, and half of the others. This recommendation was followed by the Council for the judiciary, which made it an explicit policy to enlarge the proportion of representatives of cultural minorities in the committee, in an attempt to enlarge the proportion of such representatives in the judiciary itself. Lastly, it was recommended that the committee should be more transparent about itself – its members, techniques, results, all on a website on the internet – thus refuting the image of a closed bastion which prevails in the public opinion. These recommendations have been executed by the Council for the judiciary; whether this had any success, is too early to tell. On the input side, the transparency of the institutions can enhance the legitimacy of the judiciary, as well as the accountibility as to their functioning. Earlier we saw that on the output side it was accountability in the rulings that enhances their legitimacy, as it was the transparency in the reasons for and against these rulings, and the controversies in which they are exchanged, that enhances their legitimacy. Accountability and transparency seem to be the overall objectives in the attempts to enlarge the legitimacy of the judiciary.

The policy of the Council for the judiciary to increase the number of judges from minorities raises another difficult question.[55] Since the 60s of the last century the judiciary is not a social elite anymore, as it used to be, and we all agree. But does it follow from this that the judiciary should be a (descriptive) representation of the population?[56] Is that important from the perspective of the legitimacy of the judiciary? This question is of course a much debated one in the United States, especially in the context of the appointment of a black judge in the Supreme Court. Contradictory considerations are relevant. The judiciary is not a representative organ like parliament is, because it does not make decisions on grounds of votes and power, but on the ground of arguments. In our constitutional conception of its function, judges are appointed because of their merits – as we have seen – and not as a representative of a specific group or minority. However, it is an undeniable fact that we consider it important that judges are recruited from different parts of society. In South-Africa this is even expressed in a constitutional provision: “the need for the judiciary to reflect broadly the racial and gender composition of South Africa” (S 174(2), 1996). The reason is not only the need for democratic participation in a pluralistic society, but also to show that the judiciary is open to all (not only in theory, but also in practice). A diversification of the judiciary – not in the strict sense of mirroring the population, but in the sense of being a fair reflection - will perhaps improve the quality of its output but it will for sure enhance its legitimacy. This goes not only for national judges, but also for supranational courts. As one of the former presidents of the ECJ Mackenzie Stuart has said: “I dislike the word “representative” although it is one much used by commentators, particularly in the responsible government departments of Member States, since we do not “represent” anyone, but none the less it is a word of some significance, if understood in the proper way. That is to say, in order to carry conviction, both to the litigant and to the Member States, a decision of this Court should be pronounced by a body which represents a sufficiently broad spectrum of legal thinking”.[57] As we have seen, for both the ECJ and the ECHR the nationality of the sitting judges is one particular concern for the legitimacy of its decisions (paragraph 3).

[55] See B.P. Sloot, Moeten rechters lijken op de Nederlandse bevolking? Over de wenselijkheid van descriptieve representatie door de rechterlijke macht, in: Trema 2004, p. 49-62.
[56] Descriptive representation means “standing for”, to distinguish from substantial representation meaning “acting for” (Hannah Pitkin, The concept of representation, Berkeley 1967, p. 60-100).
[57] Mackenzie Stuart, The European Court. A personal view, in: In memoriam J.B. Mitchell, London 1983, p. 118.

So far we have seen that we can improve on input-legitimacy by opening up the selection process, and by increasing the diversity of the judiciary. From this it is only a small step to the participation of laymen in the judiciary, but a crucial one. As I mentioned in the *Introduction* a Dutch member of parliament has recently pleaded for taking this step, with an appeal to the argument that this would enhance the legitimacy of the criminal justice (paragraph 1). Would it? This, of course, depends very much on the context, but I doubt that it would have the required effect in the context of the Dutch criminal system. First, I doubt whether public trust in the judiciary would increase if laymen would participate as judge or jurymember in the criminal system. The general public seems to discriminate little between the judiciary, the prosecution, the police, or even governmental institutions in general.[58] On the other hand it is not very probable that the participation would have a significant effect on the outcomes of the criminal system.[59] One could argue though, that this is beside the point because the question was not about the effects on the outcomes, or even on the public trust, but about the effects on the legitimacy of the judiciary (in our definition: the grounds of the public trust). Again, not very much is to be expected. The reason is that in our legal criminal system public trust is not based on a democratic legitimation of the criminal trial – as for example in the United States – where it is considered to be a value on its own to be judged by ones peers. I expect that this would in the Netherlands only arouse suspicion and criticism among the general public. There are other reasons to trust the judiciary here – mainly derived from our conception of the rule of law – such as its independence, impartiality, integrity and professional expertise. As it has been formulated by Bengoetxea: "The respect (legitimacy) accorded to judges will depend on the way they meet the expectations of fairness, justice, etc. which individuals have of them and on the substantive (including procedural-discursive) values which their decisions and procedures promote, especially where judgment and discretion are involved".[60]

