Under Pressure

How can magistrates uphold their position in times of wavering confidence in the judiciary?

Netherlands 1

Susanna Piras, Marloes Sprakel and Laurens Linssen

1.1 Introduction

The title of this paper could refer to the song 'Under Pressure' by Queen[1]. As will become apparent this title has been chosen to illustrate the strain of the wavering confidence the public has in the judiciary and the subsequent pressures this brings about for the judiciary.

The aforementioned public's confidence in the judiciary will be examined in this paper. This notion of public's confidence begs the following questions: what is confidence? Is it important or and necessary for the existence of the judiciary?

In the Netherlands public confidence is measured and published once or twice a year. This indicates to us that confidence is both important and necessary. Recent findings show that in the Netherlands confidence in the judiciary has increased the past year, by 5%, from 65 to 70%.

We thought this increase was rather remarkable considering the fact that the legislator is currently debating a popular proposal regarding minimum sentences which will, in turn, restrict the judiciary when choosing which punitive measures to use when passing judgement. Having said that, the increase in confidence is not that remarkable when we take into account the recent analysis on this subject made by Nationale Ombudsman Alex Brenninkmeijer.[2] According to his analysis politics are pushing the judiciary and the trias politica is under pressure too.[3] We can for example listen and read about this topic when politicians debate about a case which is still pending judgement or when politicians write a letter to the newspaper that judges are using about the European Convention for Human Rights too often and unnecessarily. In this paper we aim to examine the wavering confidence in the Dutch judiciary. Furthermore we will discuss and analyse the manner in which the judiciary has reacted to the pressures bestowed upon them in recent times.

[1] A lover of classical music might choose 'Winterreise'

[2] NRC (Daily national Dutch newspaper), 8-9 April 2012.

[3] Although pressure on the trias politica has in recent years become a hot topic, it falls outside the ambit of this paper to elaborate further on this topic.

1.2 Publicity and the administration of justice/of the judiciary:

Legal principle and/or requirement for the confidence?

Why is our work enacted in public? A rather simple question, regarding our law system.

It is written in paragraph 6 of the European Convention on Human Rights, the Right to a fair trial:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and the public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The paragraph contains two explicit requirements: one regarding the proceedings and one regarding the publicity of the judgement/sentence. The proceedings should be in public, unless there are exceptional circumstances.

The ratio behind these requirements is clear[4]:

1. Proceedings must be public in order to protect the citizens against any secret, arbitrary, judicial approach.
2. The right to public proceedings includes the right to a public hearing, if none of the exceptions laid down in the second sentence of article 6.1 of the ECHR apply. Nevertheless the question of whether a hearing is necessary is dealt with differently in different national laws, particularly for administrative proceeding as they are often written proceedings and mainly concern questions of law. The right to public hearing is particularly important where the court examines contested questions of facts.
3. Both written and oral procedure should be public. All members of the public should be able to acquaint themselves with the proceedings, in particular their course and conduct.

The public nature in the ECHR is significant for the right on a fair trial, in the context of the inquiry by the court: a procedure in public in order to protect each civilian

[4] Judicial Review, a comparative analysis inside the European Legal system, ed. S. Galera, Council of Europe, June 2010

against a secret, arbitrary and judicial approach. But to consider openness solely in relation to the system of law one would misunderstand the aim of it. It clearly finds its ground/meaning in the context of the confidence in the administration of justice, because it is to be checked, seen and heard by everyone. Therefore it contains a certain quality as the Dutch philosopher Brugmans states, not only a control mechanism as stated in the explanation to the ECHR, but also as an affirmation how the judiciary operates.[5]

This ratio dates not from the last century, when the European Convention for Human Rights has been developed. Already more than hundred years before, in 1821 the German philosopher Hegel pointed out the importance of an administration of justice acted in public.[6] He urges the necessity of it because people learn to know the law as a system of general rules which can be applied to each and their specific life, in such a way that they look at themselves and each other as members in a legal community that means as equivalent members of one and the same legal community – not only as separate individuals with their own interests,

John Rawls adds the element freedom in his study 'A theory of justice'[7]:

liberty/freedom of gathered individuals can just get its shape in a rule of law and that requires the structure of a decent administration of justice, by independent and impartial judges in public and fair trials. Law is built on the sense of justice of the citizens and the judge in his robe embodies this law in an exemplary mode.

