

Law is politics and often also policy.

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Academic lawyers like to speak with some disdain about politicians. Often politicians rose from their ranks. In this case the disdain is even higher. The academic lawyer, transformed into a politician is then considered as a kind of fallen angel. Somebody who abandoned the pure and integer heaven of the law for the intrigues and the filthy deals of the political hell. Nevertheless, both professional groups enjoy little confidence among the population. A poll of the Leuven Institute of Social and Political Opinion Research points out that the confidence of the population in the justice system as in the political parties as well is rather low.¹

	Very low confidence	Low Confidence	Neither high nor low confidence	High Confidence	Very High Confidence
Justice System	10,9%	35,3 %	31,1%	21,1 %	1,5 %
Political Parties	10,2 %	39,0 %	42,1 %	8,7 %	0,0 %

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Both justice system and the political parties are polling in this survey less well than the police, the unions, the monarchy and the banks. Only the result of the church is worse.

In this article we will show that, notwithstanding the uneasy relationship between both professional groups, lawyers and politicians, their fields of activity are strongly intertwined. Probably more than lawyers are willing to admit.

Of course, the question about the relationship between politics and law is very broad ranged. It is a container question from which a varied plurality of sub

¹ Bart Meuleman, Koen Abts and Marc Swyngedouw, 'De Wantrouwige Vlaming. De toestand van het institutionele vertrouwen in Vlaanderen', Instituut voor Sociaal en Politiek Opinieonderzoek' (ISPO), ISPO/2012-2

questions can be distilled. To limit the scope of our article we will consequently focus on three, more delineated positions:

- (1) Law is politics, but law can acquire a real and stable autonomy towards government policy
- (2) Courts often supplement government policy, even in very vital questions
- (3) Policy considerations are slipping increasingly into court decisions.

In these positions the notions politics and policy are crucial. It is important to stress the difference between them.

In the line of Aristotle², we understand politics as the art of living together in wider social contexts. Social contexts which surpass the household (the 'oikos'), the village and the tribe. In this wide sense politics encompass as well the reciprocal rights and duties of the members of society, as the scope, the functions and the government of collective institutions and finally also the question about the recruitment of the elites, responsible for legislation, administration and justice provision.

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The notion of policy is much narrower. This notion refers to a line of governance pursued by an institution. Policies are not only common to public institutions. Also private institutions and NGO's most often develop their policies.

Within the same intellectual area a third notion, i.e. a polity, can be mentioned. This notion refers to the political entity within which politics and policies are developed. This polity can be a city state, a nation state, a dynastic state, a world state ('kosmopolis'), a federal state, a member state of a federation or confederacy, a religious community (for instance the Islamic 'Umma'). Many political ideologies and conflicts concern the question about the optimal polity in which politics and policies should be developed (the nation, a people, a race, a religious community, the world...). Belgium for instance is an area of conflict concerning the quest for the optimal 'polity' or 'polities' (Belgium, Flanders, Wallonia, Brussels ...). This quest generates many complications in Belgian politics. The problem of the optimal polity however, will not be discussed in this contribution.

² Aristotle, Politics, Book I, Oxford, 1885, 1252a-1260b

1. The autonomy of law towards government policy

The impression of autonomy of the legal world towards the world of politics is a legacy of the nineteenth century, an era during which the legal world had indeed a real and stable autonomy towards government policy. This autonomy was much more limited before this century and declined after it, especially after the First World War.

Before the nineteenth century, the period of the so called Ancien Regime, a plurality of political authorities was involved in the process of legal rulemaking. Rulemaking was not the sole privilege of the sovereign princes, enacting multiple decrees and ordinances, but also lower ranked land lords, city authorities, city guilds and church authorities in canon law intervened in the process of rulemaking. This resulted into a complicated legal landscape of legislation, customs, case law, privileges, regulations, etc. To promote some order in these legal jungles academic lawyers on the European continent developed general legal traditions such as Roman law and natural law ('droit naturel', 'Vernunftrecht'). These general legal traditions constituted the subject of study in the law faculties of the Ancien Regime Universities. They also served as default rules or as guidelines of statutory interpretation ('ratio scripta'). Some well inspired and well advised monarchs, the so called enlightened despots, had understood already before the French Revolution that these complicated legal landscapes and the steady intervention of big and small legislators impaired economic growth. Consequently, they took the already developed general legal traditions as guideline for the elaboration of general and uniform legal codes. To mention some famous examples: empress Maria-Theresia and the 'Codex Theresianus', the Prussian king Frederick the Great and the 'Allgemeines Landrecht'.³ The typical nineteenth century relationship between law and politics was however established in France through the famous French Revolution. The revolutionary elites, who were pressed for moderation in their reforms by Napoleon, were able to establish a