6. Conclusions

In this paper I have investigated the sources of the legitimacy of different courts (supranational courts, high national courts, and lower courts). From their respective practices we can draw some conclusions of a more general nature. The legitimacy of courts seems to be a unique mixture of output and input factors, differing per legal system, category of courts, or even separate courts. Starting with the French *Cour de cassation* and the US Supreme Court, they were analysed as drawing their legitimacy from institutional factors and discursive factors respectively, that is, they rely on input-legitimacy and output-legitimacy respectively. Another important difference turned out to be the institutional organisation of the debate: the French bifurcation of an official and an unofficial discourse versus the American concurring and dissenting opinions within the court itself. This is more than an institutional divergence, because it presupposes different conceptions of justice (substantial versus procedural justice) and authority (vertical versus horizontal authority). As we have seen, both courts have their merits and their drawbacks. The American system illustrates the importance of a democracy of lively legal debate on controversial moral and political issues in which the Supreme Court plays an important, if not a leading role. The French system shows how important it is for the integrity of the debate and the independence of its participators that it is conducted within the

[58] The most important explanation of public trust in the judiciary is institutional trust in general (Rechtstreeks 2004/1, p. 24, 25.

[59] Research in to the effects of lay participation in adjudication in social security cases in the Netherlands showed little or no effect on the outcomes of the so-called "Raden van beroep" (see N.H.M. Roos, Lekenrechters: een empirisch onderzoek naar het functioneren van de lekenrechters bij de Raden van Beroep voor de sociale verzekeringen, Deventer 1982).

[60] Bengoetxea, ibidem, p. 103 (with reference to J. Bell, The judge as Bureaucrat, in: J. Bell and J. Eekelaar (eds.), Oxford essays in jurisprudence, 3rd series, Oxford 1988).

boundaries of strong institutions and accepted procedures. Having said that, I believe that the American system best meets the requirements of transparency and accountability that in a modern democracy are necessary prerequisites of judicial legitimacy. Not only because of the conceptions of justice and authority presupposed, but also because in present-day society people seem to appreciate output-legitimacy more than input-legitimacy.

The European courts have shown different in-between positions, each showing an unique mixture of output- and input-legitimacy. Both have started from scratch – building a new legal system and a new discourse respectively – and both have been using a Dworkinian methodology to adjust historic treaties to present-day needs. As a result, both have been called activistic, dedicated as they were to the European integration and the compliance to human rights respectively. This is understandable of course, since the enhancement of the meta-political goal of integration or the enforcement of the meta-moral goal of compliance to human rights respectively, constituted the *raison d'être* of these courts. They are, in that sense of the word, "one issue courts" and their legitimacy is to a large extent that of the issue they serve. Currently the tension between European integration and national souvereignty has become a serious risk for the legitimacy of the ECJ. The ECHR on the other hand finds itself in the middle of a debate on the standards applied in the old and the new democracies of Europe. This responsiveness to societal demands is a functional matter, of course, which seemed to have escaped the attention of Lasser (because he only addresses discursive and institutional matters). Lasser is right though, that for the European courts institutional and discursive matters are also relevant to build legitimacy. It seems that the ECHR is in the advantage, because it knows the practice of concurring and dissenting opinions which contributes to a permanent debate amongst the judges themselves. Because human rights issues attract more attention than economic affaires, the ECHR is better known to the public, which also contributes to its legitimacy.

