

CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

Answers from the Netherlands

Questionnaire for the preparation of CCJE Opinion No. 18 (2015):

“The independence of the judiciary and its relations with the other powers in a modern democratic state”

Introduction

The following questionnaire aims at gathering essential information on constitutional provisions and other laws (whether statutory or otherwise) concerning the relations between the three powers of state: judicial on one side, and the executive and legislative powers on the other. Where appropriate, the answers to the questionnaire should also provide information on specific issues and concerns in the respondent country on this topic. Answers will provide important material for the CCJE Opinion No. 18 to be prepared in 2015 as well as for the CCJE's next Situation Report.

Questions

- 1) How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

Although the separation of powers and the independence of the Judiciary are broadly recognized as being fundamental for the Dutch constitutional system, the (written) constitution itself is very concise on these topics. It only states that judges are appointed for life and can only be discharged by decision of the Supreme Court. Other safeguards for the independence of the judiciary and rules with regard to the relations between the judiciary and the other state powers are laid down in legislation at a lower level. The Act on the composition of the judiciary and the organization of the justice system (Wet op de Rechterlijke Organisatie) regulates the relation between the minister of

Security and Justice and the Council for the Judiciary and the courts. The authorities of the minister are restricted to the financing of the Judiciary.

At present, an amendment to the constitution is being prepared that aims to better lay down the fundamental right to fair trial before an independent and impartial tribunal.

- 2) Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

One can observe a growing interest in and discussions on this topic, in politics, academia, the media and in the judiciary. Some examples are the following.

- According to the recent GRECO evaluation report on the Netherlands, the members of the judiciary have a long standing reputation of independence and impartiality, and public trust in their integrity is high. However, GRECO puts forward the recommendation that a restriction on the simultaneous holding of the office of judge and that of member of either Chamber of Parliament be laid down in law.
- According to the recent report “Institutional Safeguards”, the current institutional safeguards for the independence and impartiality of the judiciary require reinforcement, e.g. with regard to ancillary positions of judges and of their financial interests, the position of deputy judges and the allocation of court cases.
- New members of the Supreme Court are appointed from a list of recommendations drawn up by the Supreme Court. The House of Representatives receives the recommendations and forwards its selection (by secret voting) to the government. Until recently this was a formality: the members of the House automatically followed the recommendation of the Supreme Court. The last years there is discussion on this procedure and a tendency to let the House have an active say in the appointment of Supreme Court judges.
- A conference was held on initiative of parliament to discuss the relationship between state powers. The main topic was the need for members of the executive and legislative powers to restrain themselves in their criticism of court verdicts for political profit.
- Periodically there is a debate in parliament on the ‘state of democracy and the rule of law’. In this debate various concerns are expressed with regard to the functioning of the judiciary and of parliament and with regard to the interaction between the powers of state. Issues are, e.g., access to justice (higher court fees, less legal aid, making the “judicial domain” smaller by transfer of powers to the prosecution), and the workload of judges and its impact on the quality of justice.

- 3) Has there been any significant debate on the issue of “judicial restraint” or “judicial moderation” with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the

other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

This topic is regularly point of discussion in the Netherlands.

Periodically, some criticism is addressed to the judiciary on the basis that judges go too far in the review and control of decisions of the administration, "the judge must not sit on the chair of the administration".

In the Netherlands, there is no Constitutional Court and, according to the Constitution, judges are not allowed to evaluate if formal Acts are in accordance with the Constitution. However, judges are allowed to evaluate whether legislation is in accordance with international treaties, like the Convention. At present, there are two diverging proposals to amend the Constitution on this point pending in parliament. The first one aims at introducing a form of constitutional judicial review. The second one aims at restricting the authority of judges to directly apply provisions in international treaties. The second proposal is inspired by political criticism directed towards the ECtHR and the national judges; it is claimed that judicial activism infringes "the primacy of politics". It seems unlikely that this proposal (as well as the first one) will be adopted by parliament, but it is an important sign of conflicting views on the relations between the powers of state.

- 4) a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?
b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the "official" reason for the changes or proposed changes.
c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

a) There have been many changes in the laws regarding the judiciary (e.g. new judicial map) but these do not directly affect the relationship between the Judiciary and the other powers of state.

b) No.

c) No, except the discussion mentioned under Question 3 to restrict the application of judges of provisions in international treaties.

- 5) In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".

Almost none. One politician expressed in public that his trust in the judiciary would disappear if he were to be convicted for discrimination.

- 6) To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external

influence by other powers of the state)?

- The relationship between the Judiciary and the Ministry of Security and Justice is regulated by law (see above) and fairly well established. Especially in this period of economic crisis there are budgetary restraints that have a great impact on the administration of justice. As already mentioned under Question 2, there are concerns on issues like access to justice (higher court fees, less legal aid, making the “judicial domain” smaller by transfer of powers to the prosecution), or the workload of judges and its impact on the quality of justice.

7) Do you have any other comments to make with regard to the relations between judiciary and the other powers of state in your country?

- In the Netherlands, the judiciary is conscious of the fact that it must also itself assure its independence, impartiality and professional competences. The balance of the powers of state and the principles of the rule of law presuppose a responsive and responsible judiciary. This is a matter of permanent attention. In this respect, judges in the Netherlands are concerned about the workload and its negative impact on the quality of their work, as is reflected in a Manifesto that approximately 700 judges signed and in a recent report of an audit commission that visited all the courts of the country.