Article 121 of the Dutch Constitutional Law has since 1983 added a different element to the administration of justice in public: the sentences and judgements should contain the grounds and reasons on which they are taken. Behind this element hides the supposition that if only the judge shows his reasoning and explains the grounds on which the judgment has been based, people shall understand and accept judgements more easily.[8] But understanding the judiciary turned out to be not that easy.

---

[5] Openbare rechtspraak als publiek geweten van de rechtsstaat, E. Brugmans, in: Trema, nr. 7, 2007.

[6] G.W.F. Hegel, Grundlinien der Philosophie des Rechts, 1821, par. 224.

[7] J. Rawls, A theory of justice, 1971, par. 38.

[8] Justice in Robes, Ronald Dworkin, London 2006
Legal ethics and professional responsibility, Ross Cranston, Oxford 1995

1.3 Not to be misunderstood

In the Netherlands the judiciary has paid highest focus/attention to publish well grounded and reasoned sentence for the past years, say from 2006 onwards. One could even conclude that this became synonymous for openness in the judiciary. The percentage of the sentences/verdicts published on the website www.rechtspraak.nl however remained all those years under the 2%. This sort of openness seems not to have caused the understanding and confidence the judiciary has wished for, since questions and (general) information has increased.[9] Of course the providing of information has become only more easy since the internet, but is it the information that people are looking for and can understand?

The principle that judgements should be pronounced in public, which is also confirmed by paragraph 6 the ECHR, requires all interested parties to have access to a judgement in which they have a legitimate interest whereby judgements of general scope should also be accessible to a broad public, taking account of language consideration and such facilities as publication in a journal or in the electronic media. But access means nothing without understanding and is this principle an obligation to publish the sentence of each proceedings held in court? Publishing all sentences will contribute to uniformity and development of law and nowadays it is not an impossible task to publish every sentence at low costs thanks to the internet. But are all these sentences worth publishing and will they be read? Shall this principle contribute to a better understanding, to more confidence? And we have to be aware of the fact that once published it remains in public.

In the Netherlands there is a directive that sentences have to be anonymised before they are published.[10] Some people however do not shun publicity themselves when they have to turn up in front of a judge. Last year a girl, aged 15, was about to sail solo around the world when she had to turn up in front of a judge because in the Nederlands at her age she was still obliged to go to school. Of course the sentence was published anonymised, but since the case got the attention of the media, it is crystal clear who the object of the verdict is. Victims do not choose to become public,

[9] Rechtspraak en publiek debat: van speelbal tot gids en baken, Marc Chavannes, Rechtspraaklezing 2011

[10] Cf. Toegang tot rechterlijke uitspraken, Openbaarheid van rechtspraak, Rapport van de VMC-studiecommissie, 2006

but they have no choice when the trial starts in court. Once published in the internet it is easy to trace persons connected to a trial. That can be very awkward when you apply for a new job.

1.4 Openness and the role of the new social media

The so called fourth power, the media controls the work of the other three powers, the legislative, the executive and the judiciary and contributes to the openness of their work. But meanwhile new social media have created an openness the judiciary until recently had never experienced or even imagined before. The consequences these new social media have for the work of the judiciary can not be stressed enough. For example every detail of a case, every saying of the judge during trial can be twittered around and flies literally and immediately outside the courtroom. The judiciary can not control it. Meanwhile the discussion on the disclosure of sentences/verdicts has been completely overtaken by the discussion on how to deal with the new social media.

