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Constitutional Guarantees for the Independence of the Judiciary

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1. Introduction

Judicial independence is generally seen as a fundamental value of the rule of law.¹ Likewise, in the Dutch constitutional order, independence of the judiciary is regarded as an essential principle. In the Dutch Constitution, however, which dates from 1814 and was substantially revised for the last time in 1983, independence of the judiciary is not explicitly mentioned. The Constitution deals with the judiciary and its organization, but in this context does not explicitly mention judicial independence as an organizational principle to be respected in the arrangements for the judicial system – and therefore does not mention it as a fundamental right for citizens. The guarantees for the independence of the judiciary are to be found in statute law, in particular in the Judiciary Organization Act (*Wet op de rechterlijke organisatie*)² and the Judicial Officers (Legal Status) Act (*Wet rechtspositie rechterlijke ambtenaren*).³ These guarantees are also partly based on European norms. The European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR), in particular, has been highly influential regarding both the theory and practice of judicial independence. In addition, guarantees may be found in unwritten constitutional law. All in all, it can be said that the Dutch constitutional order considers the independence of the judiciary to be a central principle. This is true both for the judicial system as a whole in relation to other branches of government, and for the individual members in relation to the judicial system, in particular in relation to the judicial body within which they function. The extent to which the independence of

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¹ Kuijer 2004, p. 204.

² This Act dates from 1827, and was last subject to major amendment in 2001, by the Act on the organization and management of courts (*Wet organisatie en bestuur gerechten*) of 6 December 2001, *Staatsblad* 2001, 582 and the Council for the Administration of Justice Act (*Wet op de Raad van de Rechtspraak*) of 6 December 2001, *Staatsblad* 581. The new text was published in the *Staatsblad* 2002, 1.

³ Judicial Officers (Legal Status) Act (*Wet rechtspositie rechterlijke ambtenaren*): Act of 29 November 1996, *Staatsblad* 590.

individual judges or courts also applies to their relations with other judges or courts will be discussed further on in this article.

In every list of the characteristics of the rule of law, there is at least some mention of the independence of the judiciary. The right of access to a court is generally also mentioned as an essential characteristic. In this context, there is an assumption that adequate dispute settlement can best be carried out by courts, and not by administrative bodies. The ECHR gives expression to this idea in Article 6. For the determination of civil rights and obligations, and for judgment on a criminal charge brought against someone, the ECHR requires – and grants a right to – a judgment by an independent and impartial judicial authority. Similarly, the legal protection of citizens against the government should preferably be carried out by independent courts and not by administrative authorities. Precisely because of this independent position, judicial dispute settlement – and the review of government actions and rules inherent therein – is to be preferred over forms of control by administrative bodies. From the point of view of protection of citizens' rights, in particular the fundamental rights mentioned in treaties and in the Constitution, adjudication and settlement of disputes by the independent judiciary is preferable.

Judicial independence has a number of aspects, some relating to the organization of the judiciary and some relating to the legal position of members of the judiciary. Different views exist regarding the relationship between these aspects. Some characteristics of the legal position of judicial officers can be considered essential for the independence of the judiciary, while there are differences of opinion regarding other characteristics. These issues will be discussed in the present report. In the course of this discussion, we will first examine the constitutional framework of judicial independence. Subsequently, some of the most important statutory provisions for the independence of the judiciary will be addressed.

2. General Remarks regarding Judicial Independence and the Constitutional Framework in the Netherlands

2.1. The Constitutional Framework: Constitution and ECHR

As was remarked earlier, the Constitution of the Kingdom of the Netherlands does not mention judicial independence as such. Provisions on the organization of the judiciary do, however, appear in a separate chapter of the Constitution: chapter 6. This chapter is entitled Administration of Justice (*Rechtspraak*).

Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms grant citizens a right of access to an independent and impartial court when charged with criminal offences or involved in a dispute about civil rights. This last addition somewhat limits the scope of the fundamental right of Article 6, as was demonstrated in the *Pellegrin* case (1999)⁴ and the *Ferrazzini* case:⁵ for disputes that do not concern civil rights, there is no right to settlement by an independent and impartial court. This is the situation e.g. with regard to cases concerning aliens, cases concerning extradition, tax decisions, and cases concerning the legal position of civil servants where the exercise of public authority is involved (see *Pellegrin*, in which the European Court of Human Rights explicitly follows the

⁴ ECtHR (GC) 8 December 1999, *Pellegrin v France*, no. 28541/9, ECHR 1999-VIII, AB 2000, 195 (with annotation LV), NJ 2001, 131 (with annotation EAA), par. 60.

⁵ ECtHR 12 July 2001, AB 2004, 400 (with annotation TB), NJ 2004, 435 (with annotation EEA), EHRC 2001, 57 (with annotation AWH), *Ferrazzini v Italy*.

functional approach that the European Court of Justice has developed in interpreting Article 39(4) of the EC Treaty (the public-service exception)).

