
Organization Development of the Dutch Judiciary, between Accountability and Judicial Independence

By Philip M. Langbroek¹

Introduction

The Netherlands are a country on the European Continent with a French inspired legal system as far as civil and criminal law is concerned. Administrative law has followed a different development and reflects the middle position of the Netherlands between the French, English and German administrative law systems, while maintaining a dominant procedural position of public administration. However, the organization of the Dutch judiciary mainly follows the lines of the original French conceptions: it has been organized in accordance with the concepts brought to the low countries by Napoleons' army. This traditional continental judicial organization, operated by the ministry of justice and court presidents' for over 150 years has gone through considerable institutional and organizational change during the last 15 years.

In this article I will sketch the outcomes of a mayor evaluation research of the changes in the Dutch judiciary that started in 1995 and evolve until today. I will do this by first describing the change process against the background of the New Public Management. Second, I will describe the proposals for change and the actual changes. Finally I will describe the most salient outcomes of the evaluation study. I will conclude with a brief discussion of these outcomes.

New Public Management and the change process in the Dutch Judicial Organization

In 200 years the judiciary went through a development that started with a relatively unimportant position. During the 19th century the courts evolved into adjudicators by means of juridical interpretation of law. They had a limited capacity to block or reverse political decision-making. That position has remained to date, but judges are now an integrated part of court-organizations, which are subjected to intensified public and political accountabilities. The final transition is the result of the New Public Management inspired development of the Dutch Judicial organization.

The approach taken towards the Dutch courts fits the New Public Management approach to public administration. This approach propagates to implement models for the organization of competition oriented organizations – businesses - to organizations of public administration.² The drive behind this model is the strong suggestion that this would cause such organizations to provide better services to the general public and a better legitimacy of such organizations towards both the general public and political branches of government, by means of better accounting mechanisms. It should be stressed however that the New Public management does not imply a uniform regime of organization and policy development in public administration. The same holds for the promise that NPM-models automatically lead to a better legitimacy of a public organization, e.g. by more respect from policymakers and by a higher trust of the general public. Apparently success or failure of NPM-reforms in public administration, do depend on other factors than just implementing business models in public administration.³

The position of courts and judges in relation to other branches of government still has recognizable original French traits.⁴ Courts are e.g. not allowed to review legislation against constitutional norms, and there is a Court of Cassation for civil and criminal cases (and for tax cases) . Within the context of applying legal rules, precedent, especially precedent set by the highest courts, plays an important role. This allows the courts sometimes to play a role with societal and political effects, as a consequence of cases brought before them. It should be stressed that court decisions on e.g. the right to strike or criminal prosecution in cases of euthanasia on request, in countless taxation cases and other decisions of administrative courts, are based on case by case development of judicial doctrine by the Dutch Court of Cassation.

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² There is a lot of literature on New Public Management: e.g. Kate MacLaughlin, Stephen J.Osborne and Ewan Ferlie (eds.), *New Public Management, Current trends and future prospects*, Routledge, London 2002; Christopher Pollitt, Sandra Van Thiel and Vincent Homburg (eds.), *The New Public Management in Europe, Adaptation and Alternatives*, Palgrave Macmillan, February 2007; for a critical approach: John Seddon, *Systems Thinking in the Public Sector*, Triarchy Press, Axminster 2008. In the Netherlands, the book of David Osborne and Ted Gaebler, *Reinventing government: how the entrepreneurial spirit is transforming the public sector*, Reading, Addison Wesley, 1992, was exceptionally popular amongst policymakers at that time.

³ E.g. Steven van de Walle, *Perceptions of administrative performance, the key to trust in government*, Leuven, 2004, Belgium, who stresses that better accounting of administrative performance do not necessarily lead to a higher public trust.

⁴ J.H. Merryman, *The French deviation*, *American Journal of Comparative Law*. issue 44, 1999, p. 113-114.

Also the judges' associations act as trade unions and professional associations only without reference to debates in the domains of political parties, parliament and government. The Dutch judges' association e.g. may take a stand on the relation between media and the courts, and on the provision of information by the courts. This however, is related much more to the position of judges and the relation of the courts with the general public than to the political domain of political parties, parliament and government.

This means the Dutch courts and judges usually do not have a strong political profile, even although sometimes politically sensitive cases are brought to the courts. A current example is the -complaint based - criminal case against populist politician Geert Wilders, accusing him of discrimination against the Muslim population by sowing hate against them. And, like in all cases, a court cannot refuse to decide a case when all conditions for the courts' competence are fulfilled, with, or without political profile.

The change process in the Dutch Judiciary was directed at making the judges more aware of the advantages of cooperation within their courts and between their courts, in order to maintain public trust and political respect. The aims were also to get organised to come to grips with fast societal changes, and also to develop itself into an organization that would be able to withstand public pressures. Improving services for the public, but also protecting judicial independence understood as unbiased judicial decision making have been key values throughout the process.