In the meantime the judiciary keeps quiet, they still can't believe their eyes and ears: the internal discussion is overtaken by the public and sometimes politic debate. The proceedings in the Wilders case, an in Europe well known Dutch politician, were broadcasted by television from the beginning till the end. Of course, it had to be. After Wilders had claimed that the proceedings were all about politics, the judiciary was on its guards. The judiciary did not want to start a debate, and surely not argue with a politician whose distrust in the judiciary had already been widespread, not the least because he proposed to appoint judges for five years as opposed to an appointment for life as is the current rule in the Netherlands. Without a doubt the proceedings in the Wilders case have changed the debate thoroughly. During the proceedings every (misunderstood) detail of it was discussed on the internet or mentioned on twitter and in the evening, after closing hours of the court, the proceedings were discussed in detail on television in the numerous talk-shows. And unfortunately it was not the statements made by Wilders that caused discussion. It was the judiciary itself, with two challenges of which one was successful, with one of the judges of a higher court as a witness about a dinner and influencing another, expert witness for this case, present at that diner. Needless to say that the judiciary was not present in the talk-shows. It prompted the judge witness to write a book "The dinner intrigue, the judge

as suspect in the Wilders proceedings".[11] The openness in the judiciary seems to have no limits.

Recent research of some senior judges has showed which important role the new social media played during the proceedings of the Wilders case. They suggested to use these new social media before the questions and misunderstanding arise. They recommend the judiciary to use the new social media in order to explain what happens in court.

1.5 A new dimension to openness

In the Netherlands the name of a suspect should remain unknown until the person has found to be guilty and the sentence has been spoken in public. For if the suspect turns out to be innocent, nonetheless he is marked for ever.

In a recent case you might have heard of, Robert M. (so much for privacy), a professional care-giver in a daycare centre is suspected of sexual crimes against 80+ babies and very young children. Many details have been reported by the media: openness seems to be no issue. Apart from the suspects and lawyers, there is nobody who questions the limits of openness. Evidence, argumentation, juridical aspects: it is not that complicated and the court has not been put before an impossible task: it does not examine contested questions of facts: the suspect has confessed and there is a lot of hard evidence. The main suspect, Robert M. has challenged the judges, without success, because of the decision to let the parents of the children speak in court. A right of speech is laid down in the Dutch criminal law but it is restricted to a specific group: victims themselves or direct relatives of deceased victims. For a Member of Parliament this decision led to his proposal not only to give a right of speech about the impact of the crime, but also to let speak and to hear the victim about the punishment. The openness seems to have side effects too, not all positive.

Is the judiciary trying to show with this controversial measure that they understand the mood society is in (revenge?), the anxiety of society (to be heard in court too?). Or is it a sense of justice they feel they want to be acceptable?

Does this openness put pressure onto the judiciary and is there a response?

The judicial sentence comes forth not only from the conscience of the judge, but it appeals also to the conscience of every member of the rule of law. And if they

[11] Tom Schalken, Het eetcomplot. De rechter als verdachte in het Wilders-proces, Amsterdam

understand this appeal and take it seriously, the confidence in the rule of law and the trias politica lives on.

2. The judiciary and the trias politica

2.1 Introduction

The Robert M. case shows that, increasing openness and an aware and actively participating citizen cause, apart from the question on how to deal with the media and increasing openness, more indirect ethical dilemmas as well. As we will point out and demonstrate, the Robert M. case is a clear example of the fact that these circumstances put pressure on the trias politica, the division of state into three separate branches. This chapter aims to briefly sketch the problems encountered by the judiciary in the Robert M. case, then discuss possible other ways the increasing openness of the modern day can put pressure on the balance between the three separate branches of state and the role of the judiciary specifically. Finally the chapter explores the manner in which the judiciary should act within these changing circumstances and aims to make recommendations.

2.2 The Robert M. case and the right of speech during trial for victims

The district court of Amsterdam dealing with the Robert M. case, was faced with an issue concerning the right of speech of victims during a criminal trial. The Dutch legislator has been putting more and more emphasis on the role and the importance of the victim within criminal law. In 2005 this resulted in a new legislation, aiming to give the victim of a suspected crime or, if the victim passed away, his relatives. The Robert M. case is, fortunately, rather exceptional because he is suspected of having sexually abused a very large group of very young children. The Dutch law on the right of speech for victims allows a victim under the age of twelve to speak, if he can be presumed to be able to make a reasonable appreciation of his interests at hand.

