

# Annex

## *Rule of Law and Democracy in Perspective*

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The issue of the Rule of Law and Democracy is close to the heart of Jaap de Zwaan. He has also written extensively on the subject. After the Treaty of Maastricht of 1992 and, above all, since the Treaty of Lisbon of 2009 a remarkable process of the ‘politicization’ of the European Union has occurred. This process has had a major impact on the governance of the EU institutions.

After the demise of the European Defence Community in 1954, for the next 40 years the integration process in Europe was fully concentrated on economic, not political integration. We lived in the period of the Cold War when politics and security were primarily a matter for NATO and the issues of welfare and economic growth economics were the domain of the then European Community. As a result, if a conflict arose between the two organizations, NATO prevailed. This was most certainly the case in a country like the Netherlands, where political integration in Europe had never been a priority.

In retrospect, one can say that the period between the early 1950s and 1991 was for the Netherlands, in foreign policy terms, a happy period. Of course the economic stagnation of the 1970s, largely the effect of the two oil crises, also had its political impact on the EC Member States. Nevertheless, the main priorities of the European Community were concentrated on the implementation of the four economic freedoms, resulting in the completion of the internal market. The main institutional innovation of the EC system occurred when it became necessary in the course of the 1980s to harmonize economic rules. Increased qualified majority voting was even accepted by Mrs. Thatcher, its fiercest critic. In national terms the EC had few opponents, mainly as a result of its limited political objectives.

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## The Role of Human Rights

Against this background the main priority for the EC was therefore not so much the Rule of Law and Democracy, but the completion of the internal market. Obviously the accession of Greece, Spain and Portugal had strong political overtones. But their membership of the EEC was seen in the first place as a consequence of the end of the dictatorships of Franco, Salazar and Papadopoulos. The requirements of human rights and the fulfilment of democracy were seen as a prerequisite for EC membership. But the issue of human rights was seen as only marginally affecting the functioning of the EC as a whole.

The viewpoint of the German Constitutional Court became a political and legal guideline: it confirmed in a number of cases that European law prevailed, with the exception of human rights because these were guaranteed by the Constitutional Court. That element also became the basis of what was assumed by the Court of Justice when it stated that the general principles of law, including human rights law, were also principles of the law of the European Community.

In retrospect it is clear that the demise of the Soviet Union and the disappearance of the Berlin Wall had become the turning point in the 'politicization' of the European Union. The membership of Central and Eastern European states, former satellite countries of the Soviet Union, had become a societal choice. It would clearly not have been acceptable to preserve the political separation of Europe in two blocs of countries after the end of the Cold War. On the one hand, a Western Europe which after the War had become democratic, rich and capitalistic. On the other hand, an Eastern part which for half a century had been governed without respect for democracy, with the state dominating the economy and, as a result, low per capita income.

As a consequence, both the deepening of the integration in the West through the objective of Economic and Monetary Union and, at the same time, the whole of Europe having European Union membership can be seen as the beginning of a more political process of unification. If one now looks back over the last 25 years, in political terms, the EU has made remarkable progress. In the first place, in democratic terms, the tandem Commission-Council has been largely replaced by the tripod Commission-Parliament-Council. In about 90 per cent of all the legislation, the consent of the European Parliament is required. The Commission is now subject to firm political control by the European Parliament. Individual Commissioners can now be held politically accountable.

From an internal point of view, there is a strong development of democracy within the institutions of the EU.

Secondly, concerning the rule of law, after the Constitutional Court decisions in Germany and the development of principles of law as being essential to the EU, we have seen two major developments. On the one hand, the requirement is that Member States themselves should guarantee human rights and that sanctions are even possible in case of a persistent violation of human rights. And on the other hand, the Charter of Fundamental Rights as a document with the same effect as the

Lisbon Treaty itself is now formally enshrined as being essential to the functioning of the European Union. It applies to the institutions but does not automatically apply to every action of the Member States. In a sense, it is also a modernization because, compared to the European Convention for the Protection of Human Rights and Fundamental Freedoms of some sixty years ago, its formulation of human rights is more up to date.