The evolution of change⁵

The formal situation before the change of the Judicial Organization Act in 2002, was as follows. The judiciary is a constitutional institution and, judges are to be appointed for life. However the actual organization was considered the responsibility of the ministry of justice. The former Judicial Organization Act instituted nineteen 'Arrondissementen' (the geographical areas of the first instance courts) and five 'Ressorten' (the larger geographical districts of the secondary appeal courts) for the criminal and civil jurisdictions. Arrondissementen and Ressorten were organised as geographic areas for adjudication, as territorially decentralized services of the ministry of justice. In each arrondissement a public prosecutions office functioned, together with a district court and a different number of 'kanton' courts (small claims/small crimes). The service organizations served both the courts *and* the public prosecutions offices in their districts. They were headed by a director, who, as a civil servant, was responsible to the ministry.

Judges and courts, as an institution, developed in the nineteenth century. Legislation has grown in numbers and laws have been periodically updated during the last century at an ever growing speed. At the same time, judges maintained their own unique and highly individualistic professional ethos and working culture, where professional status and individual autonomy prevailed. Judges had no inclination to work together as civil servants in other public organizations, most of which rely on hierarchy and project management for coordination and cooperation to get work done. This attitude of most judges was felt as an extension of the constitutional requirement of an independent judiciary, and was sometimes presented as a strong point.⁶ On the other hand, in terms of preparing courts and judges to adapt to social changes, it represented a weakness. Judges by definition must deal with changing social situations, and apply the law in disputes that arise in constantly changing social contexts. The Netherlands had become a multicultural society; ICT did change public and private organizations and the way people work and communicate; and medical and biological breakthroughs provided choices that seemed impossible 25 years earlier, with both legal and ethical implications. Legislators try to adapt the law to meet new circumstances by means of new legal statutes, including. environmental law, privacy law, health care law, law on bio-technical experiments, law on procedures for asylum-seekers, law on reintegration of unemployed, the internationalization of crime and so on. Judges are also increasingly confronted with cases that cross national borders. This is not only true for trade law but also for criminal law. Furthermore, the European Union (EU) was and is standardizing regulations in many fields – thus prompting constant change in the national laws of the member states.⁷

⁵ For an overview of the Dutch legal system and its societal functioning, see: Erhard Blankenburg and Freek Bruinsma, *Dutch Legal Culture*, Kluwer, Boston, Deventer 1994.

⁶ This view was expressed by the president of the supreme court when the bill of the new judicial organization act was already sent for advice to the Council of State. See: Th. B. ten Kate, W.E. Haak, *De modernisering van de rechtsprekende macht*, *Nederlands Juristenblad* 2000, p. 1607-1610.

⁷ Market Competition is dominant Area, but also the European cooperation in the field of Criminal Law. Amongst the latest developments are the implementation of the Framework decision on the European Arrest Warrant (an arrangement for surrendering of convicts and suspects between EU member-states), and the Framework decision on the European Evidence Warrant – the latter not yet having entered into force.

Eventually judges realized that even courts and judges had to go through considerable efforts of organization and training to be able to deal adequately with these changing subjects, while also having to deal with increasing media pressure.⁸

During the 1990s several changes were implemented. First of all, the concept of 'integral management' was introduced. The courts would get a separate court manager, and this functionary would have to cooperate with the president of the court for the court's organizational management. This was a difficult position, because the court manager was a civil servant responsible towards the ministry of justice, but also had to actually serve the president and the court organization. Next, in 1994, sectors for administrative law were added to the district courts. Except for the Council of State, the administration of the specialized administrative appeal courts (social insurances, economic competition, industrial relations, students' grants and loans tribunals) was transferred from their different ministries to the ministry of justice.

Following the parliamentary inquiry into the drug trafficking policies of the Public Prosecutions Offices, the PPO has been reorganised. This also involved a reorganization of the services of court districts (arrondissementen), separating services for the PPOs and the courts. These formal changes took place while a debate evolved on the position and tasks of the judiciary as a whole. It should be noted that while these changes were implemented, a fundamental debate about the position and organizational functioning of the judiciary within the judiciary and between the judiciary and political branches of government evolved. At that time, the trust of the general public was at a fair level of about 60%, although 'repeat players' and business executives held the judiciary in higher regard.⁹

It has been a happy coincidence that the National Building Service launched a plan to improve the court buildings in 1989. Most of the court buildings were too small for the increased numbers of judges, court staff and files. The overcrowding caused judges to work mainly at home; and many of them wrote judgments by hand instead of using a computer. Over the following 12 years, many new court buildings were built, some of them with extraordinary designs, with enough room for judges and court staff to work in the courts' back-offices. Thus the new buildings helped to create an environment in which judges and court administrators could cooperate.