Although not all adjudicators of disputes and courts⁶ have to be independent within the meaning of Article 6 ECHR, for most courts this is required. A clear example, which concerned the Netherlands, is the *Van de Hurk* case (1994).⁷ This case concerned the position of one of the highest administrative courts, the Industrial Appeals Tribunal (*College van beroep voor het bedrijfsleven*). The European Court of Human Rights (ECtHR) was of the opinion that the statutory power⁸ of the Crown to set aside decisions of the Industrial Appeals Tribunal meant that the Industrial Appeals Tribunal could not be considered an independent judicial authority. The fact that this power was never exercised by the Crown was of no consequence.

2.2. *The Constitutional Framework*

It is impossible to infer from the wording of the Constitution what a ‘judge’ or a ‘court’ is.⁹ The Constitution distinguishes between courts that are part of the judicial branch of government (i.e. the judiciary), and courts that are not part of the judiciary. The legislature decides which courts are (and which are not) part of the judiciary (Art. 116, first paragraph, of the Constitution). Certain requirements apply for members of the courts who are part of the judiciary. These requirements are broadly related to the independence of these courts in terms of the legal position of their members. The difference between the two types of courts has lessened since the establishment of a fully-fledged system of legal protection against the government. This system, laid down in the General Administrative Law Act (*Algemene wet bestuursrecht*, 1994),¹⁰ has gone hand in hand with a reorganization of the judicial system – a reorganization which resulted in a substantial revision of the Judiciary Organization Act in 2001.

The Constitution of 1983 lays down an open system, i.e. the legislature is granted the possibility to include courts that have jurisdiction only in administrative matters – in particular the Central Appeals Tribunal (*Centrale Raad van beroep*), the Industrial Appeals Tribunal (*College van beroep voor het bedrijfsleven*) and the Administrative Law Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*) – as part of the judiciary. Until now the legislature has not made use of this possibility.

The distinction between courts that do and those that do not belong to the judiciary does have legal consequences. An example of this difference is the power to impose sentences involving deprivation of liberty (Art. 113 of the Constitution); this power is reserved to the judiciary.

The Constitution thus distinguishes between courts that belong to the judiciary and those which do not. The Judiciary Organization Act further elaborates which

⁶ Not all courts adjudicate disputes. In criminal law, there is not a dispute as such between the citizen and the government. See Kortmann 2005, p. 257 (note) 421.

⁷ ECtHR 19 April 1994, Series A no. 288, *Van de Hurk v. the Netherlands*.

⁸ This power was based on the Industrial Organization Act (*Wet op de bedrijfsorganisatie*).

⁹ ‘De tekst van de Grondwet biedt geen aanknopingspunten voor het antwoord op de vraag welke ambten als gerechten zijn te beschouwen. Ook met de grondwetsgeschiedenis komt men niet veel verder’. (The wording of the Constitution does not give any clues concerning the answer to the question which government offices can be regarded as courts. The history of the constitution does not clarify this further either). Kortmann 2005, p. 257.

¹⁰ The General Administrative Law Act comes into effect in a number of different phases – called *tranches*. The first tranche entered into force in 1994.

courts belong to the judiciary. This act dates from 1827,¹¹ but has been thoroughly modernized in recent years, in particular by the Act on the organization and management of courts (*Wet organisatie en bestuur gerechten*)¹² and the Council for the Administration of Justice Act (*Wet op de Raad voor de rechtspraak*).¹³ The new version of the Judiciary Organization Act entered into force on 1 January 2002.

As already mentioned, the legislature is free to decide which courts belong to the judiciary. Only with regard to the Supreme Court (*Hoge Raad*) does the Constitution contain a provision in which this body is directly constituted as a body enjoying judicial governmental powers¹⁴ (Art. 118 Constitution).¹⁵

The Judiciary Organization Act (abbreviated hereafter as JO Act) provides that the Supreme Court, the district courts and courts of appeal are part of the judiciary (Art. 2 JO Act). The Judiciary Territorial Division Act (*Wet op de rechterlijke indeling*) of 1951 lays down the number of courts of appeal and district courts, and the Judicial Officers (Legal Status) Act (*Wet rechtspositie rechterlijke ambtenaren*) of 1996 lays down the legal position of members of the courts mentioned here, and also of other persons concerned with the administration of justice.¹⁶

The jurisdiction of these courts covers civil ('ordinary') proceedings, criminal proceedings, tax law proceedings and most administrative law disputes. Only a few areas of administrative jurisdiction are assigned to bodies that are not part of the judiciary: in particular, appeals in economic administrative law, social security law, law relating to members of the civil service, and certain special areas of administrative law. These bodies are, nonetheless, courts; their members must meet all the requirements of eligibility as a judge, and they are courts or tribunals within the meaning of the EC Treaty.

2.3. *The ECHR Framework*

First of all, it is important to note that the concept of 'judicial independence' has an autonomous meaning within the framework of the ECHR, which does not necessarily coincide with the meaning of the concept under national law.¹⁷

In a number of judgments of the ECtHR, in which that Court ruled on complaints against the Kingdom of the Netherlands relating to the settlement of disputes between the government and citizens, questions were raised which concerned judicial independence. In these cases the national settlement of disputes at issue was sometimes carried out by a judicial authority, and sometimes it was not. However,

¹¹ Act of 18 April 1827, *Staatsblad* 20, 'op de zamenstelling der regterlijke macht en het beleid der justitie' ('on the composition of the judicial authority and the policy regarding administration of justice').