³ More on the Codification movement in Europe in P.A.J. van den Berg, *Codificatie en Staatsvorming. De politieke en politiek-theoretische achtergronden van de Codificatie van het privaatrecht in Pruisen, de Donaumonarchie, Frankrijk en Nederland 1450-1811*, Groningen 1996

legislative body, i.e. the Code Civil, which was on one hand based on revolutionary principles of natural law, such as freedom of contract and private property, but relied on the other hand, in its more concrete rules, on the pre-revolutionary French legal tradition. By this clever combination of revolution and conservatism, of rupture and continuity, the new regime was able to gain a lot of legitimacy across broad layers of the French population.⁴ This legislative body, the real masterpiece of Napoleon, would constitute during more than hundred years the institutional base of an explicit autonomy of the legal world towards the political one. The contrast between the political inertia concerning private law legislation and the political turbulence concerning the constitution is a clear illustration of this autonomy. Nineteenth century France faced two heavy war periods (Napoleonic wars, the Franco-German war of 1870-71), one limited civil war (the Paris Commune), three revolutions and nine constitutional regimes! As far as private law is concerned nineteenth century France shows us the Arcadic image of a quiet streaming river. French private law evolved through a triangular interaction between the law professors at their faculties, the judges in their Palaces and legal practice, especially the contractual one, on the field. In the beginning of the century academic scholars and courts stayed closely with the text of the code ('The Exegetic School'), but gradually, through the necessities on the field, but also by changed opinions, more distance was taken from the text of the code and civil law became more and more conceived as a system of principles and concepts, as 'un système de droit civil'. Not the literal meaning of the text, but 'le système' constituted the base of civil law. The legal texts had to be read and interpreted in function of 'le système'. Conceiving the civil law as a system of concepts and principles was however already earlier and more outspokenly the case in the German countries. Aubry and Rau, two professors in Staatsburg and the most prominent advocates of this systemic view on the civil law, elaborated this view in a magnificent way in their manual 'Cours de Droit Civil'.⁵

⁴ This background of the Code Civil was eloquently expressed by Portalis in his 'Discours Préliminaire' on the project of the Code. See for instance Boudewijn Bouckaert, *De Exegetische School. Een kritische studie van rechtsbronnen- en interpretatieleer bij de 19^e eeuwse commentatoren van de Code Civil*, Antwerpen, 1981

⁵ The manual of Aubry and Rau, *Cours de Droit Civil Français*, was in his first edition presented as a translation of the manual written by the Heidelberg professor Karl-Salomo Zachariae (*Handbuch des Franzosischen Civilrechts*, 1811-1812). This German professor had

The stronger emphasis on ‘Das System’ in Germany, rather than on legislative texts, is not a coincidence. Until 1870 Germany was politically highly divided. Some German countries had a private law Codification, like Prussia and Bavaria, other countries did not. Lacking a political power for legal unification, as was Napoleon in France, this mission was taken up by the German law professors. Building on the older general legal traditions of natural law and Roman law, the German professors elaborated an impressive system of legal principles and concepts. This system had the pretention of coherence and completeness. New social evolutions could be integrated into the system by further sophistication of it. Rudolf von Jhering, a legal scholar of the later nineteenth century, ridiculed this theory by calling it ‘Begriffsjuriprudenz’ and ‘Juristische Begriffshimmel’.⁶ The emphasis on jurisprudence as the engine of legal unification in nineteenth Germany may sound paradoxical, taking into account the dominance of the so called Historical School. This school is famous for its resistance against codification ‘à la Française’ (Friedrich von Savigny) and its interest in the study of older customary law (for instance by the brothers Grimm). One should however not neglect that the most prominent representatives of this Historical School, the so called Romanists (as opposed to the Germanists), considered the law based on customs as fit only for primitive societies. For developed and complex societies the customary law was not adequate. Consequently, there was a need for a more sophisticated ‘customary’ law, and this had to be provided by jurisprudence. Moreover, the resistance against Codification was not absolute. According to von Savigny the Germany of the first half of the nineteenth century was not ready for Codification. One had to wait until the most creative forces of the law, especially jurisprudence, had elaborated the law in a way it which was adequate for a modern society.⁷ Generally spoken, the

reorganised the French civil code, which was also valid law in his region, along the systematic of the German Pandectists. Not the order of the articles of the Code, but the system of concepts and principles constituted the organising principle. The own contributions by Aubry and Rau became always more important in the later editions of the manual. As a consequence the reference to Zachariae was omitted. The systematic of Aubry and Rau would become prominent in France rather towards the end of the century. Before it was considered in French jurisprudence as too German and too intellectual.