In the Robert M. case however, the age of suspected victims fluctuated between 3 weeks and three years old. Obviously, these victims are not able to speak for themselves. Therefore a group of parents has asked the district court to speak on behalf of their children. The media has reported abundantly on the case, and in society, there seems to be a broad support for the parents wishing to vocalize their

---

2011.

grievances in court. This support seems to be in line with a more general embrace by the public of the idea that the rights of victims in criminal law in the past have been overshadowed too much by the rights of suspects. However, although the parents of abused children can, in everyday life, most certainly be considered victims themselves, the current legislation does not accommodate their right of speech. Only if the victim has passed away, his direct relatives can speak in court. Looking at the creation of the 2005 legislation, the legislator has expressly limited the group of persons allowed to speak as a victim because the defense cannot question the victim, which poses a disadvantage. Currently, as a result of the aforementioned change of emphasis in public opinion, a draft has been presented to parliament, proposing to expand this limited group of people that have a right to speak during trial. Although this proposal seems to gather broad support, currently the more limited legislation of 2005 is still valid. On the 15th of December 2011 the district court nevertheless decided that the case of Robert M. was so exceptional that a strict observance of the law would create an undesirable situation. The parents of these young children were given the right of speech during trial. However in a decision of March, 6, 2012 (concerning another case) the Supreme court of the Netherlands has decided that the limitations on the group of people that has been granted the right of speech in article 336 Code of Criminal Procedure must be observed strictly as the legislator has created and motivated these limitations, which are in accordance with the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings. If the judiciary would broaden the scope of article 336 Code of Criminal Procedure, the judiciary would exceed its entitlements and step on the territory of the legislator. On March, 12, 2012, the district court has decided to uphold its decision to grant the parents right of speech, due to the special circumstances of the case. That the case of Robert M. is unique, requires no discussion, however, the ruling of the Supreme court has been clear on the scope of article 336 Code of Criminal Procedure and on the fact that any changing of the position of the (relatives of) the victim in court should be decided by the legislator and not the judiciary. The district court, faced with the special circumstances of the Robert M. case, the parents actively seeking their right to participate, and the general public opinion that the rights of victims in general and these parents in particular should be observed, has exceeded the limitations of law. In doing so the court has taken a decision that, according to the traditional division of state under the trias politica, should be made by the legislator.

2.3 The legislator pushing back

The changes in openness and involvement of society however, do not result solely in the judiciary pushing at the role of the legislator. The legislator, as a result of images in the media and public opinion, pushes back at the judiciary. The last couple of years the media in the Netherlands have regularly criticized the (lack of) severity of sentences given to offenders. The debate revolves around all kinds of crimes, but the main attention of the public is focused on the sentences given to sex offenders such as the suspected Robert M. A general idea has arisen that these sex offenders receive sentences that are too low. Headlines such as “judges don’t have to leave for punishing too mildly” and “low sentence for child rapists” are not uncommon in the media. As a result of this widespread image in the media and amongst the public, the Dutch legislator has drafted a new proposal, introducing minimum sentences in Dutch law for recidivism in severe crimes. The Raad van State, the highest Dutch court in governmental law and independent advisor of the government on legal issues, has advised against the proposal. The advisory council judges that minimum sentences would infringe on the ability of the judiciary to judge each separate case on its own merits. The proposal would thus limit the judge in doing what seems to be just in a specific case. However, the proposal has been presented to the parliament despite these remarks. The problem of minimum sentences is not an exclusively Dutch issue. In rather a few European countries, such as France and England, minimum sentences are determined by law. However, as opposed to most of these legal systems, the Dutch proposal leaves no room to deviate under special circumstances. Apart from the legalised escape routes, judges in other countries seem to find other ways to avoid limiting minimum sentences. This leads to acquittals and dismissals where this might not have been done under other (legal) circumstances. Without a legally determined possibility to deviate from minimum sentences when this seems just to the presiding judge, or the use of artificial escape-routes such as seen in other countries, the proposal would form a serious infringement of the freedom and responsibility of the judge to perform his task under the trias politica.

