7. The Netherlands: practical perspective

Aernoudt Schmidt & Willem Six

7.1 Introduction

This report summarises in a practical perspective the state of the art in the Netherlands. In Part I a short profile of the Dutch judicial system is given, in Part II the actual ways of legal practice in the Netherlands regarding IT support are presented. In Part III, the principles of Fair Trial are used as an internationally recognizable framework to structure the relevant legal issues.

7.2 Part I: Profile[56] of the Dutch judicial system

In the Netherlands, the law is (re)constructed in general rules (Acts) by the legislator. The general rules cover three domains: Civil, Criminal and Administrative law. Legal conflicts may be resolved in courts, or outside. We are interested in conflict resolution inside the courts, and the role of ICT-support.

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56 This profile may be inaccurate in detail and nuance: it is meant to give the overall picture in clear characteristics. Sources used, apart from occasional interviews by and personal experience of the author are: Ministry of justice, *The court system in the Netherlands,* Den Haag 1998; H. Franken, H.W.K. Kaspersen and A.H. de Wild, *Recht en Computer [Law and Computer]*, Deventer: Kluwer 1997; Bureau PVRO, *Eerste voortgangsrapportage PVRO [First progress report PVRO],* Amersfoort 1999; Bureau PVRO, Tweede voortgangsrapportage PVRO [Second progress report PVRO], Amersfoort 2000; Interdepartmental report on the performance of the judicature [Recht van Spreken], The Hague 1999; Jaarverslag 1999 van de Orde van Advocaten: 2000 [yearly report of the Attorney-at-law profession] ; Jaarverslag 1998 van de Hoge Raad der Nederlanden: 1999 [yearly report of the Dutch Supreme Court]; Ministry of Justice, Contourennota: Rechtspraak in de 21e eeuw [Administering justice in the twenty-first century], 1998; http://www.openbaarministerie.nl; http://www.rechtspraak.nl.

7.2.1 Four layers of courts

In all, there are 87 courts in the Netherlands. It should be noted that a court may have several courtrooms and many chambers. These chambers do operate in a sectoral way, that is: every court has specialised chambers for handling civil, criminal and – due to recent and ongoing reorganisation almost in each court – administrative cases. Custom has largely been that judges change sectors every four year or so. The 87 courts are in four layers. At the top there is the Supreme Court. Its main task is to monitor unity of law-reading by the courts. The supreme court has four chambers; the chambers will sit in a number of five or of three judges. One layer down will find the Courts of Appeal, there are five. Court of appeal chambers always have three judges. The next layer contains the nineteen District Courts. These will either sit in three-judge chambers, or in single-judge chambers. The last level contains 62 sub-district courts which only have single-judge chambers. A current – we are speaking in September 2000 – reorganisation is promoting the process of merging the sub-district courts with the district courts organisationally.

7.2.2 Three instances

Thus there are four layers of courts. Yet, justice is administered in three steps, not all cases start at the bottom level. When more serious money is involved, or more serious crime, justice administration starts at the District Court level. In the first step, the case is considered completely with the rules and the facts. In the second step, the case will be reconsidered, as well as the facts and the rules, and the reading of the facts and the rules. The third step is to guard legal unity in the court system and is always performed by the Supreme Court. Here, the reading of the rules has preference over the reading of the facts.

7.2.3 Co-optation and independence: the question of management

In the Netherlands, the Supreme Court membership is not a political issue where government takes responsibility. This is generally the case concerning the staff-recruitment: in the judiciary it follows a procedure very related to co-optation. The independence of the judiciary from the Ministry of Justice and from the Offices of the Prosecution is heavily stressed and continually discussed. Recently, the appointment of attorneys-at-law as a part-time judge has been forbidden within the same district. The issue of independency of the judiciary has in the Netherlands resulted in an absence of transparent management procedures.

Independency has been defended to exist not only between judge and ministry, judge and prosecution, judge and attorney-at-law – but also between judges themselves. Consequently, the development of policies by the judiciary has been somewhat like a taboo. The necessary management of administration and ICT-support has been largely left to the specialised court managers, appointed by the minister of justice.