⁶ See Rudolf von Jhering, *Der Kampf ums Recht*, Nürnberg, 1965

⁷ So for instance von Savigny: ‘...Dass alles Recht auf die Weise entsteht, welche der herrschende, nicht ganz passende Sprachgebrauch als Gewohnheitsrecht bezeichnet, d.h. dass er erst durch Sitte und Volksglaube, dann durch Jurisprudenz erzeugt wird, nicht durch die Willkür eines Gesetzgebers.’ (*Vom Beruf unserer Zeit für Gesetzgebung und*

Romanist lawyers of the Historical School made their way. The *Bürgerliches Gesetzbuch*, enacted in 1899, after long and subtle discussions in numerous erudite commissions, reflected largely the system approach of the former generations of Romanist lawyers.

The autonomy of the legal world vis à vis the political one applies certainly also to nineteenth century England. The institutional base for this autonomy was however different. In France this base was provided by an encompassing and stable codification. In Germany by a system of principles and concepts elaborated by jurisprudence. In England the shield against reiterated political intervention was provided by the prestigious common law based on elaboration 'from precedent to precedent'. In difference with France and Germany, the distinction between the world of the law and the world of politics was also reflected by the used legal source. The law was developed by case law, from precedent to precedent. Political intervention at the contrary through statutes voted by the Parliament. If politics wanted to meddle with the law, it had to do it through a statute, which could be considered as a foreign element, pushed into the organically grown body of the common law. The difference of legal sources resulted in an additional political threshold, which was absent in France and Germany. At least formally, the *Code Civil* and the *Bürgerliches Gesetzbuch* were voted as laws by the Parliament, by which they were ranked hierarchically at the same level as the laws through which political intervention had to occur.

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England however remained not totally free from Codification attempts. Political radicals such as Jeremy Bentham and Henry Peter Brougham advocated a codification 'à la Française' because they considered the 'common law' as antiquated and as a source of legal uncertainty.⁸ Their action remained not without result although these results stayed far below the expectations of the mentioned reformers. Some parts of the common law were submitted to legislative reform, such as for instance procedural law through the Judicature Acts of 1878. The main body of private law stayed however out of the hands of the statute law and remained the playing field of case law.

Rechtswissenschaft, in Thibaut und Savigny. Ein Programmatorische Rechtstreit, 14-15, Darmstadt, 1959

⁸ See for instance P.A.J. van den Berg, Staatsvorming zonder Codificatie, Working Paper, University of Groningen, Faculty of Law, 2005

Notwithstanding significant differences, the three most prominent legal cultures of Europe show one crucial common trait: the world of law (especially private law) evolved according to its own logic, which was relatively autonomous towards the world of politics. The political world (parliaments, governments, political parties) were concerned with foreign and colonial policies, with the building of collective infra-structure such as roads, railroads and ports, (sometimes) with education, with tax collection, with the administrative structure. The lawyers were concerned with family and patrimony, with property, with contracts, with torts, with corporations, etc. It is true that the historical scenarios of the three countries show important differences. In France the first move was made by the legislator and the law professors and judges built further on this. In Germany the 'learned' lawyers of the numerous and prestigious universities were the prominent forces in legal development and their sophisticated theories were largely integrated into the codification at the end of the century. In England private law remained the playing field of the courts, who developed the law through casuistic analogies (a similibus ad similia), supported only in a supplementary way by some limited legislative interventions.

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This autonomy of the legal world towards government policy is however not something as a law of nature, but relied on a consensus among the political elites in the beginning of the nineteenth century. Under the influence of the preceding intellectual and social economic evolution (the Enlightenment, scientific and technological innovation, the failure of mercantilism, the erosion of feudalism) the elites became convinced that a permanent and regular intervention of governments into the relationships between individuals, now called 'citizens', had to lead to stagnation, exploitation and social frictions. As a consequence, to submit the whole area of daily life and the economy to the free interaction between citizens, companies and associations, was considered as the best solution. Free interaction however coordinated according the specific rules of the game, articulated in the private law. For this attitude a somewhat misleading term has been introduced, i.e. 'laissez-fairisme', literally to be translated as 'let them do what they want'. This is not what the nineteenth century elites had in mind. The agents of social life had to conform their actions to specific rules such as respecting property rights, respecting contractual arrangements, compensation for inflicted harm. Also the related term 'night watchman state' is misleading.