¹² Act of 6 December 2001, *Staatsblad* 582.

¹³ Act of 6 December 2001, *Staatsblad* 581.

¹⁴ And invested with government authority.

¹⁵ Kortmann 2005, p. 259.

¹⁶ In some statutes, the Judicial Officers (Legal Status) Act (*de Wet rechtspositie rechterlijke ambtenaren*) has been declared to be applicable by analogy in the case of the dismissal of holders of certain administrative positions. See for instance Article 74, second paragraph, of the Government Accounts Act (*Comptabiliteitswet* 2001).

¹⁷ Bernhardt, 1988, p. 67: 'Whether a person is "charged with a criminal offence" or a tribunal is "independent and impartial" cannot depend solely upon the national order of each State, but requires an international determination'. Independence is given an autonomous European ECHR interpretation; and it also has a Dutch interpretation based on the Constitution and its legislative history. Because of this, in theory, different sets of requirements that the organization of the judiciary must fulfil can come into existence.

even in cases where a judicial authority was involved the ECtHR noted several times that some elements of the judicial organization in the Netherlands did not completely comply with the requirements set for independent judicial tribunals. These cases – *Benthem* (1985),¹⁸ *Van de Hurk* (1994),¹⁹ and *Kleyn* (2003)²⁰ – did not always lead to a finding of an infringement: in *Benthem* and *Van de Hurk* an infringement was found, but in *Kleyn*, on the other hand, no infringement was found. Further, the *Procola* case (1996) has been of great importance for the Netherlands, not because there was any infringement by the Netherlands, but because the Council of State of Luxembourg, which was the focus of this case, is very similar to the Netherlands Council of State. In fact, this case was mainly about impartiality, and the guarantees for ‘structural impartiality’ of the court, rather than about independence. However, in the context of organizational aspects of the judiciary, independence and impartiality are difficult to separate. In the past twenty years, the Kingdom of the Netherlands has substantially revised the organization of its Council of State, under the influence of the European Court of Human Rights’ case law.²¹ The *Benthem* judgment even led to the abolition of the – traditionally highly regarded – remedy of appeal to the Crown; and the *Procola* judgment – although, as was mentioned, this decision concerned Luxembourg not the Netherlands – has led to a revision of both the internal organization of the Council of State, and of the way it functions.

2.4. *The Interpretation of the Term ‘Judiciary’*

Recently the Dutch government has interpreted the term ‘judiciary’ in a way which gives that term a very broad meaning. In the explanatory memorandum to the bill for approval of the Constitutional treaty – the ‘European constitution’ -, the government notes that the transfer of jurisdiction on disputes regarding patents from the Dutch to the European courts does not imply a departure from the Netherlands Constitution, because jurisdiction remains with a court. It is explicitly noted that the Dutch Constitution allocates this category of disputes to the ‘judiciary’. Thus the Government interprets the term ‘judiciary’ here simply to mean ‘a court’. This extension of the term ‘judiciary’ to embrace all ‘courts’ could mean the abandonment of the system of the Dutch constitution with regard to this issue.²² It is unclear whether the Dutch Parliament shares this interpretation by the government, since the bill in question has been withdrawn.

2.5. *Independence*

The requirements of independence of the judiciary apply – taking into consideration what was said above about the scope of Article 6 ECHR – to all Dutch courts, those

¹⁸ ECtHR 23 October 1985, AB 1986, 1 (with annotation E.M.H. Hirsch Ballin), *Benthem v the Netherlands*.

¹⁹ The ECtHR did not consider the Industrial Appeals Tribunal to be an independent court, because some of its decisions could be altered by the Crown to the detriment of one of the parties. ECtHR 19 April 1994, Series A no. 288, *Van de Hurk*.

²⁰ ECtHR 6 May 2003, AB 2003, 211 (with annotation Verhey & De Waard), *JB* 2003, 119 (with annotation Heringa) and *Gemeentestem* 2003, 7186.91 (with annotation A.J. Bok).

²¹ Lawson 2003, p. 1114-1118; Brenninkmeijer 2003, p. 1119-1123, *Gemeentestem* 2003, 7186.91 (with annotation A.J. Bok), *Administratiefrechtelijke Beslissingen* 2003, 211 (with annotation Verhey & De Waard), *Jurisprudentie Bestuursrecht* 2003, 119 (with annotation A.W. Heringa). See also Damen 2003, p. 652-660; Drupsteen 2003, p. 317-323; Zijlstra 2003, p. 324-331.

²² *Kamerstukken II* 2004/05, 30 025, nr. 3.

that belong to the judiciary as well as those that do not. This does not result from the wording of the Constitution, but from the ECHR.²³

For tribunals that deal with voluntary jurisdiction, arbitration, and disciplinary law (disciplinary tribunals), these requirements do not apply. This is, for instance, the case with medical disciplinary rules, disciplinary rules for lawyers, and disciplinary rules for accountants.