### **Reception in the Member States**

At first sight, one would expect that the political support for the Union would have become stronger. In fact, the opposite is the case. There is an increased sense of frustration that competences are being removed from the Member States and taken over by “Brussels”. Sometimes, the extent of such competences is not well understood. Another objection is that the institutions are not subject to national parliamentary control in the Member States. There is also a grudging feeling that additional powers and competences have been granted because of the economic crisis. As a result we have the paradoxical situation that even though, in fact, the impact of the European Union in the Member States is increasing, also a growing gap in understanding the European Union has occurred.

In the Netherlands, but also in some other European countries, a profound sense of unease exists. Although subsidiarity and proportionality are guaranteed in the Treaty, the application of these principles is not seen as effectively taking place. It is not unfair to presume that if there would be a referendum today in some Member States, there would be a tendency to retract powers rather than granting new ones.

In my opinion, this paradox is caused by a number of developments. In the first place, the body of politics of most Member States has not grown and become accustomed to this change of reality on the ground, which is also caused by the process of globalization over the last few decades. It is clear that as a result of the growing process of the integration of European economies, also their finances have become more integrated. Nevertheless, at the beginning of the Greek financial crisis, the Dutch Prime Minister, Mr. Rutte, when the issue of support for Greece became urgent, is quoted as having said “I have nothing with the Greeks”. Only when he understood that Dutch banks had lent 50 to 60 billion euro to Greek banks did he realize that by cutting off Greece from any support by the European Union, the Dutch economy would also pay a heavy price!

The underlying problem is a lack of understanding that political decision-making has moved away from the nation state. Unease about this phenomenon has been stimulated by the extremist political parties on the right and on the left. This new attitude is not limited to the Netherlands, although the contrast with its traditional positive attitude to more European integration in the past in this country seems to be rather extreme. It is also occurring in other countries like Germany and France, but with less impact on day-to-day political attitudes.

In the second place, this politicization of European decision-making has, for a long time, not been recognized. For a long time there was a profound indifference in the body politic of the Netherlands towards European integration. In the early 1980s, when I was a member of the Second Chamber of Parliament, I advocated the introduction of a parliamentary committee on European affairs. The reaction of the then chairman of the Foreign Affairs Committee was: “you know we have a committee on foreign affairs that also covers Europe. Europe is part of foreign affairs”.

Nowadays it has become abundantly clear that European affairs have a major impact on internal affairs. The only way forward is not to remove democratic powers from European institutions, but rather to recognize this new situation and to adjust the national decision-making process accordingly. This implies that at a much earlier phase in the decision-making process, before European decisions are taken in Brussels, national parliaments should be involved. The debate on European legislation should not be limited to the European Parliament.

Similarly, when the internalization of European norms is at stake, also the European Court of Auditors should control the way European legislation and thus also the European budget has an impact in the Netherlands. The same is true for national competition and telecom authorities. This line of thought can also be extended to the European judicial and police institutions, Eurojust, Europol and their national counterparts. Many years ago the French scholar Georges Scelle advocated the “doubling of functionality”, meaning that national institutions increasingly have a national and a European function. In my opinion, this insight can help to alleviate the feeling of being overrun by foreign structures, and thus help with creating a sense of the internalization of the European dimensions.

### **Lack of Confidence in the European Union**

The third element is that national political parties and national politics are also increasingly under attack from the general public. There is an enormous lack of confidence in national political solutions and nearly all traditional structures are under attack, whether in the financial sphere, like banking, the police, education or the prison system, and so we find ourselves in a crisis of democracy in a larger sense. That is obviously a matter of concern. This is the general background against which I would like to place these issues.

Knowledge about European affairs, not only in the national parliaments, but also in general, at law faculties or in the business world, is remarkably low. There is an urgent need to change this situation, but it would require political leadership that so far seems to be seriously lacking. Let me add a specific example from my personal political experience of many years ago to demonstrate this.

In 1980 on the occasion of a debate on constitutional reform, I tabled a motion requesting that we should have an interpretation of the Constitution which was in conformity with the EU.

With the exception of the small right-wing Christian reformed parties the motion was adopted with a large majority. Recently the same parties that supported me at the time, the liberal-conservative VVD and the Christian-democratic CDA inspired by the same right-wing Christian reformed parties, the Christen Unie and the SGP, decided to retrospectively “annul” the motion of 1980!