This term suggests that the government should be concerned exclusively with police tasks. The elites had a much wider scope of government in mind. The government was concerned with the whole of society but considered its task as an ‘ordering’ one, i.e. through the enforcement of the general rules of private law, and not as a ‘steering’ one through concrete and situational interventions.

Especially on the European continent this ‘new order’ had a dramatic impact on the pre-revolutionary structure of social relationships. Land lords were no more able to submit the farmers to irritant restrictions (for instance concerning gaming)⁹, guilds and corporations lost their regulatory powers, the church lost its jurisdiction in family matters, toll ways and toll waterways were abolished, privileged trade and industrial companies lost their monopoly, etc. This was less the case in England because some of similar reforms were already introduced earlier through the evolution of the common law.

Arrunada and Andanova consider this difference even as the most important explanation for the codification in France and the absence of it in England. In order to introduce free market principles in France the judiciary needed to be disciplined by the framework of a Code for the judiciary remained deeply imbued by a pre-revolutionary feudal mentality¹⁰. Giving free reign to this judiciary would have led, according to the revolutionary elites, to a swift re-introduction of pre-revolutionary relationships. In England such a disciplining framework for the judiciary was not necessary. At the contrary, the judges of the common law had already developed before several free market principles by which they had tied down the hands of the king and his government. This explanation, provided by Arrunada and Andanova, finds some support in the historical situation of France and England in the beginning of the nineteenth century. It can however hardly be considered as a mono-causal explanation. Van den Berg for instance shows quite convincingly that also the urge for legal uniformity, which was felt as a necessity for a modern nation state, was a

⁹ See for instance Simon Schama, *Citizens. A Chronicle of the French Revolution*, 1989. After the abolishment of the feudal privileges in August 1789, such as the privilege of gaming for rabbits and pigeons for nobles and the corresponding ban of gaming for the farmers, the farmers massively went on hunting down rabbits and pigeons in the fields throughout France.

¹⁰ B. Arrunada and V. Andanova, ‘Market Institutions and Judicial Rulemaking’ in C. Ménard and M. Shirley (eds.), *Handbook of New Institutional Economics*, Berlin, 2005, 229-250

crucial factor.¹¹ England however was already since the Middle Ages a well organised unitary state, in which a common law was applied. Consequently there was no need of a codification in order to have a uniform legal system. Pre-revolutionary France at the contrary was a patch work of regional ‘*coûtumes*’, applied by sclerotic courts (‘*les Parlements* ’), resisting permanently all attempts of reforms in order to maintain their privileges. The big sweep of the Codification was consequently inevitable.

The decision to submit daily life and economic interaction to an ordering system of abstract and stable rules, and not to concrete and situational policy interventions, is however also a political decision. By such a decision the political class decides to interventionist abstention. The political class decides here to refrain from government policy in large domains of social life but to leave this to the policies of individuals, families, companies and voluntary associations. This however within the framework of individual rights and duties. This decision on the macro-level, which is historically not identifiable in one single moment but is the result of a chain of smaller decisions, has to be considered as ‘politics’ of the highest level. It touches the deep structure of the ‘polis’. The political character of it is shown a fortiori, first by the fact that this macro-political decision changed deeply pre-revolutionary social relationships, and second, by the fact that this macro-political decision was gradually turned back after the First World War through a macro-political trend of interventionist policies.

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2. Courts are involved in policy, even about crucial issues.

According to the classical theory of the separation of powers courts should not decide about government policy. Of course, the judiciary is quite instrumental in government policies by enforcing the rules, devolving from government policies. Suppose that the judiciary would go on strike and abstain from enforcing the rules, government policies would remain dead letter. Nevertheless, the content of policies, as the classical theory goes, remains the full prerogative of the political powers (legislative and executive).

This classical theory is however less and less evident. Due to the complexity of government policies on different levels, the risk of contradictions and gaps

¹¹ P.A.J. Van den Berg, Staatsvorming zonder Codificatie, Working Paper, University of Groningen, Faculty of Law, 2005

in the legislation has increased a lot. This triggers an implicit appeal to the judiciary to supplement these gaps and eliminate eventual contradictions. Beside his classical task of applying and enforcing policies judges are also supposed to complete the policies of the government.