2.6. *The Key points of Judicial Independence: the Relationship with other State Organs, Legal Status, the Organization of the Judiciary, Constitutional Guarantees and Theory*

2.6.1. Introduction

In academic writing, a distinction is made between a narrow and a broad concept of judicial independence. According to the narrow, limited concept, judicial independence concerns the relationship between the courts and other organs of the state, particularly the legislature and the administration.²⁴

According to the broader concept, judicial independence relates to independence in relation to any other authority, including that of the parties to a dispute, interest groups and others.²⁵

As Kuijer writes: 'Nowadays, however, judicial independence will be more and more interpreted as requiring that the judge can base his or her decision on his own free conscience without being subjected to any authority, including other organs of the state, litigants and other pressure or interest groups'.²⁶ It should be noted in this context that it is not self-evident that the broad concept of judicial independence is supported by Dutch constitutional law.

In the Netherlands, a distinction is usually made between different types of judicial independence:²⁷

- functional independence; this can be 'constitutional' as well as *de facto* independence. Different views exist as to the scope of *de facto* independence. A very broad approach is defended by Kuijer, who writes that *de facto* independence means that the judge should at all times feel that he can freely give his judgments. Kuijer writes: 'factual independence will be infringed when a situation arises in which the judge no longer feels free to follow his own considerations'.²⁸ On this point, it should be noted that the judge is never completely free to follow his own considerations. The freedom of the judge consists in the fact that he is bound only by the law. Does independence also mean that the judge, or court, is 'internally'

²³ But, note the fact that the requirements set by the ECtHR only concern the settlement of disputes about civil rights and the validity of criminal proceedings. They do not apply to certain areas of administrative law proceedings, as can be concluded from several ECtHR judgments. This has to do with the way in which the European court interprets the scope of the concepts of civil rights and obligations. Aliens law and tax law in particular do not fall within this scope. So in these areas the requirements of independence are also different, at least according to the ECtHR. In Dutch law no distinction is made between the different areas of administration of justice.

²⁴ Kuijer 2004, p. 207.

²⁵ Kuijer 2004, p. 207.

²⁶ Kuijer 2004, p. 207.

²⁷ The distinction between the two types of independence dates back to Duynstee 1974, and is followed more or less generally. However, there are still divergent views on the meaning of these types of independence, and on their relationship.

²⁸ Kuijer 2004, p. 207.

independent, i.e. within the system of judicial organization, in relation to the other courts? Different views exist on this issue in the Netherlands.²⁹

- personal independence, or independence based on the legal position of the judge; this concerns the guarantees that are built into the legal position of judicial officers regarding appointment and dismissal, pay, assessment, promotion, incompatibilities, duration of the appointment, protection against transferral and dismissal, disciplinary sanctions, handling of complaints, and other elements.³⁰

2.6.2. Institutional and Individual Independence

In this report we assume that judicial independence comprises various different aspects, organizational aspects – which regard the relationship between the court and other state organs, the organization of relationships between the courts themselves, and the internal organization of the courts – as well as aspects regarding the legal position of individual members of the judiciary. Our starting point in this context is that judicial independence is essential for guaranteeing the core values of the rule of law, in the sense that courts may not receive binding instructions from other state organs regarding decisions in individual cases. Independence is, in this sense, primarily institutional independence. The characteristics of the legal position of members of the judiciary which assure independence – for instance, the fact that the salary of judges is prescribed by law, and cannot be unilaterally changed by the government – should therefore be seen in the light of this institutional independence. Moreover, judicial independence can be understood as individual independence: every judge who has to decide a certain case, must be able to form his opinion in complete independence. No exertion of influence is allowed, not even within judicial organs comprising more than one judge. This understanding of independence would preclude consultation within courts on ‘judicial policy’ or on certain points of reference to be used by the judge. In the Netherlands this does not seem to be completely the prevailing opinion any more. Obviously, consultation how to decide a specific case is unacceptable. General consultation, however, aimed at broad harmonization of policy within one court itself, seems to be accepted as a fairly normal phenomenon. Harmonization between different courts and tribunals – such as consultation between the presidents of the Supreme Court and of the highest administrative courts – has become a generally accepted phenomenon. Within courts, policy documents are written concerning questions of common interest; on the basis of these, policy is determined which is then carried out by the different divisions of the court in question. This too has become normal conduct in the last few years. At the national level, agreements exist between all courts of appeal and district courts on points to be taken into account regarding sentencing. Problems with regard to judicial independence were, however, noted when the Council for the Administration of Justice (*Raad voor de Rechtspraak*) was established.³¹ The present report will not deal in depth with the experiences of the first few years of the Council for the Administration of Justice.

²⁹ Verhey 2001, p. 21 note 6 gives further references, in a footnote that was almost literally copied by Kuijer 2004, p. 208-209. See further Kortmann 2005, p. 257: judicial independence is independence in relation to other state organs, not in relation to other courts.