The legitimacy of lower courts is more dependant on other aspects of quality, such as speed, responsiveness, and uniformity. None the less, for lower courts the motivation for the decision is also an important source of legitimacy. Recent research has indicated that the decisions of the German *Landesgerichte* were most appreciated, because they were self contained, well structured, narrative in style, well written, accessible, directed to the parties, elaborate, detailed, complete and comprehensive, containing no standard formulae and little jargon. In the light of this conclusion there is ample room for improvement in the practice of motivation in the Netherlands, Belgium and France. In the Netherlands, for example, the practice of the "head tail verdicts" is a poor performance of the judicary; not only because the convict cannot tell why he is convicted until he appeals, but also because it illustrates that the presupposition is that the ruling is directed at the appellate judge (and not at the parties involved). Another bad example from the Netherlands is the practice of unmotivated aquittals, which in some cases leaves everybody at a loss as to the court's reasons for deciding as it does. Criminal verdicts in the Netherlands should be more externally directed, more comprehensible, and containing less standard formulae (if they want to claim public trust and legitimacy). To summarize: no formulae, but good reasons; no copy/paste, but a story told; not from a pretended objective standpoint, but from changing perspectives; not with one voice, but with concurring and dissenting opinions. All these practices can be changed by the judiciary itself, both at the highest and at lower levels in the judicial hierarchy. These changes will not only improve debate (and thereby reduce the risk of judicial errors), but will also serve the purpose of enhancing legitimacy.[61]

[61] The experiment and practice of Promis – a project to improve judicial reasoning in criminal cases in the Netherlands – is aimed just at that.

Transparency and accountability are important for strengthening input-legitimacy too. The organisation of the recruitment and selection of judges for example, is important for two reasons. First, because the process should comply with standards of fair and democratic decision-making. Second, because it should result in a competent and diverse judiciary. Though these objectives are common to different countries, the means to achieve them differ because of divergent legal cultures and social structures of society. In the Dutch context I have made a plea for the opening up of the selection committee and the selection process, but I have expressed reservations about the suggestion to involve laymen in the criminal system. Of course, in the UK, Belgium, France and Germany the situation is different, but their solutions cannot be copied into a legal system with a different structure and culture. However, for each legal system it can be said that it is important to improve on the diversity of the judiciary, because society is rapidly changing of colour. It is my guess that in the Netherlands it is not so much the institution of the judiciary that troubles people, as well as some of its practices that have been established under the pressure of heavy case-loads. In this paper I have mentioned several examples in the field of the motivation of decisions in criminal cases in the Netherlands.

Are there any lessons to be learned for the enhancement of judicial legitimacy? Three general conclusions come to mind. First, it should be acknowledged that enhancing legitimacy means working on input- and output-factors in the light of the values of transparency and accountability. This does not determine the specific goals, but it does set the direction. Courts should be transformed in modern organizations and should meet all the requirements that people rightly expect from a viewpoint of quality and responsiveness. This is not to deny that courts are governmental institutions (they represent state power) with a specific character (they are independent). Perhaps most important is to realize that these demands are not contradictory – if understood well – but can and should strengthen each other. Second, enhancing the legitimacy of courts is to be a joint effort of judiciary and a managerial agent as a Council for the judiciary. On the one hand it is up to the judges themselves to improve on judicial quality in their deliberations, motivations, and communication. They should not step back from drastic innovations in their practices, such as the introduction of concurring and dissenting opinions. On the other hand, it is the responsibility of the management to facilitate the efficacy and efficiency of the courts and the recruitment and selection of the judges. From a viewpoint of enhancing legitimacy one of their most important responsibilities is to enlarge the diversity of the judiciary. It is not farfetched to presume that people put their trust in a judiciary in which they can recognize themselves. Third and last, courts are relevant and should strive to keep it that way. In the discussion on judicial restraint or activism one common presupposition is that there is a role to play, a function to fulfill. For judges this means that there is every reason to identify that role and to live up to it. For legislators and other institutional designers it follows that they should be cautious with the erection of special courts or court-like organisations (such as a commission on equal treatment). If courts should have a mission, it better be a non-controversial and lasting one, but also one that does not interfere with their impartial and independent character. Perhaps that remains, in a plurivocal democratic society as ours, one of their most important sources of legitimacy.