The so called stand still-principle concerning the application of social-economic rights constitutes a clear illustration of this task of completing policy. In general it is accepted that these social –economic rights, provided by article 23 Belgian Constitution, do not entail subjective rights, enforceable before courts.¹² These rights are in the first place a guideline for government policies. It is up to the legislator and the government to translate these general rights into enforceable rules. Nevertheless jurisprudence and also some treaty provisions go a step further by advancing the stand still principle.¹³ When social-economic rights are provided in the constitution or in a treaty, the government is not allowed to pursue a policy resulting in the decrease of the existing level of social protection, provided by these rights. From a policy point of view the level of social protection, endorsed by these rights can only be increased or maintained, never decreased. The Belgian Constitutional Court had to decide on this stand still principle at the occasion of an appeal against the increase of student fees at the universities of the French Community.¹⁴ The claimant, a student organisation, invoked in this case the Treaty on Economic, Social and Cultural Rights of 1966, since 1983 incorporated into Belgian law. This treaty provides for a stand still principle concerning the right of costless education. The Court rendered in this case a Salomon's' verdict. The increase of the fees was considered not to be in contradiction with the treaty because the increase was too trivial to have a serious impact on the purchase power and average income of the students, spent on education. By applying the stand still principle the judge clearly affect policies. The stand still principle is in most cases relevant when the government has to cut expenses for budgetary reasons. By invoking the stand still principle the judge protects some social categories against cuts in expenses (allocations, subsidies) or against higher retributions (for instance fees, tickets in public transportation). The impact of such decisions will

¹² For some rights, provided in art. 23 Belgian Constitution, this would be nevertheless possible. See Gunter Maes, *De afdwingbaarheid van sociale grondrechten*, Antwerpen, 2003, 439-453

¹³ More on this in Gunter Maes, *ibidem*, 109-140 and 460-475

¹⁴ Constitutional Court, Decision 165/2005

however be that the burden of the budgetary cuts will have to be bore by other social categories, not or less protected by such social-economic rights. By applying the stand still principle the judge implicitly acts as a minister of the budget by shifting social burdens from one protected social category to non-protected ones.

The task of the judge in completing the legislative framework is even more prominent in the evolution of European case law.

As the European Union is a treaty organisation, all power of EU-authorities should derive directly or indirectly from the treaties. The member-states of the EU are pooling parts of their sovereign power as a nation state towards the EU-institutions. Every legal act, legislative, executive or judicial, should find its legitimacy in the EU-treaties. Some scrutiny of the case law of the European Court of Justice points however out that this court has quasi proprio motu and without any support in the treaties, extended the competences of EU-institutions. From the perspective of more European integration the result of such an extension may be perhaps defensible. The question however is whether such an extension had to be pushed through by the European Court and not by an explicit change of the treaties. Now the impression prevails that the Court acted like baron von Munchhausen pulling himself on his hairs out of the marsh. The competence extension through court decisions can be illustrated by analysing some landmark cases of the European Court of Justice.

- *Van Gend and Loos 1963*¹⁵: article 12 of the EEC-treaty , in effect since 1 January 1958, provided that member)states were no more allowed neither to impose new import- or export-taxes nor increasing existing ones. In a Protocol of the Benelux-countries of 25 July 1958 a custom of 3 % ad valorem had been increased to 8 %. Based on article 12, the claimant appealed against this increase at the *Nederlandse Tariefcommissie*, which directed a prejudicial question to the European Court. According to the opinion of the advocate-general in this case article 12 had no direct effect but only resulted in an obligation of the member states. By assigning direct effect to this article the impact of article 12 would result in a very unequal application within the different member state for some member states had accepted in their constitution the superiority of

¹⁵ ECJ 26/82

European law but others not. The Court did not listen to this advice and stated that the direct effect of this treaty provision resulted from the general philosophy of the EU and that the EU had established for some well-defined competences a new international legal order, limiting the sovereignty of the member states.

- *Internationale Handelsgesellschaft 1970*¹⁶: in this case the Court had to decide whether the legal validity of decisions, made by European Courts, could be questioned on the base of the rights and liberties provided by the Constitutions of the member-states. Also here there was nothing to doubt about for the Court. If European decisions could be checked with constitutions of member states, this would lead to a very unequal application of European rules. Moreover, according to the Court, the respect for human rights and liberties is in line with the principles, endorsed by the Court itself. Protection of these rights and liberties had to be sought within the framework and the aims of the European Community.
- *Van Duyn v Home office 1974*¹⁷: Ms. Van Duyn applied for a position within the Church of Scientology in England. The Home Office however denied her access to the country because of the notorious reputation of this church. Ms. Van Duyn appealed to the High Court, which directed a prejudicial question to the European Court of Justice. The claimant invoked article 48 of the EEC-treaty (free mobility of labour) and on Directive 64/221, which implied that national regulations limiting the access of the national territory for reasons of public policy and safety could only take the personal behaviour of the person as a criterion. According to Ms. Van Duyn her denial of access was not based on her personal behaviour but on the pretended characteristics of the institution, she intended to work for. Legally the question was raised whether the mentioned Directive had direct effect within the English legal order or not because the Directive was not explicitly integrated within this order. The Home Office invoked article 189 EEC-Treaty in which a distinction was made between Regulations and Directives and in