³⁰ Verhey 2001, p. 66 et seq.; Kuijer 2004, p. 209.

³¹ See in particular Bovend'Eert *et al.* 2003.

2.7. Other Aspects

2.7.1. The Sub Iudice Principle

The *sub iudice* principle is not laid down in the Constitution of the Netherlands. The principle has of old been regarded as an important constitutional principle, although there is not much mention of it in the major reference works on Dutch constitutional law. Nevertheless, in practice it plays an important role in the relationship between the government and parliament. The government does not usually answer parliamentary questions regarding matters on which a court still has to decide in final instance. A recent example was the reply to some parliamentary questions put by Ms Vos (GroenLinks): the Minister of Justice informed parliament that that these questions could not be answered because the case was still in court.³² This position is in accordance with established practice. However, occasionally a political debate does, nevertheless, arise on matters still to be decided by the court. In particular, after the murder of the Dutch politician, Pim Fortuyn (2002), where a suspect was arrested almost immediately, there was rather intensive interference by parliament, in particular from a group of Fortuyn's political friends. Such situations should be regarded as highly exceptional, though.

2.7.2. Liability for Damage Resulting from Judicial Errors

The last subject deserving attention in this general section, is the regulation of state liability in case of judicial errors.³³ A rather restricted system of liability in this matter can partly be justified by considerations of judicial independence.³⁴ Article 42 of the Judicial Officers (Legal Status) Act (hereafter JOLS Act) provides that the State of the Netherlands, and not the judge in person, is liable for damage resulting from mistakes that are made when in office. Up to now the Supreme Court has accepted liability of the State only twice, recently in a ruling of 18 March 2005 (*Van Mechelen*) following a judgment by the ECtHR in which a breach of Article 6 ECHR was established by the ECtHR. The judge is only liable vis-à-vis the State in cases of intent or deliberate recklessness. A judicial officer is not liable for the consequences of a judicial ruling (Art. 42 paragraph 3 JOLS Act).

3. Discussion of some Specific Aspects of the Guarantees for Independence

3.1. Incompatibility of Functions

According to Article 44 of the JOLS Act, the office of judge is not compatible with that of lawyer (solicitor or barrister), civil-law notary or the otherwise rendering of professional legal assistance. This prohibition does not apply to the deputy judges mentioned below. The membership of a body regulated by public law or of a general representative organ is not seen as a breach of independence. On the contrary, the JOLS Act requires the judicial organization to take measures to ensure that a deputy judge is able to hold such a position.

Furthermore, judges are free to express their political and social views, also in the media. In practice, judges are rather reticent in making use of this freedom.³⁵

³² *Kamerstukken II* 2002/03, nr. 1859.

³³ Also accepted in EC law, ECJ, *Köbler*, case C-224/01, ECR 2003, p. I-10239.

³⁴ Agnostaras 2001.

³⁵ Huls 2004.

3.2. *Deputy Judges*

A phenomenon which is perhaps typically Dutch is the function of the so-called deputy judge. This is a lawyer – with relevant professional experience as such – whose main occupation is outside the judiciary, but who takes part in the administration of justice on an incidental basis, usually as a member of a three-judge chamber, together with two normal judges. Academics, solicitors and barristers, corporate lawyers, tax advisors, administrative officers etc. may work as deputy judges.

Deputy judges enjoy the same guarantees for independence as their colleagues whose main occupation is within the judiciary. A deputy judge is also appointed for life, and enjoys the special protection against dismissal laid down in Article 117 of the Constitution.

The use of deputy judges is widespread, and is not regarded as a threat to judicial independence. That is connected, amongst other things, with the fact that, as already mentioned, the deputy judge frequently operates within a three-judge chamber, so that his individual contribution to particular decisions remains concealed. His independence is in practice respected, also by his employer in his main occupation. There has, however, been increasing discussion as to how the requirement of impartiality should be implemented. Naturally, a deputy judge must refrain from judging cases with which he is connected in some way or the other. All positions that he holds besides his position as deputy judge are made public on the website of the court in question. The Netherlands Association for the Judiciary (*Nederlandse Vereniging voor Rechtspraak*) and the presidents of the courts have drawn up Guidelines with instructions for individual judges.

We will not go further into the question of the impartiality of deputy judges in this report. It cannot be ruled out that the fact that these officials have their main occupation outside the judiciary may lead to questions relating to their independence. For the time being, it seems that less use may be made of deputy judges – particularly solicitors and barristers – because of the discussion regarding their impartiality.

3.3. *Judicial Independence and the Organization of the Administration of Justice*

In order to explain the context within which the constitutional guarantees for judicial independence in the Netherlands are to be understood, it is necessary to consider briefly the organization of the judiciary as laid down in the Judiciary Organization Act of 2001.