In 1996, the presidents of the courts of first instance held a meeting that has had considerable impact on the hopes for a better governance of the Judiciary. These meetings have become practice. Of late, the tendency to accept a form of 'integral management' (i.e. a management of legal and administrative affairs together, performed by the judiciary) is promoted. As an important issue the allocation of financial means (by the minister of justice) features, in relation to work load and quality expected (of judges). A 'last minute commission' of judges has fabricated a working model that is currently (and provisionally) in use and is called the *Lamicie* model. A special project has been launched, together with several legislative initiatives. The special project is called PVRO (project for the re-inforcement of the judicature). The issue is considered of some importance. In all, the *additional* investments in the judicature as foreseen by the ministry in the *Contourennota* mounts from 30 Mf in 1999, via 61Mf in 2000 and 90 Mf in 2001, to 130 Mf in 2002. The PVRO-project is better considered a *programme* since it sustains several projects. Many of these projects are concerned with ICT.

7.2.4 Criminal Law

Speaking about criminal law, the Dutch judicial system has been typecast as mildly inquisitorial. Criminal law is concerned with the research, proof, judgment and punishment of acts that have been declared criminal by law. This declaration is a public affair, as well as the administration of criminal law. The victim has no influence over the criminal proceedings of his case. The authorities have assumed this role. This provides them with quite a lot of power to administer coercive measures to suspects. As a matter of fact, in the eighties and nineties the scope of these powers have been overestimated by the public prosecutors and the police to such an extent, that a parliamentary investigation has been necessary to put things into proportion again (the Van Traa-enquete in 1996).

The police investigates crimes and maintains public order. The investigations are performed on behalf of the *public prosecutor.* The public prosecutor's service operates under responsibility of the Minister of Justice. The service is in control

of the prosecution of criminal offences and has authority over the implementation of criminal judgments. The public prosecutor may either prosecute or drop charges. Charges may be dropped conditionally. Furthermore the public prosecutor may make an offer to the subject to settle out of court. If he decides to prosecute, the case is brought before the court. If the public prosecutor did not manage to secure sufficient evidence during police investigations, he may then ask the *examining magistrate* to take more far-reaching measures. The examining magistrate is a judge who leads the investigation. The examining magistrate and the trial judge of a case must not be the same person. The *trial judge* guides the procedure and assures that the prosecution and the defence have an equal say. The trial judge investigates the facts of the case anew (the police have already done so). Usually *witnesses* are interviewed by the police during preliminary judicial inquiry. Witnesses may be called by the trial judge, by the prosecutor and by the defendant. Trial judges will investigate the case during the trial, and will decide on the case in chambers. They will decide on the evidence and the facts, on the proven facts constituting a crime, on the special circumstances aggravating or mitigating the crime. They will then deliver judgment. The sentence will take the personal circumstances of the offender into account (since this often seems to lead to differences in sentencing policies, several attempts are being made to support sentencing with ICT-systems). Most criminal cases are actually investigated and decided in trial.

7.2.5 Civil Law

Most civil law cases are paper cases and are performed in special court sessions called "rolzitting" The *rolzitting* is the session where trial documents are exchanged between the attorneys. A standard procedure starts with a written claim (a writ of summons), followed by a statement of defence, followed by a reply, again followed (and finished) by a rejoinder. The judge is passive: what the parties state and accept as the truth *becomes* the truth for the civil-law trial judge. Of course – civil law procedures may become seriously complicated and end up by hearing witnesses and attorneys and asking intermediate decisions in intermediate procedures from the trial judges. Apart form the trial judges, the attorneys-at-law, the plaintiff and the defendant, specific roles are played by the *bailiff* (presenting the defendant with the writ of summons) and the *judges clerk*. The clerk keeps a record of what is said and done at a session of the court. The *office of the judges' clerks (griffie)* manages the administration and administrative support of the trial judges.

7.2.6 Administrative law

Due to very recent reorganisations, administrative law procedures are entrusted to special chambers of ordinary courts (before, there were specialised courts for administrative law conflicts). Administrative law regulates the relations between the authorities and the citizens. There has been implemented a general administrative law Act, that has harmonised the several distinct organisations and procedures into one single procedure, made part of the general court system.

Human resources	Year	In Mf	In man years
Registered attorneys	1999	Not available	10.405
Professional judges	1998	117 Mf	1.158
Administrative court personnel	1998	302 Mf	3.007
Prosecutors + adm.personnel	2000	377 Mf	Not available
Technology expenditures			
Courts - overhead	1998	84 Mf	Not available
Prosecutors' offices - overhead	2000	80 Mf	Not available

Some Data about expenditure on human resources and technology in 1998

The overall picture of current court technology in the Netherlands does include an MS-Windows 95/98 co-ordinated personal computer on every judges, public prosecutors and support-staff desk, linked by a local area network in the district court buildings, open to Internet and other TCP/IP services. The COMPAS network between court buildings operates using a safe network of dedicated lines called Podacs. This Podacs network also makes safe communication with the police possible. The COMPAS node computers have gradually shrunk from small main frames to server dimensions. Security features are severe on the safe networks – actual risks have proven to be the security loopholes created by professionals taking home floppy disks.

7.3 Part II: ICT and the legal practice

7.3.1 Introduction

Whilst in the past few years many IT support projects have been initiated, it should be noted that these projects have until recently not been the result of a centralised approach. The main initiators have been, and are still, the Ministry of

Justice, the office of the public prosecutor, the Judiciary and the developers of case law and jurisprudence databases. Most of the current initiatives are the result of the individual efforts of one of these initiators. Integration and coordination of these projects has only recently been instigated by the creation of PVRO in 1998.

PVRO, the programme for the strengthening of the Judiciary, is a joint effort of the Judiciary and the Ministry of Justice. The stated goal of PVRO is the improvement of the quality of the services provided by the courts to the citizens, while respecting both the independence and the impartiality of the Judiciary. It is interesting however to note that in this statement two very different interests are at issue, and that these are not necessarily the compliment of one another. At issue, as mentioned before, is the adaptation of the independent Judiciary to management; this has more to do about governance of the Judiciary and government finance than about improvement of the Judiciary per se. As will be seen later, the marked present reluctance of part of the Judiciary to partake in IT support projects stems from this conflict of interests.

In addition to this, while the stated objectives of many projects initially seemed to warrant a marked optimism, a clear distinction remains between the planning and pilot phases of many projects and their actual implementation throughout the Dutch Judicial system.

7.3.2 PVRO

PVRO is an initiative of the Conference of the magistrates of the courts of first instance, the courts of appeal and the Court of Cassation. The conference of Magistrates acknowledges, however, the fact that that political responsibility for the programme rests with the Ministry of Justice. The department therefore dictates the framework of PVRO, and the projects initiated by PVRO fall under the supervision, and are subject to the approval of the department. The department also appoints the key members of the PVRO project team. The Project Team has been authorized by the Conference of Magistrates to initiate new projects. The stated goal of PVRO is the improvement of the quality of the services provided by the courts to the citizens. This goal has been split up into five separate objectives: improving the access to court for litigants, shortening procedures, creating uniform national rules of procedure, improving the communication with the public and improving the quality of procedures. Initiation and implementation of IT support projects can be categorized along the lines of these distinct objectives. Foremost, is the stated aim to shorten and

improve the quality of litigation procedures. The underlying aim is to improve the efficiency of the courts and thereby to reduce the costs of an ever-increasing caseload on the state. The present practice of administration and remuneration of the courts revolves around the modelling of the time spent on an individual case by a magistrate. The annual budgets of the courts are no longer fixed but depend on the amount of cases that have been handled.

The main IT projects initiated by PVRO to shorten and improve the quality of litigation procedures fall into the category of legal information systems aimed at supporting the magistrates in their decision making process. Implementation of IT support, albeit well suited for the purpose of shortening procedures in the long term, will lead in the short term to a glut of cases before the courts. The expected increases in efficiency as a result of the implementation of IT support tools, could well result in an anticipatory modification of the Lamicie models. Thereby financially compelling the courts to shorten their litigation procedures. As a result of this the Courts will see a short term increase in their caseloads (very much like a traffic jam), during the time that the slower cases are still under consideration, as the influx of new cases will be superimposed over the existing caseload. A similar effect has in fact been seen when a shortened civil litigation procedure – with a maximum duration of eight months – was introduced as a pilot project at several courts in 1996. In this instance a flying brigade appointed to help overburdened courts is intended to solve the problem. Compounding this problem is the earlier mentioned paradox, that Magistrates will need to spend time acquiring the presupposed IT skills needed for an effective use of the IT support programs. To date, the only step taken towards a solution of this paradox has been a project aimed at providing the Judiciary with information on the *potential* of Information Technology. This pilot project has however not yet been implemented.

7.3.3 Criminal proceedings

In Criminal proceedings a lot of effort has been spent on the development of sentencing programs. PVRO aims to integrate the individual efforts to date. Chief amongst those are the IVS, BOS[57] and NOSTRA projects. NOSTRA is a sentencing database, developed by a group of courts in the Northern district of the Netherlands. BOS is an automated checklist that implements the POLARIS checklist for the public prosecutors. The aim of this check list is to achieve

[57] Over instrumenten die rechters kunnen beïnvloeden ,A.H.J. Schmidt en E.W. Oskamp (schets van een bijdrage aan de 'Trema''-Brenninkmeijer-special').

through a set of 35 guidelines that public prosecutors will demand standard sentences in 80% of the criminal cases before the courts

7.3.4 Civil proceedings

In Civil proceedings several projects, that fall outside of the purview of PVRO, are now under way Magistrates already routinely make use of software tools that compute the size of the claims that should be awarded In divorce cases the commercial ALIMENT program computes the amount of alimony to be granted in divorce cases In tort cases, the amount of immaterial damages to be awarded is computed by the DOLOR program – an automated database of case law being developed amongst other by S D Lindebergh [58]

It should be noted that in both cases the implemented functionality of these tools does not go beyond the application of well-established and maintained task-norms and case law in an automated process, in cases that that have a factual similarity These programs merely perform a very complex calculation in the very same way as an established checklist prescribes The ALIMENT program (and its counterpart developed by B P J A M van der Pol, a Judge in the Arnhem district court) apply the "TREMA" norms for alimony, whereas the DOLOR program is based on the statistic analysis of published tort case law – mostly immaterial damages awarded in relation to bodily injury

Magistrates who do use commercially available databases of case law and jurisprudence as well as the above-mentioned programs acknowledge the fact that the quality of their decision-making is improved by it, even though they still primarily rely on their own judgement It is therefore to envisage the situation wherein magistrates would relinquish their own judgment in favour of the outcome of a 'prescribed' legal information system Even though, tentatively, it is expected that once initial reluctances have been overcome, magistrates will increasingly come to rely on said outcomes

When confronted with the possibility that agreements on the use of task-models (either expressed in the written form or in an automated process) might be successfully held against them, magistrates then answer that in such a case those

[58] S D Lindenbergh, 'Enkele inleidende opmerkingen over smartengeld', in Smartengeld Uitspraken van de Nederlandse rechter over de vergoeding van immateriele schade, Verkeersrecht, The Hague ANWB 1997

agreements should never be made. However, empirical research[59] shows that magistrates do consider themselves to be under the obligation to comply with policy agreements formulated with the express intent of binding them. As long as their individuality and impartiality is not affected by it.

The second aim of PVRO is to improve access to the courts and to improve access of the public to judicial information. To this effect PVRO has initiated the electronic counter for the Judiciary project (ELRO). Under the auspices of ELRO a website (WWW.Rechtspraak.nl) has been made available to the public and to solicitors. The website now offers solicitors a remote access to procedural information regarding their cases. This very limited access is not meant to replace traditional procedures, but only to provide solicitors with a faster access to pertinent information such as the dates that sentences will be pronounced or the date at which evidence has to be given. This is for the time being a pilot project, initiated in January 2000. The site also offers a selection of judgments pronounced by inferior judges, and is intended to offer free access to all the judgments by the court of cassation.

7.3.5 Digitised Procedures

In the resent OGAP report by the Ministry of Justice, together with the IT concern CMG[60], the Ministry of Justice proposed that the office of the solicitor should be abolished and that instead that the handling of procedural matters in civil cases should be left entirely to the Barristers. The report proposed that ultimately all procedural matters should be handled over the Web. This proposal has met with considerable opposition. The main criticism being that it is not well thought through and will lead to chaos. The proposal does not elaborate on either the necessary and per force far reaching changes to the Dutch legal system or the quantitative effects of the proposal. It should be noted, however, that due to EU-harmonization efforts legislation is also being prepared in the Netherlands to remove legal obstacles to digital transactions by, with and within the judiciary.

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[59] P. Ingelse, O.B. Onnes & G.B.C.M van der Reep, 'De evenementencommissie van het gerechtshof Amsterdam: Enquête rechterlijke samenwerking zomer 1997', in: ICT en straftoemeting, de conferentie van 23 april 1998, IteR nr. 22, Deventer: Kluwer 1999.

[60] Rapport 'Alternatieven voor inrichting', van het project 'Organisatorische gevolgen afschaffing procuraat', uitgebracht door Bureau Systeem- en Infrastructuurontwikkeling, auteur Projectgroep OGAP, referentie RAP 3 OGAP 11 definitief.

7.3.6 Administrative databases

The processes of the Public Prosecution Office at the district courts and the sub district courts have been automated using the case flow management system Compas Information on the way the courts handle cases is extracted form the administrative database maintained by Compas and used amongst other things to formulate the Lamicie remuneration models The extraction of policy information from the Compas database has become fully automated since the introduction of the Rapsody criminal law module in 1994 The Lamicie remuneration models quantify, based on a statistical analysis of the cases in the Rapsody database, the costs associated with the handling by the courts of predetermined types of criminal behaviour In the Netherlands, however, several initiatives have been developed aimed at quantifying and measuring the quality of judgements Within the PVRO project, a workgroup "Quality" is currently developing measurement instruments and an automated system for the collection of performance data, aimed at evaluating the professional quality of the courts [61]

7.3.7 Informing the Judiciary

In a recent interview we noticed the marked difference of attitude between justices who have been well informed on the potentials of IT support and justices who did not have either direct experience with IT projects or knowledge of such projects While this should not come as a surprise, especially since IT support of *the Judiciary is a not an old field of research, it does provide us with some matter* for thought It should be said that there are no empirical grounds that would lead us to suspect that there exists an innate reluctance within the Judiciary to implement IT support programmes Quite the opposite in fact, as the PVRO programme demonstrates This is a line of questioning that we intend to pursue in the future However, regarding the argument often used by the Judiciary that their independence could be at stake, if there were to exist a reluctance to the implementation of IT support, then this could eventually lead to a de facto *dependence* of the Judiciary on the offices of the public prosecutor and the Ministry of Justice Because through inaction the Judiciary could stand to lose its influence over the implementation of IT support programs [62]

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[61] Bureau PVRO, *Tweede voortgangsrapportage PVRO 2e halfjaar 1999,* Tilburg Bureau Bossers, 2000, p 43

[62] A H J Schmidt and E W Oskamp, Over instrumenten die rechters kunnen beinvloeden (Trema VIb 1998)

7.4 Part III: The Convention

The use of legal information systems by the Judiciary, or more broadly speaking, Information Technology (IT) in support of the – decision-making process of the – Judiciary, does raise legal issues. A multi national comparison of legal practices creates the need for a unifying framework, as a discussion of these issues by a multinational forum might well lead to confusion, in spite of the 'probable' similarities of the national issues involved. The European Convention on Human Rights and Fundamental Freedoms (ECHR), universally in force in all participating countries, does provide for the needed common ground.

Under the Dutch constitution (Articles 93 and 94) the ECHR works directly in the Netherlands. This implies that, where applicable, the principles of Fair Trial laid down in Article 6 ECHR are to be applied instead of Dutch national Laws. The right to a Fair Trial constitutes a basic element of a democratic society governed by the rule of law. But that does not mean that article 6 applies to any type of litigation. The scope of the article, which is limited to civil and criminal cases, has been the subject of much case-law of the Court. According to the Court's case-law, in the Benthem case (judgement of 23 October 1985, A-97, §34), the leading case on the concept of "civil rights and obligations", the Court refused to give an abstract definition of the concept but formulated a list of principles:
The concept of 'civil rights and obligations' cannot be interpreted solely by reference to the domestic law of the respondent State".

Furthermore, Article 6 does not cover only private-law disputes in the traditional sense, that is disputes between individuals.

The character of the legislation that governs how the matter is to be determined ... and that of the authority which is invested with jurisdiction in the matter ... are ... of little consequence.

Only the character of the right at issue is relevant.

In the Netherlands, it is accepted that civil cases falling under art. 6 of the ECHR encompass most of the litigation between private parties and the administration. The scope of article 6 in Criminal cases was defined by the Court in the Öztürk case (judgement of 21 February 1984, A-73, § 52-53): Article 6 ECHR is applicable, if it can be ascertained that the text defining the offence in issue belongs, according to the legal system of the respondent State, to criminal law.

Nevertheless, article 6 ECHR is also applicable if the offence falls under the following notion given by the Court, "According to the ordinary meaning of the terms, there generally come within the ambit of the criminal law offences that make their perpetrator liable to penalties intended, inter alia, to be deterrent and usually consisting of fines and of measures depriving the person of his liberty."

The very nature of the offence, the nature and degree of severity of the penalty that the person concerned risked incurring and, finally the fact that the offence is classified as part of the criminal law in the vast majority of the Contracting States can in that case lend weight to its classification as a criminal offence. Litigation in civil, administrative and criminal cases in the Netherlands is generally considered to be within the scope of art. 6 ECHR.

7.4.1 The framework

Most of the relevant legal issues arising in the different European legislations with regard to IT support of the Judiciary are amenable to discussion within the concepts embodied in Article 6.[63] These concepts are: i access to courts, ii fair hearing, iii public hearing, iv reasonable time, v independent tribunal, vi impartial tribunal, vii verdict pronounced publicly and viii private life. In the present report we relate these concepts to legal aspects of IT support of the courts in the Netherlands.

7.4.2 Access to court

Both State and the Judiciary should strive towards an unimpaired access to court. Whilst Article 6 §1 ECHR guarantees litigants an effective right of access to court, it leaves to the contracting State a free choice of the means to be used towards this end (see the Golder v. the United Kingdom judgment of 21 February 1975, Series A no. 18 and the Airey v. Ireland judgment of 9 October 1979, Series A no. 32). The simplification of civil and criminal procedures constitutes one of the means by which the State can fulfil its obligation to guarantee litigants a practical,

[63] Article 6 of the Convention reads: 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. Judgment shall be pronounced publicly but the press and 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.

effective right of access to court (see the Bellet v France judgment of 4 December 1995, Series A no 333-B) Fulfilment of the Convention furthermore, on occasion, necessitates some positive action of the State, in such circumstances, the State cannot simply remain passive Procedural hindrances, whether factual or legal, should therefore be actively reduced so as not to impair "a person's access in such a way or to such an extent that the very essence of the right is impaired" (see the Ait-Mouhoub v France judgment of 28 October 1998, Reports 1998-VII) This means that State and Judiciary should strive towards an unimpaired access to court Implementation of IT support to this effect may be effective An interesting Dutch initiative that fits this aim is the ELRO project

7.4.3 Fair hearing

A fair hearing relates to the equality-of-arms principle and to equal and adequate opportunities for litigants to state and defend their cases The use of IT-support by the courts may unsettle the balance Consequently, the question of availability to litigants of IT-applications that will be used by the court is relevant This issue will for instance be raised with regards to the use of databases like JUSTEX

7.4.4 Public hearing

The concept of a public hearing is adamant to public assessment of court behaviour This is important, since other forms of quality control concerning court hearing behaviour (like appeals to the European Courts) are time consuming indeed One of the ways in which IT may reduce transaction costs of court hearings is through the use of video-conferencing and net-meeting like applications Especially in these cases the public-hearing aspects should be carefully modelled into the systems of communication There are no Dutch projects known to us in this area

An other area in which the notion of public hearing will play an important role, is the public access to data garnered on the performance and quality of the Judiciary In the Netherlands, for instance, data on the caseload and time expenditures of judges is regularly collected for the construction of the caseload model Lamicie, and the notion of quantifying the quality of judgements with quality-monitoring systems is being explored[64] Not withstanding the Freedom of Information act,

[64] Within *PVRO*, the programme for the strengthening of the Judiciary, the project "Projectplan Kwaliteit" is currently developing measurement instruments and an automated system for the collection of performance data, aimed at evaluating the professional quality of the courts See

public assessment of court behaviour will mean that some of the collected data will have to be disclosed. Relevant IT-systems are Compas and Rapsody.

7.4.5 Reasonable time

Litigation must not linger on. The reasonable-time constraint sets the limit at two years. In criminal cases, longer procedures result in shortened sentences. IT-support seems especially well-suited to help shortening litigation procedures. However: there is a paradox. Using IT-support also implies acquiring skills and spending time in applications. Implementing IT-support for the Judiciary requires careful deliberation of this aspect. One of the interesting side-effects of the recent raising of these questions in the Netherlands concerns the adaptation of the independent Judiciary to management. The *PVRO* organisation shows the ways in which these questions are currently approached in the Netherlands.

7.4.6 Independent tribunal

IT-support implies task-models. Task-models imply either agreement or compliance. Judges, using IT-support in deciding on the height of sentencing, divorce alimentation or job-loss retribution have agreed upon using these models. The very agreements are instances of legal rules without democratic foundation.

Dutch law does not provide for an effective cooperation of the Magistrates as neither the Constitution nor the procedural laws formally specify what the internal organisational structure of the courts should be, and also because no provisions are made for the cooperation between courts on the same level or on different levels. However, there is little doubt that an effective and coherent cooperation of the Judiciary aimed at the coordination of sentences ,and aimed at formulating task-models, is crucial in the sense that it is in society's best interest that sentencing by the courts should be as predictable as possible. Even more so since the principle of legal unity is one of the fundamental principles of Fair Trial, as embodied in Article 6 §1 ECHR. Martens, the president of the Court of Cassation, recently confirmed this by emphasizing that the Court of Cassation considers the realisation of legal unity through the cooperation of the Magistrates, to be of the utmost importance. Agreements on judicial policy formulated through the cooperative effort of the Magistrates are, subject to conditions, considered to have the same status as formal law. The Court of Cassation has de-

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Bureau PVRO, *Tweede voortgangsrapportage PVRO. 2e halfjaar 1999*, Tilburg: Bureau Bossers, 2000, p. 43.

clared that judicial policy, even though it can not be considered to be law in the sense of formal laws, can fall under it's scrutiny as if it were formal law (see HR 28/03/1990, published in *Nederlandse Jurisprudentie* 1990 no. 118). That is: it may be held successfully against the Judiciary. The other way around is doubtful. Snijders (*NJB* 1996) offers a way out, when he argues that Judiciary policy-agreements can only be valid as a summary of pre-cedent and consistent legal practice. These issues are of importance when considering systems like DOLOR, Aliment, IvS, BOS, Nostra etc.

7.4.7 Impartial tribunal

The importance of an impartial tribunal is self-evident. The concept of *managing* impartiality seems strange, but an instance can be seen in the sentencing directive initiative as realised in the USA in the eighties. The sentencing directives were a reaction to the apparently blatant skin-colour discrimination in sentencing practices employed by the Judiciary at the time. IT tools made the administration of court behaviour possible and made the existence of discriminatory practices indisputable. In the USA, these tools were in the hands of the administration. This fact promulgates the question whether the management of impartiality by government is not an infringement on the supposed independence of the courts. In the Netherlands the administrative systems are called COMPAS and RAPSODY, and the approach to management of impartiality and independence has resulted in legal reform, yielding the institution *sui generis* of a "Raad voor de Rechtspraak", a Council for the Judiciary. There are no initiatives known to us that suggest the development and use of IT-support in the courts in order to monitor court-impartiality. It is interesting to note that the benefits that could be derived from descriptive models that quantify the notion of quality would closely resemble the benefits that quality-monitoring systems, providing public access to their data, intend to accrue – as for instance in the case of the Nova Scotia Judicial Development Project.[65]

7.4.8 Verdict pronounced publicly

The question has been raised whether the way verdicts are rendered public by the courts in the Netherlands fully complies with the obligations laid down in Article 6 §1 ECHR (Martens President of the Court of Cassation, in his speech at the opening ceremony for the Dutch Internet site WWW.Rechtspraak.nl that was

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[65] For information on this project see: Poel D., The Nova Scotia Judicial Development Project, a final report and evaluation, Halifax, august 1997.

held on December the 9th of 1999) Arguably Article 6 §1 ECHR implies a positive obligation for the courts to not only render their judgments in public but also to actively ensure an effective and practical publication of all their judgments

The current – minimal – practice in the Netherlands is that the courts, after having pronounced their judgment 'publicly', deposit the full text of their verdicts in a registry available to the public Copies of verdicts are given out to whom ever asks –and subsequently pays– for them, but no further active measures are taken to make the judgments more widely available to the public through other means However, a selection of the most relevant case-law is usually made available at a cost through the normal commercial channels Martens puts forward that, considering the aim and the object pursued by article 6 §1 ECHR as expressed by the Court and considering the implied positive obligation on behalf of the courts, the Dutch courts are remiss in regards to their obligations under article 6 §1 ECHR The European Court does not concur with this opinion Article 6 §1 ECHR states that "judgment shall be pronounced publicly" furthermore, in the case of Szucs v Austria (judgment of 24 November 1997, Reports 1997-VII §43) the court reiterates it's often repeated judgement *"holding that "in each case the form of publicity to be given to the 'judgment' under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 § 1" (see the Pretto and Others judgment of 8 December 1983, Series A no. 71, § 26). Thus in that case (see § 27 of the judgment) it held, having regard to the Court of Cassation's limited jurisdiction, that depositing the judgment in the court registry, which made the full text of the judgment available to everyone, was sufficient to satisfy the requirement."* (Also reiterated in the Asan Rushiti v Austria judgment of 21 march 2000, §22) However, two arguments do weigh in favour of the opinion put forward by Martens Firstly, because the way a judgement is rendered public must be assessed by reference to the object and purpose of Article 6 § 1, as expressed by the Court, one could argue that the aims and objectives of Article 6 §1 ECHR, as stated by the court in the case of Pretto and the Others v Italy, are better served by a more active publication of judgments *"The public character of proceedings (…) is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1 " (judgment of 8 December 1983, Series A no. 71, §21).* Secondly, that as the Court does not formulate an absolute rule, but limits the scope of it's judgments to *the limited jurisdiction of the Court of Cassation*, simply depositing judgments in a court's registry will not in every case satisfy the requirements of Article 6 §1 ECHR Neither in the Pretto case (§26 3d paragraph), nor in the Szucs case did the Court deviate from this judgment

Arguably the publication of judgements on the Internet will contribute substantially to the achievement of the aims of Article 6 §1 ECHR by availing the public of a more effective way to scrutinise the judgments of the Judiciary and thereby enhancing confidence in the courts. As Martens suggests the courts can easily achieve effective, practical compliance with their positive obligation under the Convention by publishing their all their judgments on the Internet. Even more so since the website (WWW.Rechtspraak.nl) already offers the means of doing this in a consistent and standardised way. Publication on the website of all the judgements of the Court of Cassation will be implemented as soon as this can be practically achieved. It can be argued that electronic publishing of judgements cannot be considered to be IT-support to the Judiciary. At the moment of publication this holds true. However, the availability of information on argumentation and decisions in similar cases is a powerful tool to the Judiciary when the case to be decided is new to those involved. There are many discussions about obligations and barriers to IT-tools in this area (*cf* www.rechtspraak.nl, JUSTEX, NOSTRA, IvS).

7.4.9 Private life

The intended publication of judgments could, however, be seriously hindered by the requirement that all published cases be made anonymous. If it where to be required that all judgments be made publicly available and furthermore that these should be rendered fully anonymous, as is the widely held official belief, then even disregarding practical problems (such as the increased workload of the courts, and the considerable amount of funding needed), the question whether this practice would be in compliance with the Convention still needs to be answered. Both the terms of the Convention –"judgment shall be pronounced publicly"–, and the judgment of the Court in the Pretto case –"making the full text of the judgment available to everyone"– would seem to indicate that the 'legitimate' wish to protect the privacy of the litigants by rendering anonymous published judgments is not in compliance with the obligations under the Convention. What's even more, this rule would seem to have been stated absolutely. It would therefore follow that strict application of the Convention would mean that published findings can not be rendered anonymous. However shouldn't the Convention be interpreted in the light of the presently widely held belief that the privacy of litigants needs firm protection? This argument is supported by the Court in the Airey case (§26) where it holds that: *"On the other hand, the Convention must be interpreted in the light of present-day conditions (...) and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals (...)."* Furthermore, under Dutch privacy

law, case law databases distributed to the public are considered to be databases containing information that can be attributed either directly or indirectly to an individual subject. The information directly related to individual subjects needs to be removed as such from published cases. Private information that is considered essential to the understanding of a case can however be maintained.[66]

The method of rendering judgments anonymous could for instance be made dependent on the type of the judgment and on the nature of the proceedings. Several automated methods for protecting the privacy of litigants are open – an interesting one would be the use of privacy enhancing technology (PET) in combination with a judgment presentation language (e.g., specified in XML). There are no initiatives in this direction in the Netherlands. Perhaps the standardisation of such an XML-dialect would be an interesting sequel to the current research project.

[66] 'Anonimisering van Rechtspraak. Samenvatting', Registratie kamer, 9 juli 1998, 97V9331.