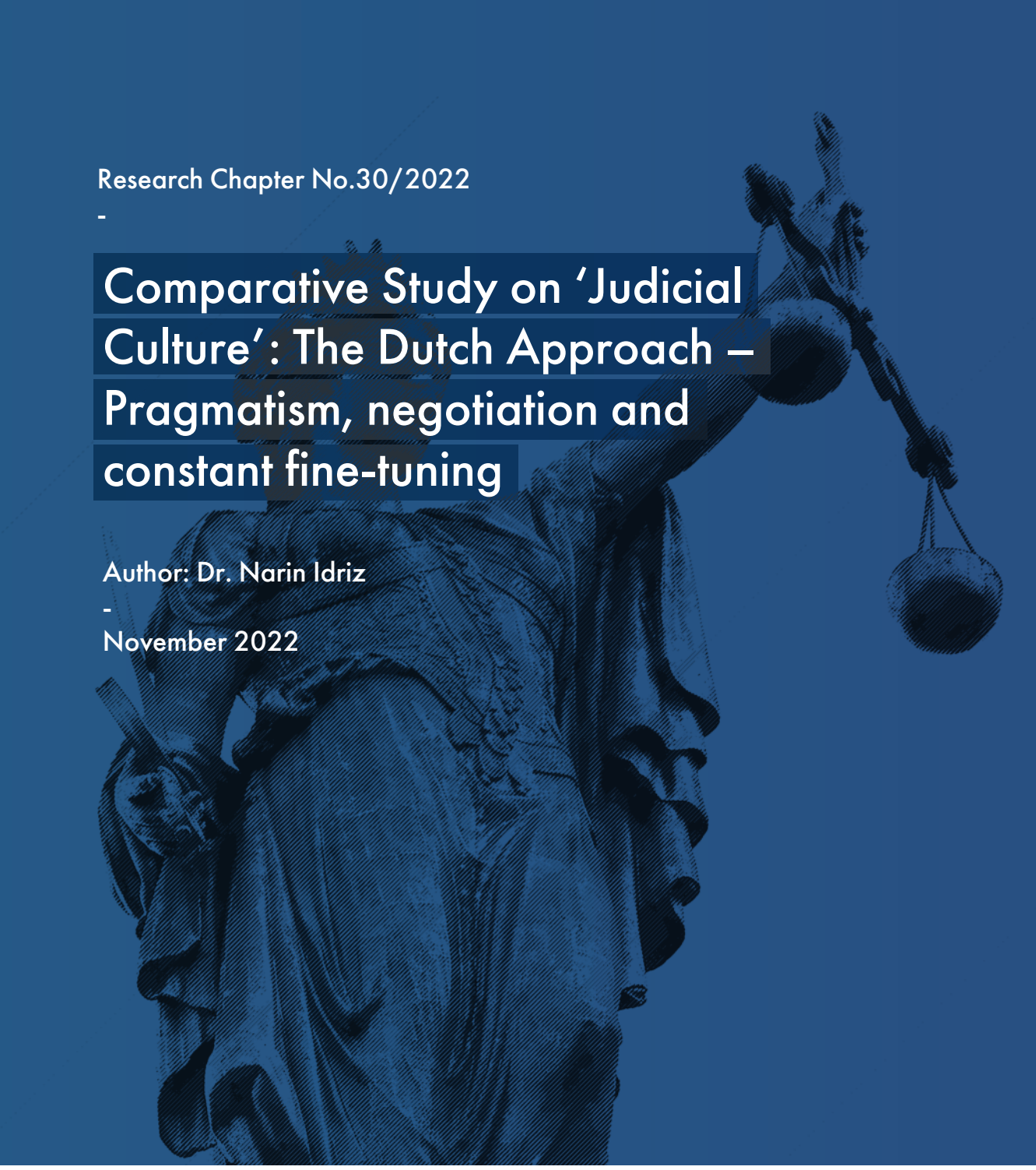

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Comparative Study on 'Judicial Culture': The Dutch Approach – Pragmatism, negotiation and constant fine-tuning

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COMPARATIVE STUDY ON 'JUDICIAL CULTURE': THE DUTCH APPROACH – PRAGMATISM, NEGOTIATION AND CONSTANT FINE-TUNING

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INTRODUCTION

This paper is the last piece of output written in the framework of the Matra project entitled "Bridging the gap between formal processes and informal practices that shape judicial culture in the Western Balkans". It aims to compare and contrast the development of judicial culture in three post-communist countries, which are EU candidate states for membership, namely Albania, North Macedonia and Serbia, with that of the Netherlands, which is one of the founding members of the three communities that laid down the foundations of the EU. As this comparative exercise will demonstrate, the Dutch model contains many idiosyncratic features and as such, does not serve as a blueprint or is not really comparable to the experience of the countries in the Western Balkans. Nevertheless, the fact that it operates quite well despite existing shortcomings can serve as an example or inspiration in terms of making the best use of the existing legal framework and making changes that have a '*draagvlak*', that is the necessary support base among the stakeholders to make these changes sustainable and successful. That is ensured by '*poldering*', which is negotiating until everyone is on board for any change. This drive to reach consensus is one of the quintessential features of Dutch both judicial and political culture.[1]

It should also be underlined from the outset that the Dutch legal system and judicial culture cannot be equated to a "European model". Even though the Netherlands is one of the founding members of the EU, the historical development of its legal system and some of its special features, such as the absence of a constitutional court,[2] set it apart from other founding members. As it will be explored in more detail in the following parts of this paper, the Dutch model is different than what is considered the "Euro-model" also in other respects, such as the mandate and organization of its Council for the Judiciary.[3] In short, it is important to make it clear from the start that what we are comparing is not an "ideal European model" of a founding EU Member State versus the "models in development" of the candidate states in the Western Balkans, but we are merely comparing the model of one Member State with its existing strengths and weaknesses to those of the countries included in the project.

As to the research methodology employed in this paper, the findings are based on literature review,

1 This was also confirmed by one of the interviewees. See Interview No. 6.

2 J. de Poorter, "Constitutional Review in the in the Netherlands: A Joint Responsibility", (2013) 9 Utrecht Law Review, pp. 89-105

3 See the five criteria that Bobek and Kosar identify as key requirement of the Euro-model for the Council of Judiciary. As will be discussed in Part 2, the Dutch Council for the Judiciary does not fulfill the majority of these requirements. See M. Bobek and D. Kosar, "Global solutions, local damages: a critical study in judicial councils in Central and Eastern Europe", (2014) 15 German Law Journal, pp. 1262-1264

the papers written on the four aspects of judicial culture by our partners in the Western Balkans,[4] and structured interviews with seven judges, two judges in training and one judicial clerk. Judges working at all levels of Courts, courts of first instance, courts of appeal to courts of last instance (the Supreme Court and the High Administrative Court for Industry and Trade) are represented. Similarly, the sample includes judges at all level of their career: from judges in training to experienced and very experienced judges who are about to retire. The geographic representation of various regions is also reasonable.

The structure of the paper follows the order by which the regional papers on the four aspects of judicial culture have been published: 1) judicial culture and the role of judges in developing the law; 2) the principle of judicial self-governance; 3) the role of higher courts in the unform application of the law; and 4) the independence of individual judges.

1. JUDICIAL CULTURE AND THE ROLE OF JUDGES IN DEVELOPING THE LAW IN THE NETHERLANDS

Before delving into the literature and interviews on the topic, this section provides a brief account of Dutch constitutional history as this would facilitate understanding the peculiarities of Dutch judicial culture, the way it developed and the way it manifests today. It will be followed by three sub-sections discussing the role of judges in developing the law, the judiciary as the third branch of government as perceived by the judges and lastly, the effects of the absence of a constitutional court on judicial culture. While the judges were invited to share their thoughts on what they understand from the term "judicial culture", the definition provided by Bell which defines judicial culture as a set of "features that shape the way in which the work of a judge is performed and valued within particular legal systems"[5] was also mentioned during the interviews.

4 All papers are available on the website on the IDSCS, the institute coordinating the Matra project: https://idscs.org.mk/en/2020/11/19/bridging-the-gap-between-formal-processes-and-informal-practices-that-shape-judicial-culture-in-the-western-balkan/

5 J. Bell, *Judiciaries within Europe: A Comparative Review* (Cambridge, CUP 2006), p. 2

1.1 Overview of the Main Features and Development of the Dutch Constitution

To make the comparison more meaningful, and to put the Dutch judicial system into perspective, it is essential to provide a brief overview of its historical development. It would be difficult to explain the specificities of the Dutch system without providing an account of the development trajectory of its constitution and what could be seen as the main features of its judicial culture. Therefore, this section begins with a brief description of the inception of the Dutch constitution, its evolution, its specificities and the implications of these features on Dutch judicial culture today.

The Constitution of the Netherlands (***Grondwet***) dates back to 1814-1815.[6] Yet, if one is to take as a starting point the constitution that laid down the foundations of the present one in terms of establishing a fully-fledged parliamentary system, that would be the constitution inspired by the liberal revolution of 1848.[7] The Constitution of the Netherlands, unlike the constitutions of post-communist countries in the Western Balkans that broke links with the past in the 1990s,[8] is an "evolutionary constitution, based on historical developments".[9] Over the years, it had to be democratized and modernized to adapt to the developments within the Netherlands as well as those on the international stage. This happened through many successive amendments.[10] An exhaustive overview of these is not possible here, but two important examples would be, instituting universal suffrage in 1917, which was inserted into the constitution with the 1922 amendment; and supplementing the fundamental rights

6 L. Besselink and M. Claes, "The Netherlands: The Pragmatics of a Flexible, Europeanised Constitution", in A. Albi and S. Bardutzky (eds), National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law – National Reports (The Hague, Asser Press – Springer Open 2019), p. 179. It should be noted that issue of the year of birth of the Constitution of the Netherlands is an issue of debate among constitutional lawyers in the Netherlands. 1814, 1815 when Belgium became part of the Netherlands or 1848 when the foundations of the current constitution were laid down, could all be considered as the year that gave birth to the Dutch Constitution. See, J. Gerards, "The Irrelevance of the Netherlands Constitution, and the Impossibility of Changing it" (2016) 77 Revue Interdisciplinaire d'Étude Juridique, pp. 207-208

7 L. Besselink, "The Netherlands: Fundamental Structure of the Constitution of the Netherlands" p. 49, available online at: https://dspace.library.uu.nl/bitstream/handle/1874/25731/besselink_07_fundamentalstructures.pdf?sequence=1&isAllowed=y ; see also the special issue of the ***Nederlands Jursitenblad*** of 1998.

8 These could be classified as 'revolutionary constitutions'. For the examples of Albania, North Macedonia and Serbia, see the first three Reports.

9 Besselink and Claes (n. 6 above), p. 179

10 Besselink makes a distinction between constitutions that reflected 'great transformations', those that enabled 'adaptation' to developments at the international level, and those constituting 'minor amendments'. See, Besselink, pp. 4-19. In total 23 amendments have passed between 1814 and 2008 (the year of the latest amendment). See Besselink and Claes (n. 6 above), p. 184.

contained in the constitution and placing them at its top as Chapter I with the 1983 amendment.[11]

It is an 'open constitution', meaning that the formal Constitution (***Grondwet***) is only one of the several sources that make up Dutch constitutional law. Other sources, which are referred to as the '***constitutie***' in the literature, include "unwritten principles, constitutional conventions, some international treaties, the Charter of the Kingdom,[12] and certain organic laws and decrees."[13] Despite this 'openness', it is noteworthy that the Constitution is not a living instrument, in the sense that it plays a very limited role in politics and public debate.[14] It is "a document for the government and public authorities, and not for society and the citizens".[15] Another reason for the Constitution's limited value for citizens is the fact that its provisions are not justiciable. Article 120 of the Constitution expressly provides that "the courts shall not review the constitutionality of Acts of Parliament and Treaties". According to Gerards, this provision which could already be found in the 1848 Constitution, "can be explained by the strong adherence in the Dutch constitutional system to notions of representative democracy and sovereignty of Parliament".[16]

The prohibition placed on the courts to review the constitutionality of Acts of Parliament is arguably compensated by the possibility to rely on directly effective/ self-executing provisions of international treaties. Article 93 of the Constitution provides that provisions of international law that are self-executing could be relied on in Dutch courts in the same way as national legislation. Moreover, Article 94 provides for the hierarchical superiority of these self-executing provisions over the Constitution and leaves it to the courts to check whether the hierarchy of norms has been respected.[17] These are the provisions that have enabled the openness of the Dutch legal system to international law.

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11 Besselink (n. 7 above), p. 50

12 The Charter constitutes the basic law of the Kingdom of the Netherlands, which comprises the country in Europe (the Netherlands), Aruba, Curaçao and Sint Maarten to which the Caribbean islands of Bonaire, St. Eustatius and Saba were added in 2010. The Charter ranks higher than the Constitution. For more info see: https://www.royal-house.nl/topics/legislation/charter-for-the-kingdom-of-the-netherlands#:~:text=The%20Charter%20provides%20that%20the,Charter%20was%20adopted%20in%201954.

13 According to Besselink and Claes, these are normal Acts of Parliament or royal decrees, which do not have a higher rank than the Constitution. The reason they are considered 'organic' is because they concern the organization of the state and elaborate on constitutional provisions. See Besselink and Claes (n. 6 above), p. 181

14 Ibid, p. 183. See also, B. van Lierop, "De cultuur van de democratische rechstaat; enkele gedachten over de situatie in Nederland, in Europees perspectief", in M. Goslings and R. Klomp (eds), ***Tegenkrachten*** (Ars Aequi Libri, Nijmegen, 2018), p. 276

15 Besselink and Claes (n. 6 above), p. 183

16 Gerards (n. 6 above), p. 212

17 Ibid, p. 217.

An additional obstacle for constitutional review is the narrow and archaic formulation of many provisions of the Constitution.[18] Even though Article 120 does not prevent the review of lower legislation with fundamental rights, the fact that the formulation of many constitutional provisions is not well-suited for judicial review, has also contributed to the use of provisions of international human rights treaties instead, in particular the European Convention on Human Rights (ECHR).[19] Over the past decades, the ECHR has arguably functioned "as a kind of substitute Constitution".[20]

Another important feature of the Constitution worth mentioning is its rigidity. It is almost impossible to amend.[21] The process is quite lengthy, as any proposed amendment needs to be "approved by two consecutive parliaments with elections in between, and approval by a two-thirds majority in both Houses the second time".[22] This inevitably forces the stakeholders (judicial actors) to be creative and make best use of other tools they have. Besselink and Claes seem to confirm this by pointing out to the paradox that the rigidity of the constitution, when combined with its political and societal irrelevance, and the primacy of EU law and directly effective provisions of international law, make the Dutch legal system more flexible and responsive to the developments taking place at EU and international level.[23]

In short, the literature describes the Dutch Constitution as "unostentatious, simple, sober and short",[24] and Dutch constitutional culture as "relativistic, pragmatic or even mocking".[25] When it comes to Dutch constitutional identity, it is defined by "constitutional colourlessness and its openness to international treaties".[26] Arguably, these are the qualities that shape and define Dutch judicial culture as well. They were also confirmed by the interviews.

18 Ibid, 219

19 Ibid, p. 220.

20 Ibid.

21 Ibid, p. 228. According to Besselink and Claes, there have been only twenty-three amendments between 1814 and 2008, the latter being the date of the last amendment. Some of those have brought only marginal change. See, Besselink and Claes (n. 6 above), p. 184.

22 Besselink and Claes (n. 6 above), p. 184.

23 Ibid, p. 180. See also, Besselink (n. 7 above), p. 50.

24 Besselink and Claes (n. 6 above), p. 182

25 Translation mine. In original, "relativistisch, pragmatisch of zelfs badinerend". See, M. Adams, "Constitutionele geletterdheid voor de democratische rechtsstaat", (2013) 17 *Nederlands Juristenblad*, p. 1110

26 Gerards (n. 6 above), p. 233

1.2 Main Features of Judicial Culture

Most of these features mentioned in the literature have also come up in the interviews. Dutch judicial culture has been defined as "practical",[27] and "very open, interested in international dimensions".[28] Other defining features were "the Dutch approach of ***polderoplossingen***" (polder solutions)[29] and "***poldermentaliteit***" (polder mentality),[30] concepts which emphasize the importance to "reach a decision or an agreement in consultation with all the different stakeholders".[31] While this is very good to ensure the sustainability of the reached result, "it also means that sometimes processes can take very long".[32]

All interviewees were of the opinion that judicial independence was an embedded feature of Dutch judicial culture. While few of them brought it up already when asked to define the concept "judicial culture",[33] others responded positively when asked explicitly later if judicial independence was part of Dutch judicial culture. According to the latter group, the fact that they did not name it was not a sign of doubt, but rather of the fact that judicial independence was deeply engrained in the Dutch judicial culture and was therefore taken for granted. Almost all judges emphasized the centrality of judicial independence for the Dutch legal system, and argued that all the facets of it were of vital importance. Not only external independence, that is independence from the legislative and executive powers, but also internal independence, or the autonomy of the judges to deliver their verdict without influence from other colleagues or their managers was also underlined.[34]

While all those interviewed expressed their view that judicial independence is undoubtedly part of the judicial culture, some added that this does not mean there are no shortcomings in that respect. They pointed out that the system lacks some safeguards or put differently, has some weaknesses which could be remedied to improve its resilience. One of these weaknesses is the lack of financial independence. The judiciary doesn't have its "own

27 Interview No. 6
28 Interview No. 5
29 Interview No. 6. Cambridge English dictionary defines polder as "an area of low land that was once under the seat but has been separated from it by dykes". For more info see here: https://dictionary.cambridge.org/dictionary/english/polder
30 Interview No. 3
31 Ibid.
32 Ibid.
33 Interviews No. 1, 3, 8
34 Interviews No. 1, 2, 4, 6, 7, 8, 10

way of funding, and is dependent on the Ministry [of Justice]".[35] Another often mentioned weakness is the workload faced by judges.[36] This has increased significantly after the introduction of a new system of financing by the Dutch Council for the Judiciary, which is mainly based on a standardized method to calculate output. Under this system the number of cases delivered per court determines the amount of financing they get. This has led to resistance and protests by judges,[37] but to no avail. According to judges, this system pushes them to prioritize quantity over quality, and if need be, skip some steps in the decision-making process in the name of efficiency.[38] Some judges also point out to the danger this brings in undermining another important characteristic of Dutch judicial culture, namely the high level of trust enjoyed by the public.[39]

The last feature to be mentioned here is the non-hierarchical nature of relations between the members of the judiciary. There seems to be no hierarchy between judges with different levels of experience in the same court, and also little to no hierarchy of judges sitting at courts at different tiers (court of first/last instance or courts of appeal). There are informal practices to ensure the cooptation of inexperienced judges, encourage them to think independently and treat them as equals from the very start. After hearing the case in court, when discussing a case in chambers, the tradition is to give the floor to the legal clerk or the youngest judge so that they can express their views freely.[40] Another informal practice is the visits by Justices of Supreme Court to other lower courts "to listen to them, to hear what they think is unclear in our legal practice, in our jurisprudence".[41] In addition to providing valuable feedback, these visits also lower the threshold towards the Supreme Court.

This overview is in no way exhaustive. There are many other factors that shape judicial culture such as the judges' education:[42] both university education, the training they obtain at the ***Studiecentrum Rechtspleging*** (SSR – Training and Study Centre for the Judiciary), and the coaching they get from more senior judges during their first years of training. The fact that disciplinary measures are not often used, because problems are usually solved informally or in cooperation with all sides is another feature of Dutch judicial culture worth mentioning.[43]

35 Interview No. 5.

36 Interviews No. 1, 3, 4, 5, 6

37 See, the Manifest of Leeuwarden, available online: https://www.recht.nl/exit.html?id=126208&url=http%3A%2F%2Fmronline.nl%2Fimages%2Fstories%2Ffiles%2FPDF_1_manifest_raadsheren.pdf and the vision of the Backlight (***Tegenlicht***) movement for the future, available online: https://www.rechtspraak.nl/SiteCollectionDocuments/Toekomstvisie%20Tegenlicht.pdf See also

38 E.g., such as not hearing witnesses or not asking for an expert report on the topic. Interview No. 4

39 Interview No. 3, 4, 8

40 Interview No. 2 and 6

41 Interview No. 2

42 Interviews No. 4 and 5

43 Interview No. 5

1.3 The Role of Judges in Developing The Law

As to the role of judges in developing the law, some judges found the distinction between application and interpretation of the law as "very, very old fashioned".[44] The predominant view was that "all judges do both kind of work",[45] and both application and interpretation of the law are part of the judicial toolkit.[46] In addition, some judges added that there might be some difference in how much application versus interpretation you do in your work depending on the area of law in which you practice,[47] the tier of the court you sit in,[48] or depending on whether the law in question is new or old.[49]

According to some of the judges, there is more room for interpretation in civil law cases, because of the number and variety of cases. The principle of legality narrows the room for interpretation in the area of criminal law, as people have to know which law applies, "but even there, there is room for interpretation".[50] In the area of civil law, you can ask a preliminary question to the Supreme Court on how to interpret the law, but as a judge of first instance you are also free enough to interpret the law yourself, if you think it's better to decide the case quickly. If the latter is the case, you need to extensively motivate your verdict, as that is essential for its acceptance.[51]

It might also make a difference between whether you are a judge at the Court of First Instance, the Appeals Court or the Supreme Court. According to one judge, judges at First Instance do not have the explicit task to develop the law, whereas that is an explicit task for de Hoge Raad. The vast majority of cases in the First Instance, do not require difficult legal interpretation, but just application of the rules.[52] While agreeing that the majority of cases at First Instance might require mere application of the rules, another judge argues that developing the law is not only a task for the Supreme Court; courts of First Instance also provide new answers to new questions.[53] An interesting example here is the *SyRI (Systeem Risico Indicatie)* case, which was decided by the District Court of the Hague.[54] The case was on profiling by way of an algorithm and concerned fundamental rights protection. The court decided

44 Interviews No. 1 and 2
45 Interview No. 2
46 Interview No. 3
47 Interviews No. 4, 7, 8
48 Interview No. 7
49 Interviews No. 2 and 3
50 Interview No. 8
51 Interview No. 4
52 Interview No. 7
53 Interview No. 5
54 ECLI:RBDHA:2020:865

that this profiling law was void in light of fundamental rights. The state did not appeal the judgement, which is an example of how a Court of First Instance contributed to the development of law.

Lastly, some judges note that if you have new legislation, it is more likely that you will need to interpret it. The need appears in the First Instance Courts, it moves up, until the Supreme Court rules on how particular law or provision should be interpreted.[55] The more recent the law is, the more judges look at what is said in Parliament and the *travaux preparatoire*. When the law is old, it has had its own path of judicial development, and a judge can stand on that development and take it a step further with other forms of interpretation.[56]

The last point brings us to the question on sources and methods of interpretation that judges use. These can be very diverse and depend on factors such as whether the law is new or old or whether there is existing jurisprudence already interpreting it. As far as the sources used to interpret the law are concerned, as one judge put it "we use everything, everything we can find".[57] The starting point is the law or statutes themselves,[58] but if the text is unclear, the first source to be looked at is the Supreme Court judgments,[59] judgments of other high courts,[60] Appeals Courts, and even judgements delivered at first instance.[61] If the law has been passed recently and there isn't much jurisprudence, the next source mentioned by the judges is the legislative history of that law: mainly the discussions in Parliament that led to it and other sources, if available, such as the *memorie van toelichtingen*[62] or *travaux preparatoire*. Other sources mentioned are international conventions, especially ECHR, the case law of the Courts in Strasbourg and Luxembourg,[63] and academic publishing/legal literature.[64] Overall, judges see themselves free in choosing their sources.[65]

Regarding the methods they employ in interpreting specific provisions, the textual, historical and teleological method of interpretation are mentioned as the main methods of interpretation.[66] Most of the judges mention the text of the law as the starting

55 Interview No. 3. The interviewee also mentions the possibility of the Courts of First Instance to refer a question of interpretation directly to the Supreme Court via the preliminary ruling procedure.
56 Interview No. 4
57 Interview No. 6
58 Interview No. 2
59 Interviews No. 3 and 8
60 Interview No. 10
61 Interviews No. 6
62 This can be translated as "explanatory memorandum", which lays down the purpose of the proposed law, its contents, and if relevant other related documents.
63 Interviews No. 3, 4, 8
64 Interviews No. 3 and 4
65 Interview No. 3
66 Interviews No. 1, 5, 7

point and as the most important element.[67] When the text doesn't help, they look at its context, at the Parliamentary discussions at the time the law was adopted to make sense of it. The teleological, purpose driven method is also used.[68] Lastly, a judge who works often with European law also mentioned the *CILFIT* case,[69] the guidance provided by the Court of Justice of the EU on when judges are obliged to make a preliminary reference to the CJEU and what steps they need to follow when they need to interpret a term/concept of EU law.

When judges were asked if they see themselves as developing the law, their answers were in the affirmative, but in most cases, they were coupled with reservations. They are all aware of their role within the legal system as well as more broadly as part of the *trias politica*. For instance, one judge replied "Yes, and I also know the limitations. Depending on which tire of the judiciary you work, you understand that your decision is valid as long as a higher judge has not quashed it. I think everybody understands their role within the system."[70] Another judge explained that "[i]f we think a law needs an update we formulate this update, but within the borders of the judges' position within one case and with a lot of motivation."[71] The most cautious was one of the youngest judges, who answered there is a limited role for judges in developing the law, as judges need to also ensure there is uniformity. According to that judge, judges are not lawmakers and need to be careful to remain within the role assigned to them in the *trias politica*.[72]

1.4 Judiciary as the Third Branch of Power

The fact that the judges in the Netherlands see themselves as members of the third branch of power comes to the fore not only from the interviews, but also from their actions and communication with Dutch authorities undertaken in the recent years. The Backlight movement (*Tegenlicht*), composed of judges representing the judiciary from all over the country, is very clear on that point in an article in which it lays down its vision for the future of the Dutch judiciary that "judges are the embodiment of the third state power, they are the professionals in the organization of judiciary".[73] In the same year (2018), in a letter sent to the Dutch Minister of Justice and the members of the Commission on

67 Interviews No. 2, 7, 9
68 Interviews No. 1, 5, 9
69 Case 283/81 ***CILFIT*** ECLI:EU:C:1982:335
70 Interview No. 3
71 Interview No. 4
72 Interview No. 10
73 Translation mine. In original, "…rechters zijn de belichaming van de derde staatsmacht, ze zijn de professionals in de rechterlijke organisatie. See, Landelijk Tegenlicht, "Toekomstvisie landelijk Tegenlicht: Concreet en constructief", (2018) 44 ***Nederlands Juristenblad***, p. 3228

Justice and Security in the Dutch Parliament, the Dutch Association for the Judiciary (*Nederlandse Vereniging voor Rechtspraak* (NVvR)) warned that the necessary balance between the different powers of the state cannot be maintained if the policy of further economizing on the judiciary is continued. While emphasizing that the separation of powers is an important value for the Netherlands, the NVvR pointed out to the vulnerability of the judiciary because of its dependency on the other powers for the financial resources it needs to operate.[74]

The interviews also revealed judges' awareness of their place in the system as well as their limitations and vulnerabilities. As one judge put it, when it comes to the question of who has the final authority to interpret the law at a given point in time, "the judges have the final word in a given situation. But they don't have the final word in the system. It's a balance of powers. … The legislator can change the law if they don't like it, within the limits of international law of course."[75] According to another judge, "the notions that the judiciary should be independent and impartial and it has an important role within the *trias politica* are generally agreed upon."[76] However, the system has its weaknesses too as pointed out by judges in the Manifest of Leeuwaarden in 2012 and the Backlight (*Tegenlicht*) movement in 2018.[77] According to this judge, in addition to the work pressure, both documents pointed towards the powers of the Ministry of Justice on the Council of the Judiciary, and also on the appointment of the members of the Boards of Courts. The latter is now in the process of changing.[78]

When asked whether they see themselves as civil servants/ bureaucrats or genuine members of the third branch of power, all the judges responded unequivocally that they see themselves as part of the latter. However, some added that the workload can sometimes lead them to see themselves as civil servants.[79] Judges are clear that there is no place for complacency. As one judge put it, "the autonomy of judges in its own place in the *trias politica* has to be protected, inside by the judges from the floor and from outside".[80]

74 Some of the other concerns expressed in the letter are the increasing workload of judges which puts pressure on quality, the shortage of judges and supporting personnel in courts as well as the poor state of the ICT services. See, Nederlandse Vereniging voor Rechtspraak, Aan de minister voor Rechtsbescherming en de leden van de vaste commissie voor Justitie en Veiligheid van de Eerste en Tweede Kamer, "Samen werken aan recht en veiligheid-Rechtspraak in zwaar weer", 14 September 2018. Availale online at: https://nvvr.org/uploads/afbeeldingen/20180914-brief-TK-en-MvRB-over-rechtspraak.pdf

75 Interview No. 1

76 Interview No. 3

77 See (n. 37 above)

78 The judge also explained that the Council for the Judiciary in consultation with the Dutch Association for Judges and Prosecutors (***NVvR***) and people from different courts have decided on a different and alternative way of appointing the Board members of the Courts. This method gives the judges and the court staff a bigger role in this process. For now, this is in the form of a regulation, but will be put into law. Interview No. 3

79 Interviews No. 3, 4, 8

80 Interview No. 4

1.5 The Absence of a Constitutional Court in Shaping Judicial Culture: Substituting International Treaties for the Constitution

"The historical context has determined constitutional thinking in Western European democracies to an important extent."[81] That is also what explains the absence of constitutional review for laws passed by Parliament (Article 120 of the Constitution). The 1848 Constitution laid down the foundations of a system of Parliamentary democracy, but it excluded constitutional review as a result of opposition from the bourgeoisie. The bourgeoisie did not want the judicial branch, which was composed predominantly of aristocrats, to have the power to limit the legislature, which represented the sovereignty of the people.[82] That has been a legacy that proved difficult to change.[83]

In the absence of a constitutional court, what comes closest to a form of constitutional review in the Dutch system are the roles played by the Advisory Division of the Council of State prior to the adoption of a law and by all other courts, including the Supreme Court and the Administrative Division of the Council of State after the adoption of the law. To begin with the Advisory Division of the Council of State, they are presented with legislation before it is submitted to the Second Chamber of Parliament. It is important to note here that the role of the Advisory Division, which carries out constitutionality review is quite different than that of a constitutional court as it merely provides advice. The fact that its decisions are not binding means the government can deviate from them as long as it justifies its action.[84] As to the role of other courts after the adoption of the law, it is derived from Article 120 which prohibits review of Acts of Parliament, but doesn't prohibit the review of lower regulations.[