2.4 The judiciary and the trias politica, pushing and pulling

The trias politica ideal divides the state into three separate branches, the legislative, the executive and the judiciary branch. As illustrated by the aforementioned examples

of the right of speech for victims and the proposed minimum sentences, widespread images living amongst the public and the active citizen can put pressure on the trias politica by motivating the separate branches to overstep the traditional boundaries. This does not necessarily pose a problem to the democratic state. The trias politica is not, and perhaps should not be, a static state. It is only to be expected that the three branches push and pull at each other, as a reaction on changes in society. Although this pushing and pulling does not pose a problem in itself, the three branches must remain balanced to a certain point, in order to be able to provide as a check and balance upon the actions of the other branches. These checks and balances the separate branches form upon each other do form a requirement of a democratic state.

To maintain that balance, however, new times might require a new attitude. Society has most certainly changed with information and opinions being more freely accessible through the media, and citizens playing an active role in influencing all three branches of the trias politica. What does this mean for the two examples above?

Of course it is in principle the job of the legislator to create new legislation. Do exceed the limitations of article 336 Code of Criminal Procedure is therefore an infringement on a democratic society. It is after all the legislator and not the judiciary that is chosen by the public, to rule and create laws in accordance with the will of the people. However, it could be said that the district court of Amsterdam in this case has a sharper democratic antennae than the Supreme Court. Although the judiciary is not chosen, it can and should listen in on the sentiments of society, after all the judiciary too is a branch of the democracy. Although the legislator should in general determine the scope of laws, the legislator can oftimes react slowly to changing democratic impulses. Politics and the public seem to be in agreement that there should be a stronger emphasis on the needs of victims in a criminal trial. The only thing that remains to be done is for the new legislation to be passed through the first and second chamber of parliament. Is it, in that situation really more democratic to interpret the law in the strictest sense, and leave the legislation to the legislator. It seems more democratic to follow this widespread agreement in society and interpret the old law more widely in order to fit both the specific circumstances of the Robert M. case as the path the legislator seems to be willing to take anyway.

If argued that the judiciary should in fact maintain a sharp democratic antennae, and listen to the voices coming from society, does that mean she should punish more severely in accordance with those very same sentiments? Not necessarily. It is true

that there is a loud calling for higher sentences, especially for (suspected) sex offenders such as Robert M. However, the judiciary has already followed these sentiments up to a certain point. The judiciary has been punishing more severely today than she has in the past, according to different studies. The Dutch judiciary also gives higher sentences on average than most western-european countries.
It is clear that for now the judiciary is looking for more ways to be understood than in publishing their sentences on the internet. Recently the website www.rechtspraak.nl already mentioned above has a new item where everyone can 'play' to be a judge. How to use the new social media is still in discussion. But it seems obvious that the judiciary will step beyond the explanation of its sentences. There is also strong need for a (more permanent) appearance in public, a kind of brand, as a counterpart against the other two branches of the trias. But isn't there a risk of loosing the impartiality and independence?[12]

2.5 Openness in the Robert M. case. How far can you get before you damage?

Fortunately the average proceedings are rather tedious and they drown in oblivion. That is different for proceedings with a high publicity factor. The media, old en new, see to an openness almost without limits. Thanks to them the information is not only published and kept in the internet, but the information remains also in the collective memory of society.
The Robert M. case began for the public prosecution office when it was confronted with an image of a young child, two years old, on a computer of a paedophile in the United States of America. In the background the famous Dutch Miffy/Nijntje was visible. This lead the US investigators to think the image was of Dutch origin. The prosecutor in charge decided to show a picture of the child in the programme 'Opsporing Verzocht'. The same evening grandparents recognised their grandson and Robert M. was arrested. A few days later a full face photograph of Robert M. is shown at television in order to prevent commotion. This was an uncommon decision, as photographs of suspects normally are not made public in the Netherlands, and certainly not without the black stripe over the eye section. But then a nightmare of very many parents starts who have trusted their child to a man who during daytime worked in a daycare centre and in the evening operated as babysitter for hire since

[12] Blind vertrouwen: de norm van rechterlijke integriteit, Rechtstreeks 2011 nr. 3

2004. Of course the media immediately told all about the suspect and all about the daycare centre where he worked and so forth. Until now the victims remain unknown. At least there are more than 80, but they are still too young to talk. But probably they will be known at a later stage in the trial as some parents will use the right of speech which the district court of Amsterdam has granted to them.