With more crimes brought to justice, it also became apparent that there was not enough prisons capacity; and convicted criminals for whom there was no space in jail were sent home. The public, the press and many politicians protested against this policy. This occurred while the building program for new prisons was underway. On the investigative side, a parliamentary committee on criminal investigations was established. Its 1996 report outlined the problems of the Public Prosecutor Office's management of investigative activities by the police, especially the methods used against drug-related crimes. Methods included telephone taps, searches on order of a public prosecutor, infiltrations into allegedly criminal organizations by police or informants; and pseudo-purchases of and trafficking in illegal goods to advance criminal investigations. In response to increasing political pressure, public prosecutor offices engaged in their own war on crime. They did this by organizing their actions independently in each court district, without adequate control of the police and without legal legitimacy or control by the courts (including the appellate courts), but especially without adequate control of investigating judges. The blame for this was assigned to the respective public prosecutor's offices. But the majority of members in the Lower House of Parliament at that time also blamed themselves for applying excessive pressure on the police and the prosecutions service to combat crime. The conclusion that the courts had failed to control the criminal investigations adequately was almost ignored in the public debate. But a group of judges feared that the next parliamentary inquiry might be directed at the judiciary. They wanted to prevent being that much exposed to public scrutiny, risking losing the trust of the general public altogether. They called themselves: the Future of the Judiciary. The group was led by Mrs. Charlotte Keijzer, a judge then working temporarily at the Judicial Administration Service of the Justice Department, and Mr. Jan Nijenhoff, a judge from Arnhem district Court and Secretary of the Dutch Association of Judges at that time (1995).

As criticism of the courts by politicians began to increase, one of the foremost critics was the Queens Governor of the Province of North-Holland, Van Kemenade. Other politicians of like mind said the government was overburdened because conflicts between citizens and public bodies became too heavily embedded in too many legal rules. This applied especially to the new administrative legal protection system based on the General Administrative Law Act of 1994 (GALA). This involved the instalment of administrative law sectors (Dutch courts have separate divisions for civil, criminal and administrative cases and a division is called: 'sector') in the district courts, and thus the creation of many new judicial

⁸ Of course, this is not an exclusive Dutch phenomenon. See e.g. the excellent Study of Pamela D.H. Schulz, *Courts on Trial: Who appears for the Defence?*, PhD Thesis, University of South Australia, Adelaide 2007.

⁹ A.W. Koers, J.A.M. Vennix, J.M.M. Austen, *Waar staat de ZM?*, Utrecht 1996. This also is shown in figure 6.1. A. Hendriks and J. van Erp, *Waardering van de rechtspraak*, in: J.G. van Erp (red.) *Kwantitatieve Ontwikkelingen Rechtspraak 2000-2005*, Informatie ten behoeve van de Evaluatiecommissie Modernisering Rechterlijke Macht, WODC, The Hague, Cahier 2006-10, p. 68. from 1997 to 2005, the trust of the Dutch public as measured in the Eurobarometer fluctuates around 60%

positions at those courts. Many of those judges had been working as juridical staff at the Council of State and pursued similar ways of judging as the Council of State before the introduction of the GALA. This involved occasional dismissal of decisions of e.g. mayors of several cities to close down drug-café's that caused trouble in the neighbourhood. Because of such decisions, which also took the rights of the café-owners into account, the mayors showed their discontentment openly in the media. Because mayors are appointed politicians, they also used their party connections to complain, and the complaints received support by the judicial division of the Council of State, whose jurisprudence restricted discretion of first administrative first instance court judges.

It was in the 1990s that newspapers and television programs also took increased interest in criminal cases, with court proceedings in the spotlight, as crime went on the upswing and quickly became a political issue. While there was no equivalent of the O.J Simpson trial, it was clear that courts and judges were under media and political pressure to account for how they dealt with every type of case.

However, there was also a bright side. Judges generally did not participate in public political debate, and the public for its part exhibited a fair degree of trust in the judiciary.¹⁰ Even so, criticism of courts and judges has increased even more in the years since 2002, including among the public commentators, barristers, solicitors, scholars and litigants, but above all, politicians. Politicians frequently suggested courts were inefficient, especially when proceedings took years of expensive court time. New technologies and thus even more transparency of the body of jurisprudence have brought to light inconsistent judgments in similar cases. Prosecution of a purse snatch in Amsterdam and a purse snatch in the town of Assen should not be decided too differently, as the media and lawyers alike closely watch court verdicts, but above all judgments in similar cases heard in a particular court should not differ materially.

Pressure for change; proposals bottom-up:

The appearance of the Future of the Judiciary group appeared to be timely, as the discussion among experts on public and political accountability for public services had intensified, leading to more scrutiny of the position of judges within the court organization and their traditional institutional independence. The Future of the Judiciary initiative had two aims: (i) to begin a debate among judges about the significance of societal developments for courts and judges; and (ii) to establish an agenda for the judiciary to deal with the outcome of these discussions.¹¹

The overall aim was to establish the judiciary as a significant societal player based on general trust of the public and respected by the political branches of government. The project was financed by the Department of Justice and organised with a very low political profile to keep the process free from political comments or possible interference. The ownership was in the hands of stakeholders, in this case an assembly of leading judges of the District and Appeal Courts. It consisted first of consultation rounds with all court management boards to encourage participation by individual courts. Second, views of stakeholders (insurance companies, the public prosecutions department, trade-unions, employers, administrative office holders, scholars in law, public administration, sociology of law and ICT) were solicited as well as the view of some 100 judges participating in 10 sessions on the work and organization of the judiciary. Advice was sought from Jaques Vennix, an expert in group model-building as a tool for strategic choices in organization development¹². The outcome of this first round of consultations was presented to all members of the judiciary. The third phase of the project consisted of a final round of some 14 discussion sessions throughout the country, with the participation of 175 judges. The outcome was very clear; judges agreed they should change their ways and that organization development was necessary.

