

**Fourth Judicial Seminar of the International Criminal Court
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Disciplinary Mechanisms Applicable to Judges
Session I: Experiences of national and regional jurisdictions
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Introduction

First of all, I would like to thank the International Criminal Court for organising this seminar and inviting us all. With this ICC-seminar, a new year of judicial cooperation starts with a joint close look at the responsibilities and opportunities of the national and international judiciary for sustaining judicial independence.

I have been asked to inform you about the experiences in the Netherlands on this subject. Before I provide some observations and examples regarding disciplinary mechanisms applicable to judges, I would like to make a few general remarks about judging in the Netherlands.

The number of inhabitants in the Netherlands is between 17 and 18 million, the number of judges about 2.700,¹ and the number of yearly decided cases about 1.380.000.²

These judges operate in a rather open legal system. The Dutch Constitution prescribes that national law must be interpreted in light of the international human rights treaties and agreements entered into by the Netherlands. The legal system of the Netherlands is part of the multi-layered national and international legal order, in which attention for human rights, the rule of law and European Union law are common practice. Dutch legislation is often formulated in an open rather than a narrow manner; it is subject to interpretation by the courts, on the basis of sources that do not differ much from the sources mentioned in article 31 of the Vienna Convention on the Law of Treaties.

In this open system, the functioning and development of socially relevant law often prevails over the significance of a well-structured and doctrinal codification. This also applies to the system of disciplinary mechanisms applicable to judges. We should identify them in the law in the books and study the law in practice in order to observe the system of guarantees for the independence of the judiciary in the Netherlands. That is not an easy job to fulfil in 10 minutes. But I will try to provide some insight.

Justice must be done en must be seen to be done

The overall perspective to look at disciplinary mechanisms applicable to judges is that justice must be done and must be seen to be done. What is at stake with regard to judicial independence, is the confidence which the courts in a democratic society must inspire in the

¹ Rough estimate; enumeration from data in the Annual Reports 2020 of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), the Raad voor de rechtspraak (Council for the Judiciary) and the Afdeling bestuursrechtspraak van de Raad van State (The Administrative Jurisdiction Division of the Council of State).

² Please refer to footnote 1.

public.³ Various stakeholders, such as the public as a whole, state powers and individual citizens, play a role in the establishment and furthering of this confidence. Their various perspectives are helpful in distinguishing different comprehensive approaches to the disciplinary mechanisms.

Standards for the independence of the judiciary

In the Netherlands, the democratic legitimation of a judgment lies mainly in the guarantees with regard to the appointment and dismissal of judges, the duty to substantiate judgments, and the public access to judgments. A basic asset for the confidence which the courts in a democratic society must inspire in the public is, amongst others, a closed system in which remedies against judgments can be obtained within the judicial domain. Another such basic asset is the decisive power of an independent judiciary to take care of judicial dignity and independence, and to eventually apply disciplinary rules to judges. This requires at least a division of state powers compliant with the rule of law, legislation that safeguards an independent role of the judiciary, and soft law instruments like national and international codes of conduct for judges.

Approaches to identify disciplinary effects of the standards

Further to the various stakeholders' perspectives, one might distinguish a collaborative, preventive and repressive approach to disciplinary mechanisms applicable to judges. That is to say, if we look with the view of democratic principles, like logic, truth, debate and criticism.

Collaborative approach

In the collaborative approach, it is my observation that judges in the Netherlands are used to share and discuss judicial ethics and aspects of judicial behaviour in court and in private life. New judges are trained and stimulated to engage in such discussions throughout their career. Judges may talk about personal ethical dilemmas within their court. The procurator-general, the head of an independent institution within the Supreme Court, has special tasks in safeguarding the independence of the judiciary, and is also engaged in dialogues on disciplinary aspects within the judiciary. In the collaborative approach, a judge initiates and appreciates a responsive dialogue about the judge's position in society and the extent of the judge's personal freedom of expression, such as social media activity, taking part in a public demonstration, or dealing with personal activities that may affect judicial work.

Preventive approach

In the preventive approach, it is my observation that national and international principles, rules and judgments about disciplinary judicial mechanisms are seen as a living instrument within the judiciary and more broad in society as a whole. The Dutch association of judges and the Dutch institute for the training and permanent education of judges for instance organise activities for judges on topics of judicial dignity and behaviour. In Dutch

³ E.g. ECHR (GC) 15 October 2009, 17056/06, [Micallef/Malta](#), para. 98.

newspapers some journalists write columns about the rule of law, in which they regularly deal with aspects of judicial independence and judicial dignity. In politics, the independence of the judiciary is defended by leading authorities within parliament and government, also against attacks.