An important element of the modernization that took place in 2001 was the establishment of a Council for the Administration of Justice (*Raad voor de Rechtspraak*). Such a body did not previously exist in the Netherlands. The tasks of the Council concern the administration and management of the organization of the judiciary. Article 91 JO Act mentions the preparation of the budget of the courts, the assignment of budgets, the supervision of the implementation of the budget, and the management of the courts, as well as ‘activities at a national level relating to the recruitment, selection, appointment and training of the court’s auxiliary staff’ (Art. 91, first paragraph, sub f, JO Act).

When the Council for the Administration of Justice was established, several authors expressed concerns as to whether the Council would be in a position to interfere with the substance of the administration of justice. Article 96 of the Judiciary Organization Act provides explicitly that the powers of the Council do not reach that far:

‘- 1. In the execution of the tasks laid down in Articles 94 and 95, the Council will not intervene in the procedural treatment, the assessment of the substance, or the judgment of a particular case. – 2. the first paragraph shall apply *mutatis mutandis* to the execution of other tasks and powers, assigned by or pursuant to this act, in the sense that the Council will not intervene in the procedural treatment, the assessment of the substance nor the judgment of categories of cases’. (unofficial translation)

Although the first experiences with the activities of the Council for the Administration of Justice do not seem unfavourable, criticism has not yet ceased completely.³⁶ It is as yet too early to draw definite conclusions on this point.

3.4. The Position of the Individual Judge within the Organization of his Court

The guarantee of the independence of the individual judge with respect to the organization of the court within which he functions, has the same characteristics as the guarantees with respect to the Council for the Administration of Justice. The management board of each court has been assigned tasks under the Judiciary Organization Act, but in each case it is added that (also) the management board of a court may not intervene in the procedural treatment, the assessment of the substance or the judgment of a particular case or categories of cases (Art. 23 paragraphs 2 and 3, JO Act). In performing its duties, the management board may give general or specific instructions to all judicial officers working at the court in question, but the exercise of this power is bound by the same guarantee (Art. 24, JO Act).

However true it may be that the management board of a court would certainly not even think of influencing a judge in his decision in a specific case, it must still be said that the management board's control over the organization of operations within the court can have a large, albeit indirect, influence on a judge's work and also on his independence. We point to the fact that, for instance, in the rules on criminal procedure there are a number of instances where a criminal case may be heard by either a single judge chamber or a three-judge chamber. This should depend on the difficulty of a case. The decision on this is left to the adjudicating judge. His policy and his decisions in specific cases can influence the ability of the court as a whole to handle its case load, or it may influence the ‘quality’ of decision-making, in the sense of the length of time within which cases are dealt with in a certain court. Both these aspects are matters in which the management board of the court is competent. When drawing up the budgets and the annual plan that is made for every court (Art. 31 and Art. 32, JO act), the way in which judges will deal with their cases and the amount of time involved is taken into account by way of indication. This may influence decisions by judges in specific cases concerning the way in which the proceedings should be organized and conducted. Some sort of counterbalance is provided by the so-called ‘meetings of the court’, meetings in which all judicial officers working at a court participate. These may not be able to do more than offer advice to the management board (Art. 28, JO Act), but they still seem a highly suitable place for guaranteeing sufficient institutional independence to all the individual judges within a court.

³⁶ See in particular Kortmann 2005, who is highly critical of the new organization of the judiciary.

3.5. Dismissal

3.5.1. Introduction

As explained earlier, the guarantee of independence contained in the appointment ‘for life’ (Art. 117 paragraph 1, Constitution; Art. 1a, JOLS Act), implies that an individual judge cannot be removed by a government body on grounds based on his decisions or performance. The fact that the judge does not have to fear consequences for his own employment from the way he functions, and particularly from the decisions he takes in specific cases – even when applying the law with regard to and against the government – is one of the most important guarantees for judicial independence.

This principle does not imply that a judge may never be dismissed, even in special circumstances; it does mean that such a dismissal is surrounded with special guarantees. This special nature explains why the legal basis for rules on such dismissal is to be found in the Constitution itself, in Article 117. This article is thus a supplement to and a *lex specialis* with regard to Article 109 of the Constitution, which contains the instruction to regulate the legal status of civil servants in general.

3.5.2. Resignation: Dismissal on Request and on Reaching the Age of 70

Judicial officers are dismissed at their own request. This takes place by royal decree (Art. 46 h, JOLS Act). Special reasons for the request do not have to be given. The constitutional provision contained in Article 117 paragraph 2 expressly creates the possibility of this ground for dismissal. The wording of Article 117 paragraph 2 prescribes fairly imperatively that the members of the judiciary who perform a judicial function shall be dismissed at their own request. When a judge requests his own dismissal, the Crown is not free to refuse this request. A request for dismissal is not necessarily the same as a voluntary resignation: for further explanation, see below. On reaching the age of 70, a judicial officer is dismissed by royal decree (Art. 46 h, second paragraph, JOLS Act).

3.5.3. Dismissal for Unsatisfactory Performance: Constitutional Basis

Although judicial independence involves a pressing need for protection against dismissal, the interest of an adequate administration of justice calls equally for protection against inadequately performing judges. Even Article 117 of the Constitution does not rule out the dismissal of judges on grounds of unsatisfying performance in special cases. The constitutional provision gives some additional guarantees in this context. First of all, such dismissal can be granted only in certain cases provided for by Act of Parliament. The wording of this provision prohibits the delegation of the determination of such cases to a lower legislative body than parliament.

The second guarantee is that the body with the power to grant, or order, such dismissal should be designated at the constitutional level. Because of the guarantee of independence of the judiciary as a whole in relation to any other government branch, the application of these grounds for dismissal is the exclusive competence of the judiciary itself, viz. of a court that is part of the judiciary. This wording itself implies that application of the provision cannot be assigned to a body within the judiciary that is not a ‘court’, such as a management board or the above mentioned Council for the administration of justice, nor to a court that does not belong to the judiciary. The courts which form part of the judiciary are determined by Act of Parliament (Art. 116, first paragraph of the Constitution; see above). In this context, Article 117, third

paragraph, provides the further guarantee that the court in question will be designated only by act of parliament.

It should be noted, however, that the legal definitions are not such that a 'court' necessarily forms part of the judiciary (Art. 116 paragraph 1, Constitution), nor that only members responsible for the administration of justice have a seat in a court, whether or not that court is part of the judiciary. The protection of the independence of members of the judiciary, as intended in Article 117 paragraph 1 of the Constitution, only applies to the category of members mentioned in that provision, i.e. those responsible for the administration of justice. The type of independence that is guaranteed by appointment for life does not, therefore, necessarily apply to all members of a 'court'.

3.5.4. Detailed Arrangements

3.5.4.1. Legal Basis: Judicial Officers (Legal Status) Act (Wet rechtspositie rechterlijke ambtenaren)

The constitutional instruction of Article 109 has been worked out in detail and specified with regard to judicial officers in the Judicial Officers (Legal Status) Act.³⁷ Insofar as the choice has been made for special arrangements regarding the legal status of this special category of civil servants, it follows logically that the instruction of Article 117 paragraph 3 of the Constitution, to regulate the suspension and dismissal of judicial officers, is also carried out in this act of parliament.

The elaboration of Article 117 paragraph 2 of the Constitution can be found in chapter 6a of the Judicial Officers (Legal Status) Act. The exclusivity of these rules has been further limited by the fact that this chapter only applies to the judicial officers appointed for life, and not to other members of the judiciary.

3.5.4.2. Exclusivity of the Rules; the Criminal Courts have no Jurisdiction

The rules regarding dismissal in the Judicial Officers (Legal Status) Act were intended to be an exclusive set of rules: other provisions regarding dismissal are prohibited. This can also be inferred from Article 28 paragraph 2 of the Penal Code. The system of penalties of the Penal Code acknowledges the deprivation of rights as an accessory penalty to – only – certain offences designated by act of parliament. Such deprivation of rights may include disqualification from holding any public office or from holding certain public offices. Although the removal of a judge from office by means of such a penalty imposed by the criminal court is not in conflict with Article 117 paragraph 3 of the Constitution, in fact Article 28 paragraph 2 of the Penal Code rules out the imposition of this penalty by the criminal court on (amongst others) all members of the judiciary – appointed for life or for a limited period.

3.5.4.3. The Cases

The cases in which a judicial officer appointed for life can be dismissed are:

- a. the case in which he is permanently unsuited to fulfil his duties because of long term illness. In case of illness, the Supreme Court can assign other duties (Art. 46k, first paragraph, JOLS Act). These should be 'suitable' or 'acceptable' within the meaning of the legislation applicable to other employees or civil servants. The refusal of such alternative duties can lead to dismissal.

³⁷ Act of 29 November 1996, *Staatsblad* 590, came into force on 1 January 1997.

- b. unsuitability to perform his tasks not caused by illness;
- c. acceptance of an office or position that is incompatible *de jure* with the office held by him;
- d. loss of the Dutch nationality;
- e. either a final conviction for a serious criminal offence (not for a minor offence, and regardless of the imposed punishment) or a final and irrevocable judgment that imposes on him a measure entailing the deprivation of liberty;
- f. placing under financial guardianship, bankruptcy or suspension of payments, application of the statutory debt rescheduling arrangement, or commitment for debt i.e. one of the various forms of financial incapacity determined by law;
- g. as a result of action or omission, seriously prejudicing the proper functioning of the administration of justice or the confidence that is to be placed in it;
- h. repeated failure to comply with provisions that prohibit him from exercising a certain occupation, or that appoint a permanent or continuous residence, or that prohibit him from meetings or conversations with parties or their lawyers or attorneys, or from accepting any special information or documents from them, or that impose on him an obligation to keep a secret, even after the disciplinary measure of a written warning has been issued to him.