For the judges, the most important themes were:

- Coordination of jurisprudence within and among the courts.
Participating judges were in favour of making each other's jurisprudence accessible to all by means of ICT. Guidelines relating to the use of rules of procedure and, for specific issues also relating to the content of court decisions (e.g. alimony calculations, sentencing guidelines, calculation of compensation in case of involuntary dismissal from a job), were discussed.
- Quality of jurisprudence and court sessions.
Judges have mainly been focussed on the content of their work, not on the organization. Judges believed treatment of clients by the court administration could be improved, but the role of judges in this remained open to debate.
- The gap between judges and court clerical staff.

¹⁰ Idem.

¹¹ See footnote 5.

¹² J.A.M. Vennix, *Group Model Building: Facilitating Team Learning Using Systems Dynamics*, Chichester, 1996.

Many judges believed this was not right, but did not know how to take responsibility for the organization of services without a clear definition of judicial and organizational responsibilities. The uneasy feeling of the judges about working relations was generally shared by members of the clerical staff who also pleaded for better career possibilities.

- A council for the judiciary with administrative competences.

Many judges explicitly referred to the ministry of justice as the cause of their discontentment. They believed there should be some institutional mechanism to defend their interests towards Parliament and the ministry, and to communicate with the media and the public about all issues concerning the judiciary. Members of this council should be judges with managerial skills.

Restructuring the Judicial organization in the State: proposals top - down.

After the conclusion of the parliamentary debate on the inquiry into criminal investigations, the Lower House asked the then minister of justice, Sorgdrager, to start an inquiry into the organization and equipment for the judiciary.¹³ In June 1997, the Leemhuis¹⁴ Committee was installed, and reported in January 1998. It proposed to improve the judicial organization in regard to judicial independence, quality and efficiency. Main problems to be solved were: a tensions in the relationship between the Justice Department and judges; a lack of organization among judges; a shortage of personnel to develop and implement necessary changes; a lack of leadership; and the absence of decision making structures for judges. The Committee proposed that a Council for the Judiciary be instituted. This council would be the public body governing the judicial organization as a whole, with tasks in the fields of budgeting, judicial co-operation, personnel policy, quality management, public services, appointment of judges, and of course the management of housing, security, IT, and information. The council would also have a main task in annually negotiating funds for the judiciary with the justice department and dividing funds amongst the courts. The council was proposed to have five members: three judges and two others who should be experts on finance and organization. The general idea was to have a buffer between politics and the courts. The other major element of the Leemhuis Committee's advice was to introduce a new management model for the courts. Each court would have a board consisting of two judges, the president, the director for quality management (a judge) and the director for organizational management (a professional manager). The board would sit above the judges of each court regarding their organizational functioning (e.g. planning and case management. It would, of course also direct the members of the local court service organization. For its financial and organizational management, the courts' management boards would be accountable to the Council for the Judiciary.¹⁵ This would involve following strict accounting rules and developing reliable registries on production, finances and quality management.

A further milestone in the ongoing change-process was the decision of the Dutch Cabinet that the proposals of the Leemhuis Committee would be the basis for changes in the Act on the Judicial Organization. Investments in the courts would be prepared by the Judicial Organization Reinforcement Project (*Project Versterking Rechterlijke Organisatie-PVRO*). It should be noted that this outcome was the result of a political compromise. Politicians were willing to invest in the judiciary if the judiciary would be willing to take responsibility and to be accountable for its functioning. The PVRO project commenced in the spring of 1999. The assignment of the project group was to implement the ideas developed by the Leemhuis Committee in accordance with the Cabinet decision.

This project was an effort to develop the judicial organization into separate organizational domains. The projects within the PVRO concerned the decision-making and management structure, personnel policies, ICT, working processes, quality management, co-ordination of punishment-sentences, regulations for handling complaints, regulations for divorcing, and applications of rules of civil and administrative procedure.¹⁶ The idea was that judges themselves would develop and implement the changes on the subjects at hand. So, for example, a PVRO working party developed a model for personnel policies within the judicial organization, and a local change team would be expected to organise the implementation of that model within each separate court organization.¹⁷ These changes could not be of a permanent character if the institutional setting of the courts and the judges were not changed as well. Hence bills for a new Judiciary Organization Act and for an Act on the Council for Judicial Administration were sent to Parliament in June 2000.

¹³ December 10, 1996, TK 1996-1997, 25000 VI, nr. 30.

¹⁴ At that time the Queen's governor of the Province of South-Holland.

¹⁵ Adviescommissie toerusting en organisatie zittende magistratuur (Commissie Leemhuis), Rechtspraak bij de tijd, Den Haag, januari 1998.

¹⁶ PVRO; programmaplan April 1999.

