Overall assessment of the draft law introducing the visiting judge concept in Slovakia through the perspectives of relevant experience in the Netherlands

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1. Introduction

I have been asked to make a short assessment of the draft law introducing the visiting judge concept in Slovakia. As I will explain the proposed Act differs substantially from the concept of 'flying brigades' of judges in Dutch legislation. Therefore a detailed comparison of the Slovak Draft Act with current Dutch legislation is not possible. In general the Netherlands judicial organisation takes a different, more pragmatic, stance on matters of efficiency in the judicial process.

It should be mentioned here that constitutional law in the Netherlands leaves quite some discretion to the executive for organizing the judiciary. This rather pragmatic approach has the advantage of easy changing regulations to efficiency needs. But it needs no explanation that this way of legislating is to the disadvantage of the security of judges. It is also important to know that there is no formalised system of case law distribution (yet) in the Netherlands.

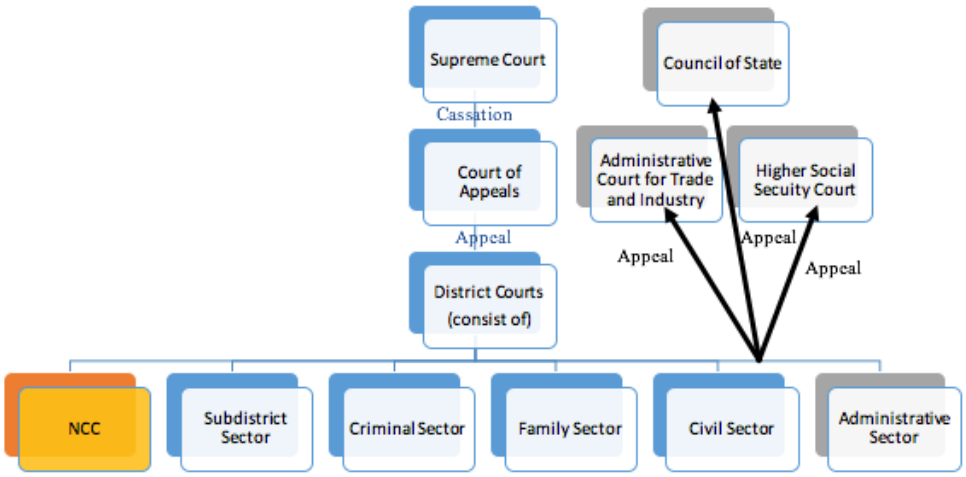
In so far the Dutch organization is not a text book example for other Constitutions. The Dutch situation can only be explained historically. The Dutch Constitution is worldwide the second oldest, written, constitution (The oldest is the US Constitution). It dates back to 1815 and it definitely needs to be brought in line with modern concepts of judicial independence. The Judiciary Act dates from 1827.

From the perspective of judicial independence, the Slovak proposed legislation undoubtedly offers better guarantees for preventing undue influence than the Dutch arrangements that rely to a high degree on good faith and a historically consolidated culture of respect for judicial independence. Differences in history, legal and political culture may explain why the Dutch judicial organisation is rather pragmatic when compared to other countries.

I will provide some general and some more detailed information of the Dutch concept of "flying judges" by focussing on the following topics:

- The Dutch court system: general information
- The Netherlands: a pragmatic approach of judicial organization
- Some remarks on 'flying squads/brigades' and 'visiting judges' in the Netherlands
- Comments on the Slovak Draft Act

2. The Dutch court system: general information



The court system in the Netherlands comprises of different areas of law and a variety of bodies. Judges are independent and cannot be dismissed by the Minister of Judge and Security (hereinafter referred to as 'Minister).

Areas of law

- Civil law (also known as private law)
- Administrative law
- Criminal law

There are four courts of appeal *(gerechtshoven),* which act as courts of first instance only in fiscal matters. They are divided into chambers of three judges each.

What is NCC (just curiosity)?

Organisational structure of the courts

The Dutch court system provides for 11 District Courts (*rechtbanken*), 4 Courts of Appeal and 1 Supreme Court. District Courts are each divided into a maximum of five sections. The sections always include the administrative section, civil section, criminal section and a sub-district section, but family and juvenile cases are often put into a separate fifth section. Cases are heard by a single judge. In cases of civil law, cases involving rents, hire purchase and employment are dealt with by a sub-district judge. In criminal cases, minor offences are also dealt with by a sub-district judge, who usually delivers an oral judgment immediately after the hearing. More serious cases can be heard by a single judge or by a panel of three judges, depending on the complexity or seriousness of the case.