3.5.4.4. Requirements for the Requirements

The principle of legality already means that these cases must be fairly explicitly elaborated in the relevant statute. The criteria of the ECHR require the cases to be sufficiently 'accessible and foreseeable'. It should be reasonably possible for every judge to ensure that his conduct as a judge complies with the relevant legal provisions, so that he may easily avoid applicability of these cases to him. In particular, the ground given under (g) is notable for its relatively broad nature. On the other hand, this is a specific application of the ground 'neglecting the dignity of his office, his official tasks or duties' under Article 46c paragraph 1 sub (a) of the Judicial Officers (Legal Status) Act. Violation of that more open standard of conduct can lead to the disciplinary measure of a written warning, but as long as this ground does not become more concrete and of a seriousness as referred to and described under (g), there is no ground for dismissal. As for the ground referred to under (f), one may wonder whether this ground is necessary in a democratic society.

3.5.5. Court: The Netherlands Supreme Court

Article 117 of the Constitution, already mentioned above, provides that the court which has powers in relation to these grounds for dismissal – and thus in relation to dismissal – should be designated by act of parliament. The Constitution does not further indicate which court this should be. In the Judicial Officers (Legal Status) Act the legislature chose to grant competence in respect of dismissals to the highest national court, namely the Netherlands Supreme Court. This court is the only one that can dismiss an individual member of the judiciary who has been appointed for life. The Supreme Court only takes decisions regarding dismissal when such is sought by the Procurator General of the Supreme Court. The latter is not a member of the judiciary, but is appointed for life; the administration cannot give him binding instructions to demand dismissal of a member of the judiciary responsible for the administration of justice.

3.5.6. Suspension and Disciplinary Punishments

Pending a possible dismissal, a judicial officer who has been appointed for life can be suspended from his duties once a ground for dismissal as mentioned in the law is presumed to be present. This would be the case, for instance, if he is taken into custody for a criminal offence. The definition of grounds for suspension is thus in each case always connected with the existence of a concrete presumption of a ground for dismissal. The constitutional guarantee of independence as described in Article 117 also covers suspension; partly for this reason, the suspension of members of the judiciary appointed for life is also assigned to the Supreme Court, in Article 46f Judicial Officers (Legal Status) Act. The Supreme Court may decide that during the period of suspension, the judicial officer's salary is partly or entirely withheld. The Act does not provide for compensation in case the suspension does not lead to dismissal. Finally, decisions regarding suspension are also only taken upon the demand of the Procurator General of the Supreme Court.

3.5.7. Written Warning as a Disciplinary Sanction

Besides dismissal and the associated provisional measure of suspension, the Judicial Officers (Legal Status) Act also provides for the disciplinary sanction of the written warning, which is not mentioned in Article 117 of the Constitution. The judicial officer who is president of the court has the power to give a written warning, as a disciplinary sanction. The grounds for imposing this sanction were already stated above. The sanction is only imposed after the judicial officer in question has had the opportunity to put forward his view orally or in writing (Art. 46e, paragraph 1, JOLS Act). Appeal from this sanction lies to the Central Appeals Tribunal (Art. 47, paragraph 3, JOLS Act). For reasons related to the independence of the judiciary, this sanction can only be imposed by a judicial officer and not by the board of management of the court, on which persons who are not judicial officers also sit.³⁸

3.5.8. 'On Request'

As was mentioned above, judicial officers who have been appointed for life will also be dismissed at their own request. In this context, it should be noted that a dismissal on request is not the same as a voluntary resignation. The procedure for dismissal by the Supreme Court against the will of the judge involved is in practice hardly ever applied; cases involving dismissal are already rather exceptional, and when they do arise, it is not uncommon for the judge involved to request his own dismissal already beforehand. This is usually the case when a judge is suspected of a criminal offence which he does not deny. Dismissal proceedings whose outcome is already self-evident can thus be avoided. It cannot be ruled out that a judge who requests his own dismissal in such a situation, does so partly on the basis of conversations with other people, in which he may be influenced with regard to the decision he takes.

3.5.9. Complaints about the Conduct of Judges

A distinction should be made between dismissal or suspension of judges, on the one hand, and the possibility to complain about the way in which a judge has treated a citizen, on the other.³⁹ Unjust or arbitrary treatment may lead to a complaint. The

³⁸ Verhey 2001, p. 70, with reference to p. 71 of the explanatory memorandum to the legislative proposal *Organisatie en bestuur gerechten*, *Kamerstukken II* 1999/00, 27 181, nr. 3.

³⁹ Naeyé 2005.

judicial decisions themselves are explicitly excluded from the possibility of complaint. The Judiciary Organization Act (Art. 26) requires each court to draw up a procedure for dealing with complaints. The legislature is still dealing with the establishment of an external complaints body. Until this body is established, the external complaints procedure contained in Article 14a-14e JO Act (old version) remains in force. This procedure applies only to the conduct of judicial officers responsible for the administration of justice. The complaint is heard in first instance by the Procurator General of the Netherlands Supreme Court. After a preliminary investigation, he may ask the Supreme Court for a decision on the complaint. A complaint can also be dealt with in consultation with the president of the court to which the judicial officer belongs whose conduct is the subject of the complaint. The settlement of the complaint is not intended to have legal consequences. For this reason, the power to settle complaints, either following the internal or external procedure, does not need to be explicitly reserved to the judiciary.

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