Although we do not know how severe the long term damage will be caused by the abuse, we know that the children once they have grown up can find out anything they want to know about this, about their (!) case. It will be inevitable as a result of the openness in this case.

To show how it works: everyone knows the case of 'Lucia de B.' or the 10 year old girl that has been raped and murdered in the 'Schiedammer Parkmoord' in the year 2000. Almost 12 years later people remember this name the 'Schiedammer Parkmoord' and the name of the victim. Of course her parents do not want her to be forgotten, but they find it very improper to still hear her full name in the media.

Does this (new) openness contribute to the confidence in the administration of justice? That's the question.

Probably the ordinary citizen does not care for uniformity and development of law until he is due in court. Listening to politicians these days the main interest of the citizens, their voters, seems safety, the war against crimes and the severity of punishment. Research has shown that crime figures have dropped, still people think and feel themselves not safe. They worry and they want to act to make society safe, trough neighbourhood watch etc. They do not trust anymore in advance the three powers of the trias politica in protecting their safety.

3 The gap

It seems that all sides of the trias politica in the Netherlands[13] put pressure on the model and to add to it all, also the citizen who grants the three powers their existence is losing its confidence in certain aspects of how the three powers work. The electoral success of the political party lead by Wilders, the PVV, is said to be a result of this decline in trust in the conventional parties and institutions. In a way the PVV is the embodiment of the faltering trust in the trias politica. Many supporters of the PVV do not trust the government, parliament and the judiciary system. This decline in trust in public institutions is not a new phenomenon in the Netherlands but has started in the late 1980's.[14] Pim Fortuijn was the first to translate this feeling in political momentum outside the traditional party structure but he was murdered in 2002 before he could lead his party to change. The party did take part in the Government, but never truly recovered from the loss of its leader. Now the PVV gives voice to these sentiments and does so from within the trias politica. That makes it even more necessary to address the underlying issues.

Although well publicised miscarriages of justices such as the 'Schiedammer parkmoord', 'Lucia de B.' and the 'Puttense Moordzaak' may not be the sole reason for the distrust in the judiciary, the result of these cases was however close scrutiny of the judiciary by politicians and public. But maybe even more important, these cases gave legitimacy to a decline in trust or even outright distrust of the judiciary. Wilders enhanced this feeling with his statement that millions would rightfully have no faith in the judiciary if he were to be convicted of hate speech. He also stated that the proceedings surrounding his trial were one big mess and a bad circus act. In the same interview he stated that he hoped that he would not be convicted, because then he could not blame people if they would attack an important institution in the Netherlands: the independent judiciary who rules independently and without

[13] The trias in the Netherlands is not a perfect balance of powers. The executive power can also make legislation.

[14] De onafhankelijkheid en onpartijdigheid van rechters Van insiders- naar outsidersperspectief, Justitiële verkenningen 2003-01 p 76.

prejudice.[15] Another grand statement by Wilders is: "The Justice system in North-Korea is better than the Dutch system."

The complaint about the judiciary seems to be that the judges do not live in everyday reality and are too elitist. There seems to be a gap between the people and the judiciary.[16]

Over the past ten years, the typical reaction to this complaint has been to defend this gap as enabling impartial rulings and to better explain the work of the courts. Publish more verdicts, verdicts that try to explain more than before the reasoning of the verdict, and have the judiciary interact with society. Corstens, president of the Dutch Supreme Court is a strong advocate of this approach. As seldom seen before, he participated in a Sunday morning talk show to react to the statements made by Wilders during his trial.