From a legal point of view, this decision is very questionable, because motions adopted during a particular government period only have validity during that period. So repealing a motion from the 1980s is rather bizarre. Secondly, it has no legal effect because the Treaties and also the case law and even the Treaty of Lisbon have established, over many decades, the supremacy of European law over national law, including constitutional law. But in political terms the decision to repeal can only be understood as a profound sign of frustration, a grudge, a negative signal of denying the reality of a changing political situation.

In the early days, there was a kind of indifference, Europe was not seen as very relevant, except for those who were farmers or businessmen as they benefited from European subsidies or were affected by EU competition rules. Nowadays every individual citizen is affected, and the EU has an enormous impact on many dimensions of national society. Nevertheless, the political attitude is characterized by a denial of reality and it reacts as if European decision-making is alien, for the reasons I have just explained.

## **Subsidiarity**

The importance of the subsidiarity principle is clear from the application of the subsidiarity protocol: we have seen some recent examples. One was an interesting one: the Dutch Parliament voted against the liberalization of the railways, they said ‘once the decision is annulled, liberalization will not take place, because we have issued a yellow card’.

This statement demonstrates a lack of understanding of the system. In my opinion, a reasonable approach to subsidiarity needs to come from both sides, the national and the European side. There is growing acceptance for this approach, which is clear from the presence of members of the European Parliament in national parliamentary sessions and meetings like the debate on the new European state of the union. Also, there is a more regular appearance of Commissioners before national institutions. Above all, the attitude of the Member States should not be simply a negative one. Both the yellow and the red cards are blocking elements, elements of saying no. On the contrary, we should move from a ‘no’ attitude to an attitude of thinking along the same lines, adding elements that on the European level are not at the forefront of people’s minds; we should aim for a real institutional dialogue.

Because of this, there are two points of view: there is the European one that the European nation states are becoming too small for many issues, and there is the national issue which for the institutions very much depends on national loyalties. And so if these two come together, the yellow card is not the right answer, because

it blocks decision-making and debate. And in any case, we should not block the system; we should allow the system to work and to improve it.

## **Sovereignty**

The current prevailing opinion in the Netherlands is to argue that within the European framework too much national authority has been eroded and is now being exercised at the European level. This, I believe, is far too shallow an approach to European decision-making and a parody of the reality which has grown over, by now, half a century.

The current situation of decision-making in the EU context is far from satisfactory, but this is not because too much authority has been removed from the Member States. Rather, the contrary is the case. We are increasingly faced with a situation that purely national decisions are inadequate to resolve a problem. At the same time no European solution can be found either, because diverging national interests are blocking competences at the European level. A very significant issue is the almost total stagnation in Europe in the area of asylum and migration. On a daily basis we are faced with horror stories of people drowning in the Mediterranean, and trucks with dead refugees who had fled their homeland because of the unbearable living conditions they were experiencing. Clearly, a European approach with real competences at the European level is an absolute precondition, otherwise we will be faced with even more dramatic stories.

However, also in areas where European competences do exist, national contributions to decisions at the European level are essential for decision-making. Nearly all European decisions require approval by the Council of Ministers, an institution composed of national representatives at the political level. This has been the rule from the very beginning of the integration process. To pretend otherwise is simply a distortion of the truth.

More fundamentally, I would defend the thesis that the European Union has reinforced national sovereignty, because it has reinforced the possibility of having control over one's own affairs. Even in the formal sense in order to achieve many national objectives, individual Member States depend on cooperation with other Member States, with or without European competences. Alan Milward very forcefully uses the same argumentation in his book *The European Rescue of the Nation State*. If it had not been for the development of democratic and rule of law structures at a higher level, Member States might easily have dwindled from the path and become subject to dictatorships. Or as we have seen with the banks which came under the control of non-democratic structures and other institutions which have never been controlled by the European Union. So I reject the concept that the Netherlands and other Member States have lost sovereignty: it has rather gained sovereignty in a new context.