Appeal Courts

Appeal Courts deal with appeals from the District Courts, re-examining the case and giving their own verdict. In addition to criminal and civil cases, the Courts of Appeal also deal with appeals against tax assessments in their capacity as Administrative Courts. Their decision may be contested by appealing in cassation (i.e. for the verdict to be overturned) to the Supreme Court of the Netherlands. Appeals against judgments passed by the district court in

civil and criminal law cases can be lodged at the competent Court of Appeal (there are 4 Courts of Appeal in total);

The Netherlands has a number of special appeal courts in administrative cases:

- The Central Appeals Court for Public Service and Social Security Matters deals with appeals in cases involving public servants and social security cases.
- The Administrative Court for Trade and Industry hears cases relating to socioeconomic administrative law.
- The Administrative Jurisdiction Division of the Council of State is the highest administrative court. The Council of State is not part of the organisational structure of the judiciary.

Supreme Court

Appeals in cassation in civil, criminal and tax law cases are lodged at the Supreme Court of the Netherlands. The supreme judiciary body is the Supreme Court of the Netherlands (Court of Cassation). It is staffed by 35 judges. Its principal task is to supervise administration of judge and to review the judgments of lower courts.

Netherlands Commercial Court (NCC)

On the 11th December 2018 the Dutch Senate approved the bill for the new international trade chamber of the Amsterdam District Court, known as the Netherlands Commercial Court, and the Netherlands Commercial Court of Appeal. NCC is part of the Dutch court system. Proceedings and judgments are in English.

The Council for the Judiciary

The Council for the Judiciary, introduced in 2002, is part of the judiciary system, but does not administer judge itself. It has taken responsibility over a number of tasks from the Minister of Judge. These tasks are operational in nature and include the allocation of budgets, supervision of financial management, personnel policy, ICT and housing. The Council supports the courts in executing their tasks in these areas. Another central task of the Council is to promote quality within the judiciary system and to advise on new legislation which has implications for the administration of judge. The Council also acts as a spokesperson for the judiciary on both national and international levels.

2. The Netherlands: a pragmatic approach of judicial organization

Compared to the Slovak Act No 385/2000 on Judges and Lay Judges, the Dutch Act on the Legal Position of Judicial Officers (hereinafter referred to as 'LPJO') is less detailed and precise. The LPJO is the implementation of Article 117 of the Dutch Constitution, which reads as follows:

> *1. Members of the judiciary responsible for the administration of judge and the Procurator General at the Supreme Court shall be appointed for life by Royal Decree.*
> *2. Such persons shall cease to hold office on resignation or on attaining an age to be determined by Act of Parliament.*
> *3. In cases laid down by Act of Parliament such persons may be suspended or dismissed by a court that is part of the judiciary and designated by Act of Parliament.*
> *4. Their legal status shall in other respects be regulated by Act of Parliament.*

Article 117 paragraph 4 of the Constitution attributes power to the Legislature. The wording 'shall be regulated' in paragraph 4 implies that the Legislature may delegate powers to the government (Royal Decrees) and to the Minister (regulations) to further detail the legal status of judges.

3. Some remarks on 'flying squads/brigades' and 'visiting judges' in the Netherlands

For a good understanding of judges in the Netherlands distinction should be made between two groups of judges:

- life time appointed ('full') judges, and
- life time appointed deputy judges.

Deputy judges are honorary judges who only occasionally judge cases in a three judge panel. They are often law professors or retired judges. Only once in a while (once or twice a month maximum) they co-judge cases.

Flying brigades old style

In the early years of 2000 the Dutch judiciary has experimented with a Flying Brigade in civil law cases. This was a rather informal yet successful practice. Up to 2007, during five years, 30 court clerks based in The Hague District Court, under supervision of 6 judges, have been writing 7500 civil judgements behind the scenes. The cases were sent from all District Courts to The Hague. When finalised, the judgements were handed down by the courts where they originated. Doubts have been raised whether this procedure met the criteria of Article 6 of the ECHR as the judgements, although written under judicial supervision, were only in name delivered by a court. Nevertheless, no procedure has been initiated with a view to obtaining the annulment of a judgement issued in this procedure for the specific reason of its non-compliance with Article 6 of the ECHR. (?)

Flying brigades of the new style

The flying brigades of the new style are more transparent. They are especially active in criminal law at this moment. In the Netherlands all full judges of the district courts are *ex officio* judges in all other 10 district courts (Article 40 Judiciary Organisation Act). The same applies for all judges in the appeal courts; they are all *ex officio* judges in all other 3 courts of appeals (Article 58 Judiciary Organisation Act).

The *ex officio* appointment in other courts has been introduced in order to make the system more flexible. Judges from, for example, the Court of Amsterdam can – on request of another court, and with his/her consent - take part in court hearings in the courts of Appeal of The Hague, 's-Hertogenbosch or Arnhem-Leeuwarden. Reasons for judges "visiting" other courts are mainly twofold:

- It may occur that smaller courts miss specialist judges, in which case a visiting judge from one of the bigger courts fills a gap.
- Visiting judges – and more and more visiting *panels* of three judges – help out in other courts to reduce a backlog.