The idea behind all this explanation seems to be: if we only can let the public understand why we have done this and that, they will surely agree that we have done a great job![17] There seems to be to ground for this reaction: in a study performed by a famous Dutch forensic psychologist in 2008, citizens were given more or less full access to all court documents, testimonies backgrounds of the suspects etc. It proved that the well informed citizen punished roughly the same as the professional judge.[18] The citizen however acquitted less often than the professional.

The problem however with this solution is that it is impossible to provide all the information to all citizens. There will be no end to explaining and before you know it, the department that gives the explanation outnumbers the judges 10-1. Besides this practical and financial limitation, there are also legal obstacles. There are not only suspects in a file, there are also witnesses and victims. To black out all the information that could lead to the identity of these people, would require an even larger department.

---

[15] http://nos.nl/artikel/193424-zorg-hoge-raad-over-woorden-wilders.html

[16] http://www.trouw.nl/tr/nl/4324/nieuws/article/detail/1813517/2010/10/30/Wanneer-doet-de-rechter-het-goed.dhtml

[17] “To understand all is to forgive all.” Evelyn Waugh, Brideshead Revisited

[18] Strafrechtelijke oordelen van rechters en leken, bewijsbeslissingen, straffen en hun argumentatie. Willem Albert Wagenaar, Raad voor de Rechtspraak 2008.

Will the solution of the trust issue lie in giving information to the public? Will a citizen be sufficiently interested to read a complete court case? Will the citizen see the need to do so in order to know all the ins and outs instead of relying on the media to give a fair summary? And will the citizen trust the information given to be complete?

As said, the typical reaction of the judiciary is to explain why the rulings are just. But should we not listen to Franklin Covey: First seek to understand, then to be understood?[19]

But to understand the citizen, don't we need to know what constitutes the gap? Judges have above average income. Judges not very often live in a housing project. That is hardly surprising and citizens probably know and understand this, as they understand that a manager makes more money than a bus driver. That is not the gap that is the basis for the distrust, this is not a new gap. So what exactly is the underlying reason for the distrust?

The existence of a gap in itself seems not to be the problem, but when the gap is so wide the citizen feels the judge does not understand him or his situation anymore, then the gap becomes problematic. In family court, the parent often asks the judge if he (or more often she) has children. In the criminal court the suspects sometimes asks the judges if he ever was addicted to heroin. The victim of a relatively simple burglary asks the judges how often his home has been burglarised. The police officer sometimes, after a low sentence or even an acquittal, asks the prosecutor: what planet does that judge live on? Is the difference in personal experience of citizen and judiciary the real problem?

The citizen wants to be understood, but what is needed to truly understand each citizen? How can a white upper-class judge understand the immigrant who lives with three fellow immigrants in a 4x4 room? Besides equal opportunities, this difference in background might also have been a reason why at some point it was decided that the judiciary in the Netherlands should better reflect the more diverse society. Although it was clear that the judiciary would never be a true reflection of Dutch society as a

[19] The 7 Habits of Highly Effective People
Habit 5: Seek First to Understand, Then to Be Understood

university degree is mandatory to become a judge, since the mid 1990's an effort was made to recruit people from different ethnicities and background.[20]

Is this the difference in background the source of the lack of trust in the judiciary? According to a dissertation by J. Soeharno[21], the difference in background in itself is not the reason for the distrust. 30 years ago, a judge was this older man, grey haired, etc. This was a stereotype everyone knew and seemed happy with. Citizens knew what to expect. And the judgement was respected. But even then not everyone was older and grey haired, so there was a gap. What makes the current gap a problem? Is it wider than before? Soeharno proposes that the pluriformity of the judiciary and society makes it harder to know the judge and therefore accept his verdict. If the citizen does not know the background the judge comes from, the verdict is harder to understand and to accept.