## Some Final Comments

It is also important to note that the future of a country needs to be decided via a ‘willful formulation’ of ideas, so I should therefore end with some comments concerning some differences between the Netherlands and a number of other European countries.

First of all, the term “Euroscepticism” is a bizarre word because all of us are living in a biotope called Europe; one cannot simply be against our own biotope. With this, I mean that Europe is the framework in which we live, and even if there would be no European Union you would still be living in that biotope and you would be far worse off because we would not have the transnational mechanisms to solve conflicts. Yet, the term “Euroscepticism” continues to be on the rise in the Netherlands. Of course, the crisis and high unemployment risk losing a whole generation from the European idea, therefore one should not want to belittle these issues. Nevertheless, where the Dutch position differs rather fundamentally from most other Member States (with the exception of the Nordic countries) is its purely economic or even commercial attitude to European integration. I referred to this point earlier.

The Netherlands thinks in terms of selling our products better in an internal market: we import, we export, our market is 70% European. What we do not realize at all, or have great difficulty in accepting, is that Europe is also a geopolitical sphere, in which our relative importance in demographical terms is rapidly shrinking. At present one in seven inhabitants of the world is a European and it will soon be one out of 10 or 15. We now have 500 million out of seven billion inhabitants worldwide. The ageing process, demographic changes and the rise of new powers worldwide: all these elements imply that the geopolitical relevance of individual European countries is becoming smaller. We are witnessing a worldwide shift of power, an unprecedented changing power balance.

Countries like Germany, France, Poland, Italy, or Spain, i.e. the larger European countries, consider a strengthening of Europe to be essential in order to increase the relevance of their states also at the European level. Federal Chancellor Merkel remarked at the World Economic Forum in 2012: “Die Zukunft der Euro ist die Zukunft Europas” (the future of the Euro is the future of Europe). And what she meant to say by this is that Germany has 78 million people out of a world population of 7 billion: Germany forms just 1 per cent, and without a European dimension that 1 per cent plays no role at all. So the geopolitical element is very strong in Germany; it is also strong in France as well as in Italy, otherwise Italy would fall away to become part of North Africa. Spain still has vivid memories of living under a dictatorship without democratic institutions, Poland is squeezed between Germany and Russia and if it is not part of Europe, it risks being a vassal, as it was for many years. So that geopolitical dimension with all its underlying differences prevails for the larger Member States and ultimately considers Europe as being also a potential power actor in world terms.

A smaller Member State, like Ireland, depends on the European Union as a counterweight against again being colonized by its larger neighbour Great Britain. A country like Belgium benefits from Europe because otherwise it might fall apart. Therefore many countries have specific reasons for looking at Europe in political as well as economic terms.

The Netherlands does not have that tradition. Twenty-four years after the creation of the Netherlands in 1648, we had a so-called 'rampjaar' (disastrous year) when we were collectively attacked by the French, the Germans and the British. I think somewhere deep in the minds of the Dutch is the impression that we do not like Europe because of our small numbers and a fear that we will be dominated by the continental powers. So with our neutrality in the nineteenth century and the later American dominance, we felt more comfortable as a trading nation.

And because we essentially have an economic attitude, above all we like earning money in a European context, but also outside as has been our centuries-long tradition. That attitude means that we feel uncomfortable in a Europe which exercises power. Recent developments in the world directly around us, such as the illegal occupation of the Crimea, the ongoing war in Eastern Ukraine, the asylum tragedies or the terrorist attacks within Europe and directly adjacent to our borders, constitute ever-increasing challenges. They can only be met by a more integrated Europe, mindful of its human values, represented by the Rule of Law and Democracy. This very political dimension of Europe is rarely explained in the Netherlands. It is certainly not the subject of the political debate in our Parliament. The government does not explain its actions in and with Europe in these terms. In short, the country is leaderless in a European vision of the future. The Dutch Prime Minister considers this attitude to be even his identity in Europe. Recently he proudly proclaimed "I don't want any vision of the future".

It is precisely that lack of vision that makes people uncertain. One can argue that we go forward, we go backwards, we do this, we do that, but at least there should be intellectual and political leadership. But if there is no political leadership, the people who are affected by the crisis turn to extremist or populist parties which promise the moon, although they realize that it is not possible.