

## Rule of Law report 2021

### Contribution of the Netherlands Bar

#### General remarks

According to the Rule of Law Index of the World Justice Project, the Netherlands has been in the top five countries with a well-functioning rule of law for years. (Examples: no judges are being dismissed, the media can report critically and the state powers are properly balanced. Sometimes an incident can cause an imbalance: a politician being prosecuted for discrimination, a judge ordering the Dutch state to do more to meet climate targets, a mayor ignoring the fundamental right to demonstrate, or the intelligence services eavesdropping on the media.)<sup>1</sup>

In the latest advisory report of the Council for Public Administration, the Council states that while there is no immediate threat to the rule of law in the Netherlands, the concerns identified, when added together, result in a deficit in the rule of law.<sup>2</sup>

As mentioned in the CCBE-statement on the 2020 Rule of Law Report<sup>3</sup>, there is a need to ensure the existence of an independent self-regulated legal profession which comprises independent lawyers who are independently supervised and who are able and allowed to challenge decisions which are taken by those who are in power. The Netherlands Bar attaches great importance to this matter.

#### Trends & developments

##### 1. General trends and developments

##### 1.1. Court capacity

General and worrisome tendency of cut backs regarding court capacity, which reflects on the quality of the proceedings: less time and space for fact inquiry, further restrictions on witness hearings, etc.

##### 1.2. Efficiency as point of departure

There have been financial cutbacks and continuous pressure in the interest of 'efficiency', reducing the quality of court proceedings (see 2. Covid-19 impacts and 4. Legal aid below).

##### 1.3. Legal remedies

General tendency to reduce or abolish legal remedies, trying to keep people away from the courts which are considered 'petty cases' and 'too expensive' for society.

##### 1.4. Voices in the political arena

There have been increasing voices in the political arena that advocate for reducing or abolishing remedies that make it possible to have legislation and regulations reviewed in court (on constitutional grounds and/or under international law).

##### 1.5. Immunity for public authorities

Spaces of immunity for public authorities in large areas covered by administrative law have been created: lawyers are basically barred from commencing effective remedies in such areas as immigration and asylum law and social aid ('Dutch childcare benefits scandal'), either because public funding is cut back or because the legal remedies are restricted or a combination of both.

##### 1.6. Questioning public authorities in court

There is a tendency to keep Dutch lawyers curtailed in their possibilities to question public authorities and to have their conduct examined in court by calling witnesses, especially to call and

<sup>1</sup> [Advisory report of the Council for Public Administration](#), p.13-14

<sup>2</sup> [Idem](#), p.23

<sup>3</sup> [CCBE-statement on the Rule of Law Report 2020](#)

cross-examine prosecution witnesses (see most recent conviction of the Netherlands in the case *Keskin v. Netherlands* of the ECHR, 19 January 2021<sup>4</sup>).

## 2. *Covid-19 impacts*

The developments concerning Covid-19 have significant impacts on justice and the legal profession.

Drastic decisions were taken that led to restrictions of rights. In criminal justice for example, courts had to close temporarily which resulted in considerable backlogs. Therefore, the Netherlands Public Prosecution Service gives final judgement in certain criminal cases, without the intervention of a judge (and unfortunately often without legal aid). Furthermore, cases in which normally three judges were involved, are now handled by a single judge - if you are unlucky also on appeal. Many cases are still taking place by remote video hearing which means that the suspect has to monitor the handling of his case from a distance. By the end of 2021, these backlogs should have disappeared.

The suspect's right to attend a case is another example that is restricted. Every day there are suspects who could not physically attend their case, but only remotely by video. Connection issues and a time limit of 45 minutes were part of the challenges. Also some victims and surviving relatives need to follow cases by remote video while they wish to be at court and exercise their right to speak there.

Suspect's lawyers are still refused to attend hearings or arraignments with a reference to Covid-19. The reason given is that the rooms are too small for the judge, the public prosecutor and the lawyer in order to comply with the Covid-19 measures. Of these parties, the lawyer is the first person who is denied access. Some lawyers are also told by judges to arrange the presence of the client themselves if they want to be present in any way. Not to mention suspects who are expected to speak confidentially to their lawyer at a police station via an intercom and suspects who remain detained for longer because the video connection is not working.