¹⁷ Derde voortgangsreportage PVRO, 1^e halfjaar 2000, van landelijk naar lokaal, Amersfoort 2000.

The new Judicial Organization Act

The bill for a new Judiciary Organization Act¹⁸ proposed some important institutional changes. First the Act provided a legislative basis for a situation which had developed since the late 1980s: the existence of a management board for each individual court (district courts, appeal courts, but not the Supreme Court), consisting of a president, the co-ordinating vice presidents of the different courts sectors, and the managing director (not a judge). Under the Act, these members are to be appointed by Royal Decree for a period of 6 years. The idea behind this limited period is that it should be possible to replace a member of a board if s/he does not fulfil their function adequately. Reappointment is possible for another 6 years. This was a revolutionary change, because until then the president of a court was appointed in that function for life. The consequence of this change was that – in principle, a president or a judicial board member can be dismissed from the courts' management board, but, of course, not from their judicial office. So far, such a dismissal has not occurred.

The tasks of the management board are to take care of ICT and information management, accommodation and security, quality management and personnel. Other tasks are to further consistency of judgements and their juridical quality. In these matters judges and court staff alike are subordinated to the management board organizationally. But the management board must not influence the application of rules of procedure or law in concrete cases. This may be viewed as an expression of the fact that Dutch judges are formally called 'judicial civil servants', in the Statute act regulating their labour position.

Via the budgeting process, the Minister of Justice has competences to oversee and enforce the well functioning of the Council for the Judiciary, especially concerning financial and production reports. The Council is accountable to the ministry for providing information on production and quality of services, and for money received and spent. The budgeting system is arranged by Royal Decree (order in council). It was the cabinets' plan that the courts would receive annual funds according to the number of cases decided in the year before. This system was intended to stimulate the courts to prevent backlogs and increase productivity¹⁹ (productivity is number of cases in a year divided by the total amount of fte employed by the courts). However, the introduction of a separate and effective system of quality management is thought of as a necessary precondition for implementing such a budgeting system. To date, both such an out-put based budgeting system and a related system for quality management are functioning.

Another major change is the integration of the kanton courts (small claims/ small crimes) as a separate sector into the district-courts. This did not imply a physical centralisation of court activities, but kanton courts would cease to exist as separate organizational units. Sub-district judges had resisted this change effectively for almost 10 years²⁰, but they lost their battle to maintain their own organizational culture, which differed considerably from the organizational cultures of the district courts. Kanton judges had developed a way of dealing with issues which was based on their practical experiences, rather than on theoretical considerations. This pragmatism may be seen to have developed as a consequence of the large number of cases they had to deal with (and continue to have to deal with). For instance, to make guidelines for the application of material law in the fields of divorcing or damages at involuntary discharges was seen as anathema by most judges of the civil and criminal court sectors. The pragmatism of kanton judges went even further, as they preferred to apply the sentencing guidelines of the public prosecutions office in most traffic offences. It is therefore arguable that 'professional autonomy' probably had a different meaning for judges of the civil and criminal court sectors compared to kanton judges. Most kanton judges had had to operate in more organizationally-constrained environments which required pragmatic approaches to resolving issues.

From a continental law system perspective, the new judicial organization Act also enabled a much more flexible deployment of judges throughout the country. Under this Act, each judge is now appointed as a substitute judge in all the other courts at the same level. This was intended to allow the courts to engage in deployment of their judges to any a court in need of their capacity. Based on this arrangement, special provisions have been made for the allocation of aliens' cases and of 'mega' criminal cases. The latter are allocated to the courts with sufficient capacity at the time the case is fit for trial.²¹

¹⁸ TK 1999-2000, 27 181 nrs. 1-3.

¹⁹ Commissie Meijerink, *Recht van spreken, interdepartementaal Beleidsonderzoek Bedrijfsvoering Rechtspraak*, The Hague, July 1, 1999

²⁰ The way they did this was described by Pim Albers, in his dissertation: *Met Recht Herzien, Een onderzoek naar de beleidsvoorbereiding en implementatie van de eerste en tweede fase van de herziening van de rechterlijke organisatie*, Tilburg 1996.

²¹ Mega cases are defined as cases with more than 30 hours hearing time. Also see: Mirjam Freudenthal and Philip M. Langbroek, *assignment of cases to the courts in the Netherlands*, in: *Case Assignment to and within Courts, a comparative study in 7 countries*, Philip.M. Langbroek, Marco Fabri (eds. and research directors), Shaker Publishing, Maastricht, November 2004, p. 167-191.

The judicial profession remained quite sceptical about the proposed budgeting system.²² They feared their professional autonomy, if not their independence, would be affected by financial and economic considerations.²³ Others criticized the proposed Act heavily from a constitutional point of view.²⁴ And even the President and the Procurator General at the Supreme Court objected to the speed with which the cabinet wanted to have the acclaim of Parliament for both bills.²⁵ The criticism was not only generated by lawyers. Sociologists of law also doubted the effects the bills will have on the authority of judges.²⁶ Nonetheless, the bills to change the judicial organization act were adopted by parliament, even although in the senate quite some scepticism was expressed. The political promise to invest in the judiciary was more compelling than holding on to traditional judicial views on the position of the judiciary within the state organization. The new Act entered into force on January 1, 2002.