¹⁶ ECJ 11/70

¹⁷ ECJ 41/74

which direct effect was assigned to Regulations. By reasoning *a contrario*, no direct effect should be assigned to Directives. If the European Council had indeed the intention to assign direct effect also to Directives, it would have mentioned it explicitly. The Court however did not accept this argument. By denying direct effect to Directives the legal authority of Directives would be undermined. Moreover, by denying a direct effect to Directives, also the benefits of the Directives would be denied towards the European citizens.

- *Parti Ecologiste 'Les Verts' v European Parliament 1983*¹⁸. The French Green Party felt being treated unfairly by the allocation of funds, awarded to the political parties for their electoral campaigning. The European Parliament had abused its right by privileging the incumbent parties at the detriment of the new comers. The question arose whether the European Court had jurisdiction on the decision of the Parliament. Article 173 of the EEC-Treaty provides that the Court decides about the legal validity of the decisions of the European Council and the European Commission. The Parliament is however not mentioned. The Court did not worry about this restriction. Deciding the non-competence of the Court on measures of the European Parliament would be in contradiction with the philosophy of the European Treaty.

The analysed decisions of the European Court of Justice illustrate quite clearly that the Court does not limit itself to the mere application of Treaty provisions, Regulations and Directives. The Court is also productive in the further elaboration of the European Institutions, including its own competence, eventually at the expense of the competences of the member states. To put it shortly, the Court practices self-extension. This self-extension does not concern marginal details of legal trivialities. The question about the direct effect of treaty provisions, regulations and directives affects the core of the political-legal relationship between the European Union and the member states. In case of direct effect the member state loses a part of control on its own institutions. In case of direct effect the national political authorities have to accept that their own judiciary has to apply rules, which were not developed

¹⁸ ECJ 294/83

and enacted by themselves. It is as if a new master intrudes the national home and takes control over a part of the employed staff of it. Again, one can be in favour of the result of this process of self-extension, i.e. an ever stronger union and the establishment of a robust and uniform European legal order. One can however also raise questions about the method through which this result was realized. Self-extension does not create much of legitimacy. A more explicit discussion about this between the member states had probably slowed down the process of European integration, but had also given more legitimacy to the European integration process and less fuel to Euro scepticism.

3. Limiting policy or determining policy? The distinction is weakening.

The relationship between the judges and government policy is of course the most delicate for those jurisdictions which have to decide on the legal validity of measures, devolving from government policy such as administrative courts (p.ex. the Council of State in Belgium), constitutional courts (p. ex. the Constitutional Court in Belgium) and international courts (p.ex. the European Court of Justice, the European Court of Human Rights). By their decisions these instances can stop a certain policy to be pursued and force the government to look for alternatives. Nobody will deny the sometimes dramatic impact of the decisions of these instances on government policy. Nevertheless, according to the classical theory, this impact should not mean that judges determine policy. The position of these judicial instances would reflect the image of rather a 'delineator' of policy than a 'decision maker' in it. According to the classical theory legitimate democratic majorities enjoy a freedom in determining their policies, but these majorities are tied to legal boundaries such as constitutional rules, treaty provisions and general principles of law. It is up to the mentioned judicial instances to guard these boundaries.

This classical theory remains for a large part relevant. Many decisions of these judicial instances can be considered rather as limiting policy than as determining policy.

To mention some examples:

- The government can pursue an anti-racism-policy but has to respect in this the constitutional limitation of the freedom of speech. As a consequence, this anti-racism-policy cannot entail an ‘opinion policy’. The sharpness of this limitation is not the same in all legal systems. In the US the limitation is very sharp because of the First Amendment of the Constitution.¹⁹ In Belgium this limitation is not so strict because of the laws against holocaust denial and racism.²⁰
- The government can pursue a policy concerning gaming, but has to respect in this individual freedom such as the freedom to abstain from membership of an association. The law Verdeille in France made it possible that municipalities could establish an ACCA (‘Association Communale de Chasse Agréée’). The owners of land could then be obliged to become a member of this association and open their land to game migration and giving access to gaming. The European Court of Human Rights considered this mandatory membership of an ACCA as a disproportionate limitation of individual freedom and property rights.²¹

Often however the distinction between a ‘delineator’ of policy and a decision maker in it is not so clear and in some cases the judge is drawn deeply into real policy issues.

