

REFORM OF THE JUDICIARY IN THE NETHERLANDS, SOME LESSONS AFTER THE FIRST 8 YEARS

Introduction

In this brief presentation I will sketch the basic aims, concepts and developments in the development of the judiciary in the Netherlands during the past 8 years, and I will connect the concepts to these developments. I will finalize this presentation with some factors of success and failure for the judicial change process in the Netherlands.

Aim

10 years ago, several judges in the Netherlands – not the highest in rank – became aware of the rapid changes in societal developments. Basically this referred to the fact that many things and circumstances that were self-evident years ago, seemed to be losing ground. I refer to several factors:

- internationalization of trade and industry – problem: knowledge of treaties and foreign law
- the rapid development of the European Union – problem: knowledge of European law, foreign languages & cultures
- immigration and development of a multicultural society – problem: foreign languages & cultures
- the rapid development of medical techniques - problem: understanding the scope and the choices and their morality
- the development of ICT's – problem: understanding the scope and the choices and making them strategically
- the vulnerability of courts and judges for political disqualification – problem: how to take care of the public interest of well functioning courts without politicians interfering?
- You can imagine that these problems can only be solved by:
 - a selection and career policy for judges and court staff
 - training policy for judges and court staff
 - good cooperation between staff and judges
 - having enough translators
 - having good ICT systems and a clear policy on how to use them, including adequate support
 - having adequately equipped court buildings
 - politicians willing to invest in the courts.
 - some cooperation between the legislative and the courts regarding rules of procedure and rules of court organization

Basic concepts

In order to understand the changes in the Netherlands I need to explain a few basic concepts.

Independence *versus* accountability.

From an analytical point of view, judicial independence has a strained relationship with accountability. The special position of courts and judges within the organization of the state make courts and judicial organization different from relatively autonomous executive agencies, like tax services or the students loans and subsidy organization (IBG) in my country. Eventually, executive agencies are politically accountable for their way of functioning, but, generally courts should only be publicly accountable. Judges cannot be dismissed by a parliament because of the content of their judgments, but political office holders can be dismissed when they lose political support.

Judicial Independence *and* organizational autonomy

Judicial organizations and courts are not just organizations, they are also quite complex organizations. They do many different things. They have a special position within the state, and so have judges. This means that organizing a court and making a court an efficient organization delivering quality decisions requires special skills and attitudes, but also cooperation wider than the court-organization alone.

As a consequence one has to rethink the concept of judicial independence. Organizational complexity makes it unlikely that if a ministry of justice is responsible for court organizations, that administration & management do not interfere with e.g. case management. From a practical perspective this even is inevitable, because non-judicial public servants are a part of the ministry of justice. So their highest chief is the minister of justice.

In order to reinforce judicial independence, the Netherlands have chosen for a different model for judicial administration: a council of the judiciary with explicit administrative competences, especially in the field of planning and control (money & productivity) and quality management. Next, courts have become autonomous organizations. Non-judicial staff are employed by the courts themselves. Courts have become self-administering bodies, but their administration is under supervision of the Council of the Judiciary. The Council supervises expenditure and also the functioning of the management boards of the courts. The Council itself is under supervision of the Minister of Justice. Supervision means in this context, that malfunctioning members of a courts' management board can be dismissed by royal decree on advise of the Council, and the same holds for members of the council on advise of the Minister of Justice. Against such decisions appeal can be lodged at the High Court, which is not administered by the Council.

Political and public accountability

But if courts as organizations are not controlled by politicians, as executive agencies are, how can they account for the way they do their work? After all they are publicly financed and they do fulfill quite an important state function. The solution for this may be found in the concept of public accountability.

Public accountability is larger and wider than political accountability. Judges are not politically accountable, but they are publicly. This means that they have to show the reasons for their judgments as far as jurisprudence is concerned, and that court sessions are public, as are the judgments and their reasons. Because courts are not only organized groups of judges, but also organizations, public accountability demands quite a degree of organizational transparency. This presupposes a well functioning independent press and legal community (academics, barristers). The transparency should not only be about the organizational functioning, but also about judicial functioning.