The preventive approach includes the right of a judge, regulated by law, to refrain from hearing a case because of reasons that would justify his or her challenge by a party.

The repressive approach

In the repressive approach, we may observe, on the one hand, instruments within or around the closed system in which remedies against judgments can be obtained. An example is the right of a party to challenge a judge because of a lack of independence or impartiality.

Another example from a Supreme Court decision implies that a judgment is null and void if the judge who heard the case, isn't a judge anymore at the moment of the adoption of the court decision in the name of this judge.⁴

On the other hand, in the repressive approach, instruments can be observed that enable to take disciplinary measures against individual judges within the judiciary, to deal with a complaint against a judge, to dismiss a judge, or to prosecute a judge for criminal behaviour in its capacity as a judge or former judge such as violating the secrecy of judicial deliberations. In the Netherlands, the Constitution, the Law on the Judicial Organisation and the Law on the Legal Position of Judicial Officers provide the main framework for these repressive instruments. I will provide you with two examples to illustrate the functioning of these instruments.

1. Complaints

It is possible to file a complaint with the board of a court. Complaints should be about the way in which a judicial officer in charge of the administration of justice has behaved towards the complainant in the performance of duties. A complaint cannot concern a judicial decision. The Netherlands have a layered system for complaints against judicial officers. In this system, the complainant may file a complaint with the relevant court. If the complainant is not satisfied with the way the court has dealt with the complaint, it is possible to send the complaint to the procurator-general at the Supreme Court, who is competent, but not obliged, to forward the complaint to the Supreme Court. Recently, the procurator-general filed a complaint against a judge who ordered that somebody who worked for an appointed administrator and who was suspected of fraud, had to stop performing administrator tasks. The complainant complained about the conduct of the judge and his decision. The Supreme Court ruled that the judge had acted within the judicial domain.⁵ Therefore, the case could not be dealt with by the disciplinary chamber of the Supreme Court. This example illustrates that the delimitation of the judicial domain is in the hands of the independent judiciary.

⁴ HR 18 November 2016, [ECLI:NL:HR:2016:2614](#), para. 3.3.2; HR 13 April 2018, [ECLI:NL:HR:2018:604](#); HR 20 September 2019, [ECLI:NL:HR:2019:1408](#), para. 3.2.

⁵ HR 9 July 2021, [ECLI:NL:HR:2021:1126](#).

2. Dismissal of judges

The same applies for the dismissal of judges. The procurator-general at the Supreme Court is competent to submit a claim for dismissal of a judge. Recently, he asked the Supreme Court to dismiss two deputy judges who had not been employed in judicial work for more than two years, which provides a legal ground for dismissal.⁶ It is the president of the court of the deputy judge who may ask the procurator-general at the Supreme Court to submit such a claim. It is also the president of that court, as a member of its board, who is able to decide not to employ a deputy judge. Therefore, the procurator-general asked the Supreme Court for an interpretation of this dismissal ground that safeguards the internal independence of the judiciary. In the judgments, the Supreme Court provided a standard in that sense.⁷

The application of disciplinary measures against judges

I would like to conclude with some remarks about guarantees for the independent application of disciplinary mechanisms. The Dutch law states which disciplinary measures against judges are possible⁸ and for what reasons⁹. The president of a court is competent to reprimand a judge.¹⁰ Case law is rare.

Other disciplinary measures against a judge, like the withholding of no more than half of a monthly salary, suspension for a maximum period of three months, or dismissal, may only be imposed by the Supreme Court, on the application of the procurator-general at the Supreme Court. The annual reports of the Supreme Court show that judgments about disciplinary measures against judges are rare in the Netherlands.

The procedural rules for applying disciplinary measures explicitly mention basic rules of a fair trial, such as the application of the adversarial principle. The legal protection of a judge who is confronted with a disciplinary procedure, is considered essential for the independence of the judicial office.

⁶ PHR 23 August 2021, [ECLI:NL:PHR:2021:1236](#) and PHR 7 October 2021, [ECLI:NL:PHR:2021:1234](#).

⁷ HR 24 December 2021, [ECLI:NL:HR:2021:1995](#) and HR 24 December 2021, [ECLI:NL:HR:2021:1996](#).

⁸ Article 46ca of the [Law on the Legal Position of Judicial Officers](#).

⁹ Article 46c of the Law on the Legal Position of Judicial Officers.

¹⁰ Article 46ca lid 1 under a of the Law on the Legal Position of Judicial Officers.