Money according to production

The Council for the Judiciary and the courts are not autonomous legal persons according to civil law. They are legally a part of the organization of the national state and their finances are a part of the ordinary financial accounting system under the law on financial accountability. The Order in Council on the finances of the courts, therefore is of great importance for the relationship between the Council for the Judiciary and the courts, and for the position of the Council in relation to the Ministry of Justice.

During the years 2002- May 2005, the new accounting system was introduced into the courts. The system of production measurement and related budget allocation was not put into effect until May 2005, even although measured production showed a huge increase of numbers of cases decided during 2003-2004. From input orientation the financing system was changed to output orientation. According to the new financing system the courts and the judiciary as a whole receive money in accordance with the production of cases decided in the year previous to the budget year. A small part of the budget, however, is allocated as a lump sum, related to special projects and special costs for court-proceedings (e.g. hiring experts by the courts). Special projects usually are started on request of one or more courts (e.g. mediation in administrative law proceedings, or mutual coaching of judges in their performance of court hearings (there are some 100 of such projects going on in Dutch courts). The courts' production is measured in 49 categories of cases. To each of these categories an amount of minutes (time units) is attributed, meaning the average court time necessary to handle such a type of case. This amount of minutes is based on empirical workload measurement to be repeated every 3 years. Therefore, the money the separate courts are entitled to is: number of cases decided per category x minutes per case x minute price. No need to say, this system requires reliable production registries and accounting systems in the courts.

The Council for the Judiciary receives money from the ministry of justice (as a part of the budget bill for the ministry of justice) according to the aggregate production of all the courts together. In the relationship between the Council and the Ministry of Justice, the number of categories has been reduced to 11 categories, but in the relationship between the Council and the courts, the 49 categories remain. For these 11 categories the Minister of Justice sets the price per minute every three years.

A budget rule is that each court may have a reserve capital of maximum 5% of its annual budget. When they have earned more, the extra money flows back to the account of the Council for the Judiciary.

It is an essential part of the financing system that a nation-wide system of quality management is activated in the courts, so as to counterbalance the possible economizing effects of the financing system on the courts and judges.

²² See: A.M. Hol, *Wijsheid of efficiëntie, over de spanning tussen rechtspraak en management*, in: P.M. Langbroek e.a. (red). *Kwaliteit van rechtspraak op de weegschaal*, Utrecht/Zutphen 1998, p. 255-267. The editors of NRC-handelsblad (one of the leading national newspapers in the Netherlands) feared cynical effects of such a budgeting system. Editorial August 17, 1999.

²³ Ibid. p 65. F.C.J. van der Doelen, *Measuring the Quality of Judges*, argues measuring the quality of the performance of judges by the courts does not have to interfere with their independence at all, in: Marco Fabri and Philip M. Langbroek (eds.) *The Challenge of change in judicial systems, developing a public administration perspective*, IOS Press, Amsterdam, Washington DC, September 2000, p. 155-166.

²⁴ P.P.T. Bovend'Eert, C.A.J.M. Kortmann, *Het Court-Packing Plan van het kabinet Kok*, *Nederlands Juristenblad* 2000, p. 1769-1775.

²⁵ Th. B. ten Kate, W.E. Haak, *De modernisering van de rechtsprekende macht*, *Nederlands Juristenblad* 2000, p. 1607-1610.

²⁶ Nick Huls, *Wie bewaakt de eenheid en de kwaliteit van de derde macht?*, *Nederlands Juristenblad* 2000, p. 1776-1777.

Evaluation of the first 4 years

In 2006 the new setting of the judiciary was evaluated from several organizational and professional aspects. The evaluation took place under the guidance of the Deetman Committee²⁷. Within this framework, the study I participated in focussed on the functioning of the court organizations between the council for the judiciary and the judges.²⁸ We wanted to see how the Council for the Judiciary and the courts' management boards dealt with their tasks in applying the new accounting system, and especially how the judges have experienced the new situation from the point of view of the content quality of their work. There are many other aspect to the organization development of the judiciary but I restrict myself to the quantity-quality aspects of the judicial work. The study involved a methodology of questionnaires (2900, response 63%), self evaluations of the 25 courts' management boards in the Netherlands and interviews and round tables with almost 200 judges and court managers.²⁹

What we found was that the Council for the Judiciary and the management boards of the courts have invested heavily in the introduction of the new system of measuring and accounting for production. They also invested time and effort in the development and implementation of the system for quality management, but the production and finances registries were priority number one. The system for quality management became effective one year later (2007) than the financing system (2006). For the Council and the management boards of the courts the most important issue was to show (to the ministry of justice and the ministry of finance and parliament) that they could manage public money adequately. So, even from 2002-2005, when the financing and accounting system was being installed and the budget for the judiciary was also based on other factors than 'measured production', the Council for the Judiciary and the management boards of many courts were chasing after productivity³⁰ increases and shorter throughput times. This was especially sought after by the Council, as they discovered differences in productivity between the courts, and therefore they had decided to award increases in productivity with extra money. As a result, by 2006, 9 out of 19 district courts had a financial reserve larger than the allowed 5% of their annual budget – the surplus flew back to the account of the Council for the Judiciary.