Financial autonomy? Efficiency!

Courts in the Netherlands are for the larger part financed according to the amounts of cases they delivered the previous budget-year. This is based on a number of indicators, involving empirically defined average time needed to deliver a certain type of judgment. This system is flexible, because from time to time a time registration project is organized in order to check if the parameters are still up-to-date. This system presupposes adequate systems to measure productivity, and it sure presupposes nation-wide identical definitions of parameters. I consider it one of the miracles of the change process in the Dutch judiciary that these parameters were commonly accepted by the courts.

This also indicates that Dutch courts work under quite some economic incentives to produce certain numbers of judgments. Efficiency therefore certainly is an aspect on which the courts should demonstrate considerable transparency, as an essential part of the planning and control cycle.

Quality management

In order to preserve essential judicial values also under serious incentives for efficiency, the courts are under the legal obligation to develop a quality management system. The implementation of this system is well under way. It has primarily the function to enable the courts to adapt their ways of doing things. Therefore, they monitor themselves, they organize mutual visits and every 3-5 years they conduct a self-analyses. These results are mainly for the courts themselves, it is their information. Outcomes of quality management processes will not be made public on the level of individual judges, but generally will be made public on an aggregate level. At this time, we do not know yet in how far judicial values (a.o.) independence & integrity, juridical quality and legal unity, timeliness, security) are maintained exactly, but there are no indications of major wrongs, and my impression is that the traditional socialization of judges in training in the courts still is a strong foothold for maintenance of these values.

Assets for success or failure of change processes for the judiciary

This is a list of factors that I will explain summarily.

1. Judges are involved in and support the change process.

The change process was initiated by an informal group of judges, who managed to win the (financial) support of the minister of justice, in order to start an initial program.

2. Judges organize help in order to be able to speak with one mouth to the minister of justice and the legislative offices (government & parliament).

Judges generally are lawyers and not managers. They did not speak the language of organization & management and hence needed support to have their messages delivered.

3. Good and open cooperation between judges and the ministry of justice (who is also a part of the legislative in a parliamentary democracy) is essential.

This is so in the beginning of the change process, but also later on, because countless details have to be arranged for and the judiciary has no extensive rule making powers. E.g. concerning information provision to the public, or flexibilization of case management. The Council of the Judiciary can function as the interface between Ministry and the judiciary

4. Politicians should be willing to invest some extra money into the organization-development of the judicial organization.

Judges promised organization development and increased efficiency in exchange for more money. The new organizational structure was designed to enable that, while also aiming at preservation of judicial values. Judges accepted these restrictions with some hesitations, but saw no alternatives.

5. The Council of the Judiciary takes responsibility in defending and guarding judicial values in the public debate about justice.

The media strategy is a task of the Council of the Judiciary.

6. Frequent informal contact (6 times annually) between presidents and coordinating vice presidents and court-directors of different courts is essential in order to be able to speak with one mouth to the non-judicial world.

7. The Dutch Change process started half way the program for new court-buildings.

Most courts are housed in modern, well equipped buildings nowadays. Judges generally work at their offices, not at home, and mostly, there is sufficient room for them. 20 years ago this was certainly not the case. Judges would work at home and the court buildings were poor with old junk furniture and heaps of files everywhere.....

8. Judges must accept organizational responsibility, also for non judicial court staff, some of them must be willing to learn how to manage a court or a court division.

This means: learning the organizational language, but also accepting the help and influence of professional managers.

9. There are risks: the issue here is about building trust. Trust between the council and the ministry of justice, trust between the council and the courts, trust between the management board of the court and the court divisions.

Essential is that different persons on administrative and managerial positions trust each other enough in order to cooperate in an open manner.

10. Courts and judges accept that organization development is an ongoing process.

Organization development eventually is a process of continuous and organized adaptation to changing circumstances in society. Blue prints may help, but it are the judges and their staff that have to let themselves be inspired by their tasks in that interactive process.

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