

# De benoeming van rechters : constitutionele aspecten van de toegang tot het rechtersambt in Nederland en in de Amerikaanse deelstaat New York

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# Summary

## The appointment of judges

### Access to judicial offices in the Netherlands and in New York State

This study investigates the constitutional framework that governs access to judicial offices in the Netherlands and gives a historical description of how Dutch parliament shaped the genesis and the later development of this framework. This study is also an attempt to explore relevant aspects of the system of access in relation to modern constitutional law, and to assess these. 'Access to the judiciary' in the Netherlands is characterised by the barriers which are put up in positive law to a judicial appointment. We distinguish the stages that precede a judicial *appointment* (or promotion), i.e. the recruitment and selection of judges, from the *eligibility* of judicial candidates. In the Netherlands the latter is restricted by the requirements of Dutch citizenship, a university degree in law, and the absence of certain incompatibilities.

Chapter 1 takes as its hypothesis that (constitutional) legislators in the 19th-century, when they created and further developed the system of judicial appointment and eligibility, were guided by a clear vision of access to the judiciary that was related to a specific idea of its task. This raises the question whether recent changes in our definition and understanding of the judge's role in society make it necessary to reform the existing system. In order to answer this we need to know the answers to three key questions: 1) what does the present access system actually look like, and how does it reflect the constitutional framework; 2) what considerations historically shaped this system; and 3) what recent developments are there in the way we define and understand the task of a judge in relation to access to the judiciary.

The discussion of the second question in Chapters 3 and 4 (see below for the first question) shows that the various factors in positive law that have developed over time to govern access to the bench lack any coherence. Chapter 3 shows that (constitutional) legislators have never had a clear vision of what kind of judge the system is designed to select, let alone that they have thought through how judicial appointments should reflect the function and task a judge

is supposed to fulfil. The explanation for this is threefold. First, one should realise that most if not all of the existing system of judicial appointment and eligibility dates back to the early 19th century, when judges were supposed to limit themselves to merely applying the law. The precedent-setting or even normative role of the judiciary was therefore very much ignored. This explains why legislators were not particularly interested in the person behind the judge and why they limited themselves to such general requirements as Dutch citizenship, a university degree in law, and the absence of certain incompatibilities. Another explanation for this lack of interest in the judge's personal characteristics is undoubtedly the circumstance, partly because of the requirement of a degree in law, that judges were until fairly recently recruited from a small well-off elite. Moreover, not everyone was keen to take up a poorly-paid job in the judiciary, especially when the vacancy was in a far-off corner of the country. Finally, Chapter 3 also shows that the diversity of the bench and the related issue of access have only recently become topics of public interest, and that they were far removed from the minds of 19th-century (constitutional) legislators. The two key selection criteria, for instance, i.e. financial independence and the exclusion of women, have never been enshrined in positive law. As far as financial independence is concerned, this criterium was thought necessary (a belief that persisted well into this century) as a safeguard against bribery, thus securing the impartiality of the bench.

Discussing the post-war history of judicial access, Chapter 4 distinguishes two main trends. They are defined as the technocratic and democratic perspectives. The technocratic perspective on judicial access is the perspective adopted by the government, which sees the filling of vacancies in the judiciary first and foremost as an administrative matter. Reforms of the existing appointment and eligibility regulations (such as the introduction of selection committees, the laying-down of rules guiding promotion, or the debate over the citizenship requirement, the law degree requirement, or the incompatibilities) are therefore not seen as related problems, which could have a significant impact on the access to judicial posts, and therefore on the diversity of the judiciary. That these regulations are mainly technocratic in nature is underlined by their low legal status (royal decrees, ministerial orders or circular letters). The fragmentedness and obscurity of the access system explains the problematic relationship between judicial recruitment, selection and promotion regulations and the constitutional framework, in particular Article 116, Section 1 of the Dutch Constitution, which requires all regulations to be anchored in basic law. In reference to the first key question, Chapter 2 concludes that significant parts of the judicial access system are at odds with the Dutch Constitution.

The second trend, the democratic perspective on judicial access, is the result of a growing interest after World War II in the individual characteristics of a

judge and in the make-up of the judiciary. Initially this interest is prompted by a crisis of confidence in the judiciary, which is said to draw its members exclusively from an upper-class elite in society. This negative approach towards the judiciary marks a break with the past, which considered the bench's lack of diversity as an advantage. Although there is no empirical evidence to substantiate this claim, it does seem to be legitimate. Limited access to the university; the unpaid position of clerk of the court, which in the Netherlands used to precede a position on the bench; and possible class prejudice inherent in the culture of the magistracy that draws up the list of recommendations: this all contributes to making the judiciary until well into the Fifties an almost impregnable fortress to the lower classes.

During the Seventies and Eighties the focus of the debate shifts slowly and almost imperceptibly to a more positive interest in the make-up of the judiciary. As is pointed out at the end of Chapter 4, the critical voices that once complained about class justice have now fallen silent - whether they have really disappeared still remains to be seen - and the judiciary appears to take the lead in all sorts of controversial social issues. This new judicial activism raises the question whether the magistracy has the legitimacy and capacity to take upon itself such a pioneering role. An analogy is drawn between the selection and promotion of judges and the way in which members of the Dutch Lower Chamber of Parliament are elected in a direct ballot. Looking at how this debate on judicial access has developed in recent years, one is struck by its incidental and arbitrary nature. The agenda is being set by controversies that happen to make headlines. It seems to me that the (selection of) news items in the media, and the way in which these are reported, play a crucial and often underestimated role in our perception of the judiciary. What's more, there is clear evidence to suggest that media reporting also has an impact on constitutional law. Many developments in the organisation of the judiciary are instigated by institutions outside parliament.

Chapter 6 shows that the democratic perspective is a persistent misconception that arises wherever (the traditional job of) the judiciary comes into conflict with (the traditional job of) the legislature or the administration, especially over issues such as constitutional review, administrative law, and judicial activism. Trying to take into account recent changes in the definition and understanding of the task of the judiciary, and taking as its premise the principle of separation of powers, the democratic perspective is inevitably faced with a problem of legitimacy. This, it believes, can only be solved by adopting the system of selection that is used to select the legislature, i.e. the direct election of members of the Dutch Lower Chamber of Parliament. Chapter 6 puts these notions into perspective, focusing first on the controversy between the appointive and elective systems, and then on the principle of the separation of

powers. To shed some initial light on these issues, Chapter 5 discusses the system of judicial election in New York State, and the debate surrounding it. This and other evidence enables us at the end of Chapter 6 to separate the problem of legitimacy of the judiciary in relation to recent changes in the way we define and understand its task, from the issue of access. By linking judicial legitimacy to, for instance, dissenting and concurring opinions, and to the wider principle of open and public administration of justice, we are able to leave behind us the school of thought which says that public control necessarily presupposes a constellation of public (appointive/elective) powers. Disconnecting legitimacy and judicial access gives new meaning to the concept of public control, and opens up new opportunities for scholarly and social debate.

Translation: Henk van Appeven