This happens in the first place through the impact of the ex ante policy preparatory works on the ex post legal validity control. During the last three decennia governments spend more and more attention to cost-benefit-balances in their policy. Specialised government departments, mostly directly supervised by central government authorities (p.ex. the president, the prime minister), check proposed regulations on their expected costs and benefits and compare the proposed regulations with possible, less interventionist alternatives ((p.ex. provision of information, self-regulation by the sector,

¹⁹ This is shown in *National Socialist Party of America v Village of Skokie*, 432 U.S. 4 (1977) The Supreme Court ruled that a march of the national socialists through a quarter with a Jewish majority could not be banned because of the First Amendment.

²⁰ The law against holocaust denial (29 march 1995) incriminates opinions, in which the holocaust is either denied or minimalized. The law against racism (30 July 1981, amended several times) incriminates opinions, involving a systematic instigation of hatred against ethnic groups or of discrimination.

²¹ *Chassagnou and Others v France*, ECHR, 29 April 1999, 25088/94, 28331/95 and 28443/95

covenants with the government, policy taxes, etc.).²² As the classical viewpoint goes such cost-benefit-analyses belong to the mere preparatory phase of rulemaking and have as such no impact on the ex post legal validity control by the judge. Nevertheless, gradually preparatory works start to have an impact on ex post legal validity control.

This is clearly the case for European case law. The White Paper of the Mandelkern group was the official start-up of regulation management within the European Union. The White Paper provided that for all decisive acts within the European Union such as Regulations, Directives, White and Green Papers a preceding Impact Assessment has to be elaborated. Within the terms of art. 288 TFEU these Impact Assessments and their Guidelines are no more than ‘atypical’ acts without any legal binding impact.

Nevertheless the European Court seems to abandon this position by adopting a so called ‘process-oriented review’²³. In this review the control of the legal validity of an act is not limited to the final regulatory act, but concerns also the process of its legal genesis. Through this, ‘atypical acts’ from the preparatory phase of the act can become relevant for the ex post legal validity control. The famous legal dictum *Patere Legem Quam Ipse Fecisti* provides the deeper normative bases for such a process-oriented approach. Indeed, when the EU-policy makers impose to themselves a certain procedure for the making of an act, such as the drafting of an Impact Assessment, and when these policy makers fail to follow their own procedure, they cripple at the same time the legal validity of the final act. The judicial involvement into policy considerations also follows from the proportionality principle, provided by art. 5.1 TFEU. The process-oriented review urges the judge to scrutinize the correctness of the preparatory process of an act and in this scrutiny the judge will have to consider the Impact Assessment from which she can eventually conclude that the act does not meet the requirement of proportionality. The European Court followed this approach in *Spain v Council*²⁴, stating that the European Council, however sovereign within its policy margin, is required nevertheless to prove that it has made a careful inquiry about all relevant

²² For an exhaustive overview of the development of regulation management see A. Renda, Law and Economics in the RIA-world, Ph.D. Dissertation, Erasmus University Rotterdam, 2011

²³ On the ‘process-oriented review’ see K. Lenaerts, ‘The European Court of Justice and Process-oriented Review’, Department of European Legal Studies, Research Paper, 01/2012

²⁴ Case C-310/04 Spain v Council (2006) ECR I-7285

factors concerning the situation, which is the subject of the regulation. The Court is even more explicit in *Sungro SA*²⁵ *et al* by stating that the regulation in itself is not disproportional but that by not considering all relevant factors of the situation and especially the lack of an Impact Assessment the act does not meet the requirement of proportionality. In the case *Vodafone*²⁶ the advocate-general as the court as well refer to the Impact Assessment to ascertain that alternative options for the roaming regulation were analysed and that consequently the regulation cannot be considered as disproportional.

When this tendency is continued within European case law Impact Assessments will become always more important in the proportionality assessments of EU policy decisions. As a consequence EU judges will spend more attention to the know-how of Impact Assessments in order to draw from them the correct conclusions. This will lead in the longer run to a more active policy involvement of judges. They will not only guard the limits of policy margins but they will also be participating in policy by checking the proportionality on the base of the preparatory works such as cost-benefit-analysis.

Policy assessment based on the proportionality check becomes also more and more relevant in the case law of the Belgian Constitutional Court. This is illustrated by the case on the Flemish *Grond- en Pandendecreet* (Decree on Landed Property Management). By this Decree the Flemish government imposed on the land sub dividers, involved in a subdivision of more than ten lots, to sell to the government two lots at prices, fixed by the government. These lots had to be used to provide for social housing. As compensation the sub dividers could enjoy a reduction of VAT. The sub dividers went to the Constitutional Court invoking the disproportional violation of property rights within this Decree. In order to check this claim the Belgian Constitutional Court referred to the European Court for a prejudicial question whether this VAT-reduction could be considered as a hidden non-registered subsidy to sub dividers; The European Court answered this question positively²⁷ Because the compensation through the VAT-reduction had to be annulled the Constitutional Court had no alternative than to decide that the obligation of the sub dividers to sell two lots at fixed prices was a disproportional violation of

²⁵ Cases T-252/07 and T-272/07(2010) ECR II-55

²⁶ Case C-58/08 Vodafone and Others (2010)

²⁷ Cases C-197/11 and C-203/11

property rights and to annul this provision of the mentioned Flemish decree.²⁸ The answer of the European Court on the prejudicial question by the Belgian Constitutional Court offered this court a nice escape not to render a substantial judgment on the Flemish decree. By the annulment of the VAT-reduction the internal compensation, provided in the Decree, had disappeared by which the disproportionality had become evident in the terms of the Decree itself. Suppose that no compensation through VAT-reduction had been provided within the Decree, the Constitutional Court had to decide whether the hidden taking to the sub dividers was disproportionate or not and whether alternatives were not better suited. Even when in this case the substantial proportionality test could be avoided, inevitably the Constitutional Court will be confronted with legal questions in which the proportionality test is crucial and in which the cost-benefit -analysis made in the preparatory phase will be decisive. By this the borderline between the function of the judge as ‘delineator’ of policy and a decision maker in policy will become more and more porous.

4. Conclusion

When we understand by politics the art of living together in wider social context, it is impossible to separate law from politics. At the contrary, law is a full part of politics. This is also the case when the ‘world of the law’ has realized a relative autonomy towards policy, when the law becomes more or less ‘policy-proof’. Indeed, also the ‘policy-proof’-character of the law is the result of a political decision, albeit one of the highest macro-political level. In this case the political world decides not to submit large parts of social life to concrete and iterated policy interventions but to submit it to stable, general and abstract rules and principles. The political-legal culture of the European nineteenth century is a clear illustration of this.

In the beginning of the former century this ‘policy-proof’ character of the law have been abandoned to a large extent by which legal rulemaking has acquired more and more a policy character. This evolution has also its impact on the position of the judge.

²⁸ Belgian Constitutional Court, 7 November 2013, 145/2013

In the first place judges have been, without been willing it, placed in a position of policy supplementation because more and more hiatus and contradictions become apparent in the complex and sometimes ephemeral government policies.

The highest judicial instances, which have the competences to decide about the legal validity of legislative and administrative policy measures, are eager to define their position rather as a policy delineator than as a decision maker in policy. In this way they try to avoid a too active involvement into policy questions. The role of a policy delineator implies that the judge checks policy measures on higher norms (constitutional, treaties) which are supposed to be 'policy proof' also. Often the judges leave in fact this role of policy delineator and see themselves involved into the content of policies. Because the quantity and quality of regulations has an always rising impact on the economic attractiveness of a country in a globalized world, governments are more and more eager to check their regulations on their economic necessity (cost-benefit-analysis). When courts have to decide on the proportionality of regulations, one can expect that these courts will consult the preparatory assessments, in which the economic viability of these regulations was scrutinized. When the interventions within the economy through regulations and policies increase, it is to be expected that the economic agents retaliate in some way and demand that these regulations reflect the requirements of economic efficiency. It will be expected from judges that they take up their role in these efficiency checks.

The reciprocal intertwinement of law, policy and economy, we analysed in the preceding sections show that law is not an isolated social phenomenon. The law is an integral part of politics in its large sense. This implies that it is impossible to practice legal science in the way it was when law was 'policy proof' for a large part. To assess law as a kind of an auto-referential system, as an 'autopoeisis', to use the expression of Niclas Luhmann²⁹, has become a real anachronism.

'Politics, I conceive is to be nothing more than the science of the ordered progress of society along the lines of greatest usefulness and convenience to itself' With these words Woodrow Wilson also identified the deeper aim of the law in society, i.e. as a tool of ordered progress.

²⁹ See Niclas Luhmann, *Legitimation durch Verfahren*, Berlin, 1969