This background is indeed not as uniform as it used to be. Nowadays the judge more often than not is a woman and can be of Moroccan or Turkish descent and can be as young as 28 years old.[22] According to Soeharno, this changing profile of a judge is one of the reasons (besides amongst others miscarriages of justices) that judges find themselves under public scrutiny. People want to know who is judging and due to the changing profile of the judiciary, people do not know what kind of person, with what background is judging them. As long as they don't know the judge, even as a stereotype, it is hard to have trust in the judgment. This could very well be the part of the gap between judiciary and citizens, that presents the biggest challenge. To ignore this or even deny it by explaining verdicts seems not to be an option. Also the strive for diversity will never be completely successful to the extend that every citizen will recognise himself in the judge and know the judge. Even if the judiciary resembles society more by recruiting differently, from different walks of life,[23] how will the

---

[20] Ethnic minority representation in the judiciary: diversity among judges in old and new countries
of immigration. Raad voor de rechtspraak 2005.

[21] J. Soeharno, The Integrity of the Judge: A Philosophical Inquiry, Surrey 2009.

[22] Ethnic minority representation in the judiciary: diversity among judges in old and new countries
of immigration. Raad voor de rechtspraak 2005.

[23] In the Netherlands some argue the opposite is happening. Kwaliteit en diversiteit van de rechterlijke macht in de krimp *NJB* 2011,729

citizen know the judiciary understands his circumstances and background? And as there is no one stereotype judge due to the more divers recruiting, how can the citizen get to know the judge? The solution lies not in explaining, but plain informing. The citizen needs to be informed about the judge presiding over his case. The judiciary needs to be very open about their background even if that makes the gap painfully clear.

Instead of a robe and a wig to render the Judge anonymous, the Judge has to bare all: past present and future. His upbringing, schools, summer jobs, evening jobs, relations, family, hobbies, sports, the works. Postings on Twitter and Facebook, profiles on Linkedin, all mandatory. The complete background of a Judge needs to be made public. This way a citizen can find out what kind of person is judging his case. It can be expected that all this openness will result in an increase of parties seeking the recusal of a judge. The citizen might not like all parts of the background of the Judge. Is the Ajax fan judge fit to rule over a committed Feyenoord fan?

But then how should we prevent a further increase in recusals?[24] Recusals delay the judicial process. Also the impact on the judiciary is not to be underestimated. To have ones impartiality challenged while that is at the core of the profession surely cannot leave a judge unmoved. In the Netherlands, where colleagues of the same court have to rule about the recusal, a recusal process leaves marks on these colleagues.

Would it not be better to be one step ahead. Why not give parties the possibility to recuse the Judge after giving them a full biography of the Judge in question. More or less like the jury selection process we see in the American movies. This is the rule in many international arbitration case.[25]

But is this the life a Judge wants: the life of a pop-star? Instead of an anonymous person behind robe and in some countries wearing a wig, we will be totally visible.

[24] Between 2005 and 2009 there was an 81% increase in recusals with only a 12% increase in verdicts. Source: Wraking van de rechter, een analyse. Majida Chrit, Rosa Venneman, Utrecht 2011.

[25] http://www.jus.uio.no/lm/icc.arbitration.rules.1998/11.html

But do we really have a choice? Unless we are willing to change jobs? The anonymity of a Judge might very well be a thing of the past as the individual has little or no control over what is known about him. Of course nobody is required to have a facebook page (although for pop-stars it seems to be a necessity), but even if you are not on facebook yourself, what can one do to prevent a fellow party-goer to post that nice picture of the two of you in the swimming pool in a certain state. Software acquired by Google might make it possible to recognise this party animal as the current president of the supreme court or director of the IMF.[26]

For someone already working in the judicial system, this is not that threatening. Keeping a low profile has often become second nature. But does this also apply to the now 10-year old who now wants to become a fighter-pilot, but after a knee injury in 2020 starts a study of law to become a judge. This girl might not appreciate the fact that every picture posted on the web is there to stay. And the entry for a debating contest defending the death penalty for the sake of argument is still to be found 10 years later.

It more and more is an illusion to think that the judge can remain anonymous. So let's get personal!

[26] http://www.fastcompany.com/1768963/google-may-be-planning-to-face-recognize-the-web, http://money.cnn.com/2011/12/09/technology/google_find_my_face/index.htm