Other developments, that had been set in motion already by the PVRO-project, concerned the consistency of judging in all court sectors. Guidelines were developed on administrative and civil procedure, on alimony payments and damages in cases of involuntary dismissal; and even in the criminal law sectors, developments started to use the policies of the Public Prosecutions' office for sentencing demands as 'points of orientation' for sentencing. Furthermore, the Council had issued guidelines to reduce postponements (in order to use court capacity as efficiently as possible, and in order to reduce average throughput times), also in criminal cases. We encountered judges who felt they were being pushed to increase production. Because of their loyalty to their courts – as they told us -they worked many more hours than they were supposed to. Together with the courts' management boards they neglected their training and education programs – they often simply did not go to courses even although they had subscribed to them.

According to the judicial organization Act of 2002, the management boards of the courts have as tasks to further the quality of the judicial work, but also the consistency of judging. We asked judges how far they felt free to deviate from guidelines on procedure and from guidelines on the content of judgements. The answer to this question was rather divergent. In the questionnaire, 34% (N=1270) of the judges indicated that they would be called to account (peers, sector chair) when they would deviate from arrangements on procedure, but 54% nonetheless felt free to do so and about 60-70% indicated they almost never do. Concerning organizational arrangements on the contents of judgements almost 25% (n= 1282) indicated they would be called to account for deviations, although 74% felt free to do so, but about 60% of the judges indicated they only seldom deviate from guidelines. Nonetheless, research amongst advocates and other repeat players showed that consistency of judging still is not sufficient according to their perception. Courts still are relatively unpredictable. In the interviews, however, judges complained they did not have enough time to go into the depth of a case, and that deviations were not desirable for efficiency reasons.

What also confused us in interpreting these results is that the overall increase in productivity from 2002-2005, was about 8%, so on average 2% per year. Most of this production increase has been realised in the small claims/ small crimes

²⁷ Mr. Wim Deetman is a former minister of education and was mayor of the Hague (until 2008). See also: <http://www.rechtspraak.nl/Gerechten/RvdR/Achtergrondinformatie+Commissie+Deetman.htm>, especially the final report: Rechtspraak is kwaliteit, December 2006.

²⁸ The evaluation study was conducted by KPMG and Utrecht School of Law, published in Dutch: Miranda Boone and Philip Langbroek (Utrecht University), Petra Kramer, Steven Olthof en Joost van Ravesteijn (KPMG), Financierien en Verantwoordten, Het functioneren van de rechterlijke organisatie in beeld, Boom Juridische Uitgevers, Den Haag 2007.

²⁹ Space limits for this essay make it impossible for me to go into full details and nuances of our analysis.

³⁰ Productivity is defined as production of cases decided measured in standard time spent on these cases/ by the number of fte employed by the courts.

sectors (the former kanton courts) of the first instance courts. Production was raised much further (about 8% annually in the first 2 years and slightly less in the fourth year), but this may be explained by the expansion of personnel in the courts since 2001.³¹ Politics lived up to their promises; the judiciary was one of the few branches in public administration that did not suffer from cut backs in public expenses. Nonetheless, we encountered many judges complaining about work pressure, but we encountered also only a modest increase in productivity. Why then our findings of timidity and protest against the ways in which the courts were being led?

Several sector chairs from the first instance courts we interviewed told us they were glad the older generation, several of which were considered 'stubborn' judges, had almost entirely retired. So we also see a process of rejuvenation of the Dutch judiciary with many persons entering the courts either as young trainees or as side in-streamers, for example from law-firms. They are being socialized in a changing judicial culture where conformism, fear of having a judgement reversed in appeal³², and perhaps also fear of negative exposure in the media, have become more dominant. There have been several recognized miscarriages of justice in the recent past (for example, the park-murder of Schiedam; the temporary release of a women trafficker for humanitarian reasons), and public debates are ongoing about the appropriateness of final judgements in several other criminal cases. Several TV programs have displayed misgivings about judgements, and criticized sentences as being too soft on crime.

What we perceived from this evaluation is that a process of restructuring of the actual functioning of the courts has continued since the PVRO process started, where judges have increasingly become organizationally embedded within their court sectors. The courts have made great progress in their organization development. They have become manageable organizations, and this should be applauded as a necessary development in the light of the immense societal pressures exerted on the courts by the media, members of the public and by the ministry of justice and members of parliament. Without organization they would be almost defenceless against those.

Discussion: Courts and Judges Under Public Pressure Versus Professional Judicial Self-Assertion In The Media

From the evaluation research it seems as if judges have become much more 'functionaries' only than they were before the change process started. Of course, there are differences between court sectors and there are differences between courts and, above all, differences between judges. But this is the overall trend. Given the immense societal challenges for the judiciary, I found the one sided economization of judicial work questionable. The role of the Council for the Judiciary and managing judges in the boards of several courts in that process was at stake, because interviewed judges complained they had to give in on content quality. On the other hand, also in the courts, organization development is not possible without a certain discipline of the members of the organization. To date, the Council has changed course and stresses the need for quality of judging. That expressed need comes with a elaborated policies for training, specialization and a change of the geographical court map. Efficiency has remained an organizational aim, however.

From a point of view of judicial independence – not from the constitutional point of view, but regarding the judicial attitude - a certain sensitivity of first-instance court judges for implicit organizational pressures on production and with consequences for their case management should be a matter of concern. In so far, Dutch judges and the Council for the judiciary have been the Ministry of Justice' most loyal civil servants. In a reaction to the report of the Deetman Committee, the Dutch government has stated that indeed attention for quality is necessary, but within the parameters of continued attention to efficiency.³³ In that respect the new judicial organization in the Netherlands lives up to the suggestion of Guarnieri and Pederzoli, according to which a solution to the rising tension between the judiciary and politics is necessary, balancing restraints on judicial power with a safeguarded judicial independence. They fear for a judiciary as a major political power within the (actual) constitution.³⁴ However, in the current Dutch judicial system, judges do not take such a position. It is a question if this condition should be evaluated as the new and desirable balance between the judiciary and political branches of government as Guarnieri and Pederzoli have referred to.

³¹ See: W. vander Heide and D.E.G. Molenaar, Personeel en uitgaven rechtspraak, in: J.G. van Erp (red.) *Kwantitatieve Ontwikkelingen Rechtspraak 2000-2005*, Informatie ten behoeve van de Evaluatiecommissie Modernisering Rechterlijke Macht, WODC, The Hague, Cahier 2006-10, table 5.3. The increase from 2001-2002 was 1300 fte; from 2002 to 2003 498 fte. In 2005 the judiciary (judges plus juridical staff) counted 8174 fte. Administrative court staff are not part of these figures.

³² This is a marker in the quality system.

³³ Kabinetsstandpunt inzake de evaluatie van de modernisering van de rechterlijke organisatie, letter of June 27, 2007 to the Lower House, p. 18. Also see the reasons for the bill sent to Parliament to redress the problems discovered by the evaluation exercise: *Evaluatiewet modernisering rechterlijke organisatie*, TK 2008–2009, 32 021, nr. 3, where 'efficiency' is a key word.

³⁴ Probably based on their Italian experience. Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges*, Oxford 2001, p. 191-196.

There may be many reasons for the way the Dutch judiciary developed since the new Judicial Organization Act entered into force in 2002. The organizational changes were absolutely necessary regarding the increasing public and political criticisms on the judiciary. The Judiciary needed a decision-making and organizational structure, on the national and on the court levels. Without such a structure, the courts and the judiciary would be quite defenceless against the media, other critics and, possibly, members of parliament.

Under the pressure of production-based financing and the new organizational hierarchy for accounting purposes the Council and the courts' management boards have transformed the courts into production-oriented organizations. Many managing judges and ordinary judges have shown to be sensitive to the expectations put upon them, and for the persuasions exerted towards them. The introduction of the new financing system carried the risk that judge-managers were not able to resist economizing pressures and that several judges appeared to be conformist against expectations put onto them. Many first instance court judges prioritized production over guarding a high content quality during the first transition years.

It should be also noted, however, that although many judges did complain heavily about working pressures, they also did not go to court to fight their situation. Apparently, breaches of judicial independence as stated in the Dutch constitution or in the European Convention on Human Rights did not occur. Appointed judges - as civil servants - never addressed the civil servants' court (The Central Appeals Tribunal, a specialised administrative court) to stand up for their legal position in their court organization. They complained to us during the interviews but they abided with working pressures. This may be explained by their loyalty to their court organization, but maybe they were also convinced of the inevitability of the organizational changes.

In reaction to the evaluation study commissioned by the Deetman committee, the Council for the Judiciary and the managing judges in the courts try to reinforce the professional capabilities of judges and court-staff. It also tries to improve the management skills of managing judges. Thus it tries to strengthen the autonomy of court organizations. The purpose of this is to increase content quality of judicial decision making, and also to enhance organizational support for judicial work. And another purpose is to enable the courts to further develop interactions with their societal environment (e.g. the general public, advocates, notaries, journalists, child protection agencies).

During 2009, negative media exposure of the judiciary has continued and leading judges like the president of the court of cassation and the president of the Dutch judges' associations have called upon their colleagues to engage in more efforts to explain judicial work to the general public.³⁵ Thus they have tried to inspire their colleagues to assert themselves professionally in public when need be. Because of the responsiveness of leading judicial policy makers, and given the success of the efforts for organization development and accountability so far, the judiciary has a good chance to further enhance its position within the Dutch state, society and in the media. This latter aspect, however, is a subject for further analysis beyond the scope of this article.



³⁵ G.J.M. Corstens, *De derde macht*, Luchtlezing voor de Wetenschappelijke Raad voor het Regeringsbeleid, 16 april 2009; Reinier van Zutphen Television interview, October 25, Hilversum, The Netherlands.