As a temporary emergency measure, such choices for the non-substantive handling of parts of cases may be justifiable. But the Judiciary must ensure that efficiency does not become the new standard in the future. It is also very questionable whether it is "efficient" to further lower the level of the legal protection of citizens in cases against the government. Above-mentioned impacts of Covid-19 are additional to the cutbacks that practically all parties in the criminal justice system have faced in recent years. Restricting access to justice will ultimately cause a great deal of damage to society as a whole and the citizens' confidence in the rule of law.

## 3. *Resilience/protection of lawyers*

Increasing the resilience and awareness of the possible vulnerability of lawyers is an important and topical subject for the legal profession in the Netherlands. The direct reason for this is the murder on Derk Wiersum (September 2019), lawyer for a state witness in a case against members of a violent drug gang. Additionally, the Netherlands Bar has been noticing an increase in threats against lawyers. Initial observations amongst lawyers in various areas of law and in several roles (besides lawyer also curator and supervisor) underline that importance. At the same time, it seems to be difficult to make the topic vulnerability a subject of discussion in the legal profession. However, there is need for support with regard to this issue. The Netherlands Bar is coordinating this support with the Judiciary, prosecutors and journalists. In 2021, some concrete steps to support lawyers will be put into practice. These steps include: i) trainings to increase resilience that are an inherent part of the vocational training, ii) a free "object scan", through which lawyers can have their own law firm checked for physical vulnerabilities and for findability in registers, and iii) the national bar initiative to set up a place of refuge for persons threatened in their professional practice. The so-called "Wijkplaats" intends to provide a quiet shelter to share negative experiences

<sup>4</sup> [Case of Keskin v. The Netherlands](#)

with other (legal) professionals like judges, notaries, prosecutors but also journalists, bailiffs and public administrators.

#### *4. Legal aid*

Since 2008 the Dutch government has cut back a number of times on the subsidized legal aid system. As a result, legal aid lawyers do not receive reasonable remuneration for their work. Despite the possible consequences for the access to justice and the quality of legal aid, the current government has chosen not to structurally invest in higher remuneration for legal aid lawyers. Notwithstanding the campaigns of the Netherlands Bar, the legal profession and even the parliament, the Minister for Legal Protection focused on a reform of the system that could only be implemented in 2025; a system reform that has already been criticized on several points. After the March 2021 Dutch general elections, the Netherlands Bar will draw the attention of the new government and parliament to the acute needs of legal aid lawyers and the importance of investing in access to justice.

Already for several years the Netherlands Bar is making efforts to achieve an intensification of legal aid regarding the imposition of penal orders. A well-organized legal aid system is essential in a model in which a prosecutor acts as judge. Important steps were taken in 2020 that will need to be further developed in 2021. The Netherlands Bar continues its efforts and also emphasizes the importance of an adequate remuneration for lawyers. In doing so, the necessary legal aid could really be granted in a fully responsible way.

#### *5. Undermining confidentiality*

Problems with the Netherlands Public Prosecution Service and police wiretapping privileged telephone conversations between lawyers and their clients continue. For instance, in the high profile Marengo case, the Prosecution Service tailed the lawyers to find out who they were meeting abroad (in this case in Dubai). This is a threat of the safety and confidentiality of lawyers. Besides, a new law on secret services applies that weakens the remedies against wiretapping of privileged communications between lawyers and clients.

In the past years consistent calls have also been made for containing legal professional privilege of lawyers and notaries (and medical practitioners), the main reason being that this privilege is 'bothering' (fiscal) investigation authorities during the performance of their work activities. In 2017, the Dutch government proposed to eliminate fiscal confidentiality. Some have argued that this is hypocritical: the Dutch government has created laws to make tax evasion possible. In addition, the Tax Authorities can already demand that all information, which is required for the Tax Authorities to carry out all the audits, is shared (except for the communication between lawyer and client).

The Netherlands Bar is committed to put the importance of professional secrecy and legal professional privilege into the right perspective, namely to protect the litigant.