

The relationship between the executive and the judiciary in a democratic society;
the question is - who should be master?

THE NETHERLANDS

The independence of the judiciary and the balance of power between the three powers of a democratic state: the legislature, the executive and the judiciary, are core elements of the work of the First Study Commission.

The central role of the legislature will not be part of our considerations of this year. In the past the First Study Commission has studied several topics where the relationship between the executive and the judiciary has been an element of the analysis. This year this relationship will be the centre of our investigation.

An examination from this viewpoint may make possible general conclusions on the mutual influence of these two branches of the powers of state and we hope will throw light on the question of the balance of powers in Member States and this specific aspect of independence of the judiciary.

For the purpose of this questionnaire we ask everyone

- (i) to exclude from their consideration the position of the “constitutional court” (if one is part of the judicial system in their country) can be regarded as part of the judiciary system; and
- (ii) to exclude the head of state in their country (as opposed to the head of government) from consideration as a part of the executive, unless the head of the state exercises power or “influence”. If either might be exercised, then it should be noted.
- (iii) “Influence” may be exercised or not; we think that if it might be exercised, then it should be noted.

Question 1: Is the principle of independence of the judiciary enshrined in the constitution or a comparable legal source in your country?

Not specified as such but it can be derived from several clauses in the constitution

Question 2: Is the principle of balance of powers enshrined in the constitution or a comparable legal source in your country?

Ditto

Question 3:

Is there any influence of the executive on selection and the first appointment of judges?

In a formal sense there is because for the first appointment of judges a Royal Decree is required which is given after a nomination by the Minister of Justice, advised by the Council for the Judiciary. In actual practice the recommendation for an appointment made by the relevant Court is complied with.

Question 4:

Is there any influence of the executive on the promotion of judges?

See under 3

Question 5:

Is there any influence of the executive on the selection, or appointment or dismissal of presidents of court?

*Selection takes place by the Council for the Judiciary, appointment - for a period of six years which can be renewed for consecutive periods of six years - by Royal Decree after nomination by the Minister of Justice, so advised by the Council for the Judiciary. Dismissal of a president **in his or her capacity as manager of the Court** in the same way, but only if and when the president in his capacity as a judge is dismissed or suspended by the Supreme Court.*

Question 6:

Is there any influence of the executive on the distribution of cases /assignment of judges to certain cases?

No

Question 7:

Is there any influence of the executive on the transfer of judges to other courts

No

Question 8:

Is there any influence of the executive on the termination of office of judges?

No

Question 9:

Is there any influence of the executive on the disciplinary procedure against judges?

No

Question 10:

Is there any influence of the executive on the initial training of judges?

No. See 11

Question 11:

Is there any influence of the executive on the in-service training of judges?

No formal influence: in-service training is the responsibility of the individual judges and the court management. The Council for the Judiciary facilitates training of judges and clerks and stimulates agreement on minimum and uniform quality standards for all courts.

Question 12:

Is there any influence of the executive on the salaries of judges?

The system of remuneration of judges is prescribed by law but the periodical raise of salaries connected with the different categories of judges in that system are subject to negotiation with the Minister of Justice by the Dutch Association for the Judiciary.

Question 13:

Is there any influence of the executive in deciding on (a) the overall budget of the judiciary; and/or (b) how the funds designated for the judiciary are to be spent?

The overall budget for the judiciary is decided by the legislative on proposal of the Minister of Justice, advised by the Council for the Judiciary. The Council distributes the budget over the courts, mainly on the basis of an elaborate and rather complicated system in which the number and the nature of cases handled are the relevant factors.

Question 14:

Is there any influence of the executive on the selection and appointment of clerks of the court?

No

Question 15:

Is there any influence of the executive on the composition of the Council of the judiciary or a similar body (if such a body exists)?

The Council for the Judiciary consists of five members (assisted by a staff of about 130 employees). Of the 5 members 3 must come from the judiciary. Members are not elected but appointed by Royal Decree after nomination by the Minister of Justice. Selection takes place from a list of 6 candidates, drawn up by the Minister of Justice. The selection committee consists of a president of a court (chair of the committee), a representative of the Dutch Association for the Judiciary, a member of the Board of Representatives (advisory body for the Council, composed of judges and clerks), a director of operations of one of the courts and a representative of the Minister of Justice.

Question 16:

Is there any other influence of the executive on the work of the Council of the judiciary or a similar body (if such a body exists)?

Yes. The Council supervises the management of the courts (with the exception of the Supreme Court), distributes their budgets and takes measures to ensure recruitment and training of judges and other employees. The Council is not allowed to take measures interfering with the processual handling or the evaluation or decision of individual cases or groups of cases. The Minister of Justice can give "general directions" on management of the courts under the same condition. The Council must be consulted about the envisaged directions and these directions must be published in the Government Gazette.

Question 17:

What influences (if any) does the judiciary have on the executive power of central/local government? In particular, (a) does the judiciary have any power to control the exercise of executive power (by virtue of orders that the court can make on the application of parties to the court) and (b) what power (if any), does the court have to oversee the appointment of members of the executive?

- (a) Yes, the court may on application of parties set aside a decision of local or central government and/or order local or central government to take a new decision.*
- (b) None*

Question 18:

What power does the judiciary have over other public bodies (eg the police, or other quasi – governmental powers) in your country?

None other than described under 17(a)

Question 19:

Who fulfils the task of prosecution in your country?

The Public Prosecutor's Office

Question 20:

Is there a common career of public prosecutors and judges?

Careers used to be similar but separate. In late years careers are diverging

Question 21:

Can judges be appointed as public prosecutors and vice versa?

Occasionally public prosecutors are appointed as deputy judges (in other districts than their own) This practice is frowned upon and is considered acceptable only if necessary for in-service training prior to an appointment as judge after resignation as a public prosecutor. Judges can be appointed as public prosecutors but they have to resign as a judge.

Question 22:

Is there an influence of the executive on the appointment/promotion of public prosecutors?

Yes

Question 23:

Is there a possible influence of the executive on the cases public prosecutors are in charge of?

Yes. The Minister of Justice may give directions to prosecute in individual cases. In daily practice it seldom happens. Such directions must be given in writing and must be added to the case file .

Question 24:

Which problems (if any) do you see in the relationship between the executive and the judiciary in your country?

There are at the moment no serious problems. There is always the question whether the budget for the judiciary is adequate and in these days there is a discussion about the organisation of the court system.

Question 25:

Are there concrete projects to change elements in the relations between the executive and the judiciary ? What would this change mean?

Projects concern the organisation of the court system (number of courts, competence of the courts in regard to various groups of cases and the role of the Council for the Judiciary)

The members of the First Study Commission are asked to send their answers to this questionnaire to the General Secretariat as well as to the members of the presidency committee of the Study Commission not later as **July 5th 2008**

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