This is not only to the advantage of the receiving court, but also to the court of the visiting judges. It should be reminded that courts in the Netherlands are financed on the basis of output. In case of a temporarily or sudden drop of incoming cases, a problem arises because the court cannot meet budget arrangements and risks a lower budget next year.

Visits are based on an agreement between the two courts. As there is no formalised system of case law distribution in the Netherlands it is easy to 'fly in' judges from other courts once in a while. In theory it is possible that Amsterdam judges hear cases as 'Arnhem' judges in the Amsterdam court building. Because it is important that courts are not at too much distance of the litigants, it is preferable that Amsterdam judges travel to Arnhem in such case. It can even be more complicated: an appeal judge from The Hague, who volunteers, can be sitting in a three judge panel of Amsterdam appeal judges, hearing cases for the Arnhem Appeal Court, sitting in a Utrecht District Court building. Of course all of this is not very transparent to litigants and lawyers, but it can happen.

Transfer of cases

For efficiency reasons it is also possible to transfer cases from one court to another. Article 46a Judiciary Organisation Act provides that in the event of a temporary lack of sufficient court capacity within the district, the Minister may, after hearing the Council for the Judiciary, temporarily designate another court to which the overburdened court may refer cases for consideration and decision. The designation is valid for a maximum of three years and can be extended once for a maximum of one year. If the designation relates to criminal cases, the designation will not take place until the Minister has heard the Board of Procurators General.

4. Comments on the Slovak Draft Act

Material criteria

From a Dutch point of view the Act of Parliament is rather overregulating some areas of law which as I have mentioned before makes the arrangements rather inflexible. We would leave certain areas of this law to be regulated on a lower level than an Act of Parliament.

At the same time it seems that rather important issues that in the Netherlands definitely would be regulated are left to the discretion of court presidents.

Article 1 § 28a

As the selection procedure is of paramount importance to the composition of the national bench – and is as such vulnerable for undue political influence - one would expect the law to prescribe at least material criteria for the selection procedure for judges. The arrangement now seems to be quite undefined. Who is the president consulting; what selection criteria are used; is there a selection panel, how is it composed, and how is it controlled and does it answer to a judicial body within the court?

Article 1 § 28d

The same applies for judicial education. It is not clear what is meant by **practical skills** required for the office of judge. Very often practical skills are in essence rather theoretical and moral. For example, the question how to interpret the law. Younger democracies are often more positive law orientated and legalistic. Which is understandable from a national perspective. But how does this fit in the concept of the European Convention on Human Rights? The ECHR is a living constitution and needs a different, more open and creative approach of human rights. The EU law has its own specifics.

Suggested reading:

- CCJE Opinion n°11 (2008) on the quality of judicial decisions;

- CCJE Opinion N° 4 (2003) on training for judges.

Selection procedure and management of the court: general

More in general, it may be useful to take a look at recent case law of the ECHR where the Court stresses the importance of internal judicial independence, especially with regard to the role of court presidents

In the case of Agrokompleks v. Ukraine it held:

> *"137. The Court further observes that judicial independence and impartiality, as viewed from an objective perspective, demand that individual judges be free from undue influence – not only from outside the judiciary, but also from within. This internal judicial independence requires that judges be free from directives or pressures from fellow judges or those who have administrative responsibilities in a court such as, for example, the president of the court. The absence of sufficient safeguards ensuring the independence of judges within the judiciary and, in particular, vis-à-vis their judicial superiors, may lead the Court to conclude that an applicant's doubts as to the independence and impartiality of a court may be said to have been objectively justified (see Parlov-Tkalčić v. Croatia, no. 24810/06, § 86, 22 December 2009, with further references)."*

More recently the Court held in the case of Baka v. Hungary:

> *"4. The principle of the independence of the judiciary is not simply a matter of its relations with the executive and the legislative branches. It also concerns judicial independence within the system of the administration of justice itself. Judges must be free, in their individual capacity, not only from any external influence, but also from any "inside" influence. This "internal judicial independence" implies that judges do not receive instructions and are not subjected to pressure from their colleagues or from persons exercising administrative responsibilities in a court, such as the president of a court or the president of a court's section (see Parlov-Tkalčić v. Croatia, no. 24810/06, § 86, 22 December 2009, and Agrokompleks v. Ukraine, no. 23465/03, § 137, 6 October 2011; see also Moiseyev v. Russia, no. 62936/00, § 182, 9 October 2008). The absence of sufficient guarantees ensuring judges' independence within the judicial branch, and especially vis-à-vis their superiors within the judicial hierarchy, could lead the Court to conclude that an applicant's doubts as to the independence and impartiality of a court may be said to have been objectively justified ..."*

Suggested reading:

- CCJE Opinion n°19 (2016) on the role of court presidents;
- CCJE Opinion N° 2 (2001) on the funding and management of courts;
- Opinion N° 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges.