Quality management and Autonomy for Court-Organisations.

or creating public trust by developing and implementing quality standards for court services.

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1. Introduction

In Europe, politicians and the public services have discovered the possibilities of quality management in the public sector and in courts. They aim at increasing efficiency, transparency and accountability of courts and judges. This is the New Public Management, introduced into the judicial domain only several years ago.

In this paper I develop some thoughts on the question what could be done to enhance the transparency and accountability of our courts without impairing the constitutional demands of judicial independence and impartiality. I have three starting points:

- There is a (more or less natural) tension between the public and political demand for control and accountability of public services on the one hand, and the strife for autonomy by (some) organisations in the public services on the other.

- The idea that the functioning of an organisation may be regulated entirely by statute law and delegated legislation is out of date. Nowadays any organisation needs some flexibility in order to be able to adapt itself to changes in its societal environment.

- The traditional institutional design of courts as an organisation and as part of a national judiciary complicates the way in which courts can be transformed into more or less flexible, client oriented organisations because judges are supposed to be independent.

I do think that quality management as indicated in the standards of the Institute of Dutch Quality or in the ISO 9000 series may be an option to reconcile the tensions between central control and organisational autonomy.[2] The unique combination of independent judges working together with public servants in court organisations offers an opportunity to redesign the organisational separation of courts and judges from the executive branch of government. Development and implementation of quality standards for courts may function as an aid in realising that goal.

2. Why improve our judicial organisations?

It is quite amazing to observe the developments in countries like e.g. England & Wales, Germany, Australia and the Netherlands, if one compares the policies of the governments in this field with the policies of the Legal and Justice Department of the World Bank. The idea of the World Bank is that if in a developing country the judicial system may be developed

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[2] ISO is not an abbreviation but means: “equal”, The ISO organisation is vested in Geneva and they have an informative web site at: www.iso.ch .

into a system of courts and judges, working with efficiency and integrity, the legal certainty thus provided for, will make such a country more attractive for economic investors. Anyhow, the quality of legal institutions is an indicator of chances of economic development. Apart from that, the idea is that to be poor does not mean access to a true justice may be denied as a matter of fact. A well functioning justice system is also presented as a moral obligation to realise the human right to a fair trial as far as one's civil rights and obligations are concerned.[3]

Why should we engage in difficult and time consuming organisational projects in the judicial field, when we can say that the integrity and efficiency of our courts is quite well developed, compared to the judicial systems of former Soviet - dominated countries and countries in Latin America and Africa?

There are several and different reasons to go on with it, but they are not primarily the goals of obtaining independence, integrity, and a minimum level of efficiency. Legal certainty as opposed to biased judgements because of corruption and threats of violence are not a major issue in EU-member states as far as I know.

The pressures for change in the organisation and functioning of courts and judges come mainly from outside the judicial domain. These pressures come from politics, from the media and the public, but a pull towards change also is the increased transparency of what courts and judges do for lawyers and the general public. This is mainly a consequence of developments in ICT.
Nowadays it is easier to criticise a court decision and to compare court decisions in similar cases from courts all over a country. The principle of equality prescribes that similar cases are treated similarly throughout a country. For politicians it has also become easier to criticise the courts. First of all because courts do sometimes give judgements politicians don't like. But also because courts traditionally used to work too slowly. No one wants to wait a year or even more before a first instance court has reached a decision. And politicians are not willing to invest in a modernisation of courts if the judiciary and the courts' service organisations are unwilling to do so.

But they have to if they want to enable courts to deal with:

- increasing numbers of cases (in the civil and administrative domains)
- globalisation of production and trade, and therefore increasing complexities of supra- and international law
- the evolution of western societies into multi-cultural societies.
- the large numbers of asylum seekers (in France, Germany and the Netherlands)
- the internationalisation of crime
- the increased interest of the media in the business of the courts
- developments in the field of medical technology (procreation,), genetics & intellectual property,
- and so on

These pressures tend to generate tensions in the relations between courts and the public, and between courts and other branches of the state.

[3] Take a look at: http://www1.worldbank.org/publicsector/legal/institutional.htm

I have the impression in Australia these tensions are present as well. Politicians and the press are pushing hard to increase productivity and transparency, even to the point that serious proposals have been done by the Australian federal government to make judges' salaries depend on the amount of cases they deal with individually. Australian courts and judges tend to react on these tensions by developing benchmarks and increase their transparency as far as throughputs, efficiency and productivity are concerned, in an effort to regain public trust.[4] I wonder if this strategy will work.

In the Netherlands, courts are not quite used to deal with this kind of tensions (yet). Courts deal with applying law in a case, and that is their core business. So, if asked to do something else, like managing these tensions, the first answer of judges used to be: "No, this is not a judicial responsibility. Judges are professional lawyers, they are not managers." The efforts of the Judiciary Reinforcement Project and new legislation for the organisation of the courts and the judiciary may change this gradually. Some successes have been achieved already, such as uniformity in the ways in which organisational rules of trials are implemented.

If courts are not able to catch up with the pace of change of this world, they risk to loose their societal and in the end their institutional relevance. Courts may risk to loose their credibility, and the public trust. This means that other ways for conflict resolution will develop. Of course, our concept of a state does not go without some kind of judicial institution separated and independent from the legislative and executive branches of government. But probably – I am not only speculating – some of the functions of courts can be dealt with otherwise. Alternative Dispute Resolution and Arbitration have entered not only the domains of civil law, but the domain of administrative and penal law as well.

So, there are choices to be made as to what kind of functions should be fulfilled by the courts. Should courts just apply the law as they used to, should they improve their traditional services, or should they even offer other services as well? Or may the function of courts be reduced to a role of catcher of cases that went wrong in efforts for informal and private conflict resolution? Are different approaches needed in the fields of civil, administrative and penal law? I do not doubt these choices of principle should be laid down in Statute Law.

But to elaborate these choices in an organisational design means to answer the question on how responsibilities for courts, court services and jurisprudence should be organised. In order to do that I will first deal with the question how the tension between central control and organisational autonomy in the public domain may be reduced.

3. The tension between central control and organisational autonomy in the public domain.

The public domain is the sphere of the state, and it is the sphere of public debate. It should be discerned from the spheres of the market and the private spheres. I will concentrate on relations within the state on the central level primarily.

The relation between politics and the public services is a relation of hierarchy and (political) accountability as a matter of democratic principle. Politicians have a democratic mandate, public servants have an appointment. The roles of politicians and public servants differ on

[4] Stephen O'Ryan, Tony Lansdell, Benchmarking and Productivity for the Judiciary, paper for the AIJA Conference "Judicial Accountability", in 2000, at http://www.familycourt.gov.au/papers/html/courts.html.

principle as it comes to develop and execute new policies of government. Essential is the fact that politicians decide on policies and hold the legislative and executive offices. Public servants design and execute policies and legal rules. In their capacity of public office holders, politicians are democratically and politically accountable for governmental policies and for the implementation of legal rules. For that reason public servants are accountable for their designing- and executive services.
Control of policy development and implementation of rules is being exercised via the hierarchical lines of ministerial bureaucracies. Within governmental organisations there are quite a number of inspectorates, and of course, there is a Chamber of Audits as well. For concrete decisions a court may be addressed, and for misbehaviour of office holders or of public servants the Ombudsman. These are the traditional ways of control and accountability in the Dutch public domain.

In the relations between parent organisations and subsidiaries a movement of a pendulum can be discerned, the pendulum between centralisation and decentralisation (or devolution). Making public services self-reliant and self-supporting, or even privatisation of public services still is a Dutch government policy (although the pendulum is returning from its highest point of devolution already). But it is amazing to see that, while policies are being directed at making public services independent, politicians are trying to increase their controls. An example for the Netherlands is the Public Prosecutions Office and the aftermath of the Parliamentary inquiry into policing methods in relation to the fight against drug-related crime. The Public Prosecutions Office is a professional organisation, yet politicians seek to influence the success rates of the Public Prosecutions Office and also the use of the ministerial competence to give a directive to prosecute.
Until recently the government favoured privatisation of public transport, but of course, the government wants to have adequate public transport in the unprofitable outback of the country. The Dutch Railroad Company and Bus-firms do like their autonomy but resist competition with other companies. Privatisation does not bring competition automatically, especially not when politicians want to maintain control.

So, there is a paradox in public policies concerning the public services: On the one hand, there are the political beliefs in the power to effectively design and make organisations and society function as intended, in control and in accountability. On the other hand are the public services and devolved organisations with their expertise, professionalism, and particular values, often striving for some kind of autonomy. And the strife for autonomy of subsidiaries of larger organisations is being stimulated by the increasing complexity and unpredictability of society. A considerable extent of flexibility is required to be able to play a meaningful role within the public services .

The opinions on responsibility of the government and the desire for organisational autonomy in a societal field can be displayed in a matrix. This matrix is intended to have an heuristic function only.

Opinions on responsibility of the government and the desire for autonomy in a societal field

		Opinion of the government on the extent of its responsibility	
		Large	Small
Extent of the autonomy desired by an organisation in a societal field	Large	**I** government enforces, inspects and calls for accounts	**III** market without or with restricted regulations.
	Small	**II** top-down bureaucracy, accounts are called for along the hierarchical lines of the public service	**IV** organisation begs the government for money, attention and/or a close relationship

I Government holds itself responsible, organisations desire a large extent of autonomy
This is a situation of potential conflict. If the government provides an organisation with money or enforces regulations, and therefore bears political responsibility, whereas the organisation has the expertise and professionalism to do its job without interference from politics, tensions may arise. The relationship between the government and hospitals, the relationship between the government and health-insurance organisations, and also the relationship between the government and the public prosecutions service may be placed in this quadrant. Of course, this also is the current situation of the Judiciary in the Netherlands and e.g. in Australia.

II Government holds itself responsible, organisations do not desire a large extent of autonomy
This is the situation of many public service organisations. Government intends to command the actions of people by regulations and instructions. Accounts are called for along hierarchical lines. Examples are social services offices, the police, but also the immigration and naturalisations office. Also the relations between government and organisations in subsidised sectors may be instituted in the same way. An example in the Netherlands is the field of primary and secondary education until halfway the eighties.

III Government does not hold itself responsible or holds itself responsible for small part, and organisations desire a large extent of autonomy
This is the market. This does not exclude responsibility of the government entirely. The government has made rules for physical working conditions, and there also are rules for competition on the market. Competition is even guarded by an Economic Competition Authority. Here, the desire for autonomy may also be a source of tensions. On the one hand there is the responsibility of organisations and businesses to keep away from government interference via law enforcement; on the other hand the Health and Safety Inspection and the Economic Competition Authority may function properly only if enough flexibility is left to them, in accordance with their expertise.

IV Government does not hold itself responsible, organisations do not desire a large extent of autonomy
Some subsidiary organisations do like their position of some kind of dependence. Imagine the government considers to stop the subsidy for an orchestra. Another example may be the

privatisation of a research- and development department of a province while most people working there do not like the idea that assignments should be competed for on a market. To a certain extent, this also was the situation of court-organisations in the Netherlands until the late eighties. The court organisations functioned as different territorial parts (districts) of the justice department, and neither the government nor the court-organisations themselves felt an urge for change.

4. Reducing the tension between central control and organisational autonomy

Traditional lines of command and control and - accountability may be perceived as a form of quality management. The condition, of course, being that the organisation concerned provides for the effectuation of the commands and remarks of controllers. The idea is that they should lead to actions for improvement. But there is a difference on principle between quality management in the public sector and quality management in the market. Quality management in market-oriented organisations aims at building trust with customers and at selling a product or service as a consequence of that.
Nevertheless, there are parallels between public services and the market. Some services do compete for new assignments; social services do strife for public recognition and public support for their work.[5] For that reason some services did have themselves certified according to the ISO –9000 series for service organisations, e.g. the Public Prosecutions Office in Amsterdam, or several environmental law enforcement offices at the provincial level.

The idea is that quality management may reduce the tensions described. I see two directions of development.

1. Quality management as a compensation for reduced central control.
Quality management may lessen the stress on central planning and control, and the demand for accounts from the periphery. This could alter the relationship between public services and citizens/customers. It will become easier for citizens to access and profit from these public services on the one hand. On the other hand, the position of these public services between politics and citizens/customers may change, because they will state their mission, aims and working methods not only in terms of political, financial, and juridical accountability. This allows the traditional bureaucratic perspective to change. In this way a movement of a public service from quadrant I to quadrant II may become possible. This is not to indicate that public services should operate as suppliers on a market, but is intended to visualise that the responsibility of a government can be operated by relations of accountability between public services and the public. Traditional, vertical relations of accountability between central and executive actors in the public services may in part be transformed into new horizontal "checks and balances" between public services and their citizens/customers. It is another way to organise public trust.

II. Quality management as a tool to teach and learn organisational autonomy.
A policy to increase the autonomy of organisations in a field of government activity may not be liked by the organisation in that field. The idea is that increased autonomy will help to improve quality of services to the public. This increased autonomy sometimes is combined with an incentive for competition. If you are not used to some kind of competition, it takes

[5] This process has been described by M. Lipsky, in Street- Level Bureaucracy, Dilemma's of the Individual in Public Services, New York 1980. Quality management in public services is a relatively new way to gain legitimacy (public support).

time to learn that. An example may be the situation of primary and secondary schools in the Netherlands. (public and private school organisations are financed by the government). Fifteen years ago the policy for financing schools was changed. Legal quality standards were combined with a financing system that was based on the number of pupils entering and leaving a school. So, schools have to compete for pupils. Unfortunately the introduction of this way of financing was combined with cut backs in government funds for education. Nonetheless school organisations made great efforts to compete.

So, organisational autonomy means: taking responsibility for organisational development. I do think quality management may be a tool to accomplish that organisations within the public services take responsibility for themselves. This may be shown to the public and to politicians by the having the public service organisation certified by a bureau for certification. This means the public service organisation has to proof that it qualifies for the certificate according to the standard at hand (ISO, British Standard, INK, Deutsche Industrie Norm). Consultants of the certifying bureau will assist in accomplishing that aim. This process of certification will have to be repeated from time to time, because a certificate is given for a restricted period. The certificate may show for example that the organisation functions in a responsive way to the general public.

Standardisation and certification is in private hands in the Netherlands, but, of course, a public institute for certification of public services is conceivable.

To engage for certification in the market is a free choice for private organisations, but the freedom of this choice may be absent for devolved public services: they have to develop some kind of quality management in order to gain and maintain public and political trust if they want to work autonomously to a certain extent.

5 Prescribing quality standards for courts and its consequences for the separation of powers.

I do not doubt that the legislative power has a major part to play in prescribing the way courts should function. But other norms than just legal norms do exist and have the ability to steer the functioning of organisations in the same, and sometimes even more effective ways than legal norms; they are called standards or norms of normalisation.

I discern between different court functions:

- to give a judgement by applying law authoritatively in conflicts brought to court;
- the application of rules of judicial procedure and the organisation of the trial;
- the provision of services to parties and others involved in a judicial procedure (parties, third parties and their representatives);
- the provision of services to the public and the media;

From these functions one may derive functions in a wider organisational domain, like selection, education and training of judges and law clerks, organisation development, development and application of ICT, information management, public relations etc.

So, a distinction between the juridical content of judgements and the organisational services for participants and the public is logical.

In most EU countries the application of law in judicial proceedings and the requirements for a fair trial as indicated in article 6 ECHR is without grave problems. Generally speaking courts and judges do meet the requirements of article 6 ECHR, the only exception to this consists of the fact that in some countries, like Italy, the demand of a *reasonable time* often is not being met. Also, the application of rules of procedure do not cause grave problems. This may be explained by the fact that judges are professional lawyers, trained and experienced in the content of law. The professional culture of lawyers is oriented on the content of the law. Those who excel in law and in handling cases may expect to have the best careers. In this respect judges do not differ on principle from other traditional professional groups like medical doctors, accountants or barristers/solicitors. The quality of the juridical content of the work of Dutch courts and judges is quite alright.

But problems do exist as far as the provisions of services are concerned. There is a diversity of subjects to attend to, as in any (public) service organisation. E.g. opening hours, contact with the media, communication of a judgement to interested parties, the timeliness of proceedings, the behaviour of judges in the court-room, the treatment of parties and lawyers by the court. A major problem may even be how to measure the productivity of a court, and how the outcome of this measurement may be compared to the productivity of other courts. Administrative, penal and civil proceedings do differ on principle, so they would need different standards.

So juridical quality is something quite different compared to organisational & service quality. And the question to be answered is how the organisational & service quality may be improved and according to what kind of norms.

Prescribing quality standards….
Legislators have choices as it comes to formulating demands and prescribing to executive bodies - and thus to public services - how these demands should be met. The main question is in how far central steering & control is necessary. The answer to this question may differ according to the kind of organisation one is dealing with: ordinary public services, devolved public services, quango's and ordinary private organisations with some kind of public function. The choice for legislators on the one extreme is to leave the wording of the quality standards to the (public) services, on the other extreme to formulate these standards by themselves, either on the level of Statute Act or in several kinds of delegated legislation. And these quality standards deal with the services provided for and the organisation itself.
The implementation of a system of quality management may reduce the organisational burden of control of the central government, and it may also diminish the responsibility of the central government, because it implies an increased autonomy for the organisation that has to work with the (new) quality standards.

Standards may be set in Statute Law, but in a professional environment this will not be much appreciated. In most professional organisations standards have to be developed by the professionals themselves.

It may be otherwise, if one has to deal with an organisation that is not used to take responsibility for its own functioning. In that case central incentives to develop quality standards may be necessary.

Traditionally, in the Netherlands the courts supportive services are organised in district organisations as parts of the justice department. Judges are independent, but the organisations they work with and in consist of public servants, and the Minister of Justice bears full political accountability for what they do or not do. The public and participants in a trial not only have to deal with judges, but with public servants as well.

This is quite the normal situation in Europe, although all kinds of varieties may exist. [6]

So, if not Parliament & Government, who should set the standards for juridical quality and who should set the standards for organisational & service quality for the courts?[7]

Juridical standards can be found in international treaties, in constitutional law, and in rules of procedure. They concern judicial independence & impartiality, fair trial, access to justice, the different phases of procedure in the courtroom, the judgement itself and the timeliness of the procedure. Some of them can be found in article 6 ECHR, and are explained in numerous judgements of the ECHR, others are laid down in Statute Acts on legal procedure, and in court-rules. This is not to say that improvements cannot be made. The traditional system for juridical quality management consists of appeal to a higher court. But the majority of cases is not appealed at all. I do think that in the field of training of judges, of co-ordination of the contents of judgement to reach a greater uniformity (within a court, but also between courts on a national scale), but also in case management, improvements can be made.

Standards for organisational and service quality in Dutch courts are in a developing stage.[8] They concern subjects like leadership, devolution of responsibility, sensitivity for external signals from clients, lawyers and scholars; the co-operation between judges and their support-staff, case management, treatment of clients before and during trial etc.

… and its consequences for the separation of powers.
As far as courts and judges are concerned, a government policy could be that the judicial organisation because of increased societal complexity and change should develop in the direction of an autonomous, self governing organisation. If judges and court support staffs want to be able to cope with changing circumstances, some kind of flexibility will have to be developed, and as I described above, a quality management for the court organisations may provide just for that. Amongst organisations in the public sector, the idea that relations of command and control may be replaced by horizontal checks and balances, matches the special position of court-organisations the best, especially because of the independence of judges. The intended autonomy of the court services staffs in relation to the ministry of justice should be seen as a derivative of the independence of judges.

Until a few years ago this point of view was not shared by many judges. Today, managing judges do accept this aim, but this does not mean that a majority of judges is welcoming this development. The justice department went through great efforts to convince judges of the

[6] See on this subject also David. K. Malcolm, Judicial Reform in the 21st Century in the Asia Pacific Region, paper for the World Bank Conference, Washington, 6 June 2000, p. 15-17.
[7] The difference has been explained by J.B.J.M. ten Berge, Contouren van een kwaliteitsbeleid voor de rechtspraak in: P.M. Langbroek, K. Lahuis, J.B.J.M. ten Berge (eds): Kwaliteit van rechtspraak op de weegschaal , Deventer 1998, p. 21-40.
[8] For an elaboration on that subject see: F.C. Lauwaars, F.C.J. van der Doelen and A. Weimar, Professional Quality: the Balance between Judicial Independence and Social Effectiveness, Tijdschrift voor de Rechterlijke Macht 2001, p. 43-48.

inevitability of this change. Bills for a new Judicial Organisation Act are currently being proceeded by the lower house, but have not been accepted yet.

To engage for this kind of organisation development goes not without some discipline of the members of an organisation. Not all judges are used to that. The judicial culture is a culture of individual professional autonomy, and the argument to keep it that way was the constitutional demand of judicial independence. But in an adequate court organisations the work of judges and the court-services is intertwined. Court sessions and judgements will increasingly be the result of a team-effort, under judicial responsibility. Therefore, the development of organisation & service standards cannot be left to the court services only, but should be developed together with judges. On the one hand, therefore, it is necessary that judges accept responsibility for the court organisation they work with. On the other hand, some solution should be found for the problem that the court-service staffs function under the political accountability of the minister of justice. Apart from the judges' salaries, the budget for the courts is part of the budget for the Ministry of Justice.

For that reason, the separation of powers needs a new elaboration.[9] Judges and courts must be independent and impartial, and because their work is increasingly intertwined with the work of the clerks of the court services, the solution may be found in organising autonomy for the court-organisation. They are part of the public service, people working there are public servants, but their close working relationship with judges and the court demands for a special organisational design if it comes to the relationship with politics, clients and the public.

Parliament decides on budgets, and this should remain so. The relation between the court-organisations and the Ministry of Justice should be made less direct than it is now. For that reason a buffer may be installed between the courts and politics. In the Netherlands the buffer will be a Council for the Administration of Justice, with competencies in the organisational and financial domains. They propose a draft budget to the Minister of Justice and the Minister of Justice proposes to vote for it in Parliament if he agrees with the draft. The financial details will be elaborated by Order in Council; the proposed content was sent to the Lower House on May 18th[10]. Essential is that courts will be financed according to their output. Special arrangements have been made for overhead costs and direct costs of court proceedings (hiring experts etc.).

The Council will be accountable for the way it exercises its competencies in regard of the courts, towards the Minister of Justice. Amongst the tasks of this Council will be the task to stimulate the quality management within the courts. And the courts will be accountable – for their budget and their organisational functioning towards the Council. Thus an equilibrium may be reached between horizontal and vertical checks and balances.

Prescribing quality management for courts thus means that courts will develop and implement their juridical, organisational & service standards themselves. Thus they may earn public and political trust, while evolving into responsive organisations from a societal perspective, and while keeping them free from direct governmental controls.[11]

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[9] Separation of powers never has been a fixed concept. Its content and operation evolve with the circumstances of state and society. See for example: J.C. Vile, Constitutionalism and the Separation of Powers, Oxford 1967; O.W. Kägi, Zur Entstehung, Wandlung und Problematik des Gewaltenteilungsprinzipes, Zürich 1937.

[10] TK 2000-2001, 27 182 nr. 41

[11] Klaus Röhl states explicitly that judges should develop quality norms themselves in order to forego a far streching governmental involvement to stimulate quantitative production figures of the courts: Justiz als Wirtschaftsunternehmen, Deutsche Richterzeitung, 2000, p. 228-229.

The Quality Project of the Judiciary Reinforcement Project organises this development on a national scale. It would be spoiling resources if every court would try to invent its own quality standards.

The development of quality standards by courts also has a symbolic quality. By developing and implementing quality standards, and by reporting on their achievements, judges and court-organisations show that they, although independent and autonomous, are willing to take public responsibility for their work. From a European perspective it may be a challenge for courts & judges to develop and implement European quality standards for courts. By living up to such norms a court could gain a certificate and thus symbolise that it accepts organisational and public accountability for its functioning as an independent and autonomous part of the State.

6. Conclusion

Among public service organisations, court-organisations are organisations that should be as autonomous as possible. This autonomy is to be seen as derivative of judicial independence. Political responsibility for courts may be reduced to a minimum if court organisations succeed in effectively engaging for organisation development by using quality management.
The legitimacy of courts and judges may be enhanced by earning quality certificates according to special quality standards for courts. In the near future court-organisations and judges in Europe may symbolise their autonomy and independence by developing and implementing a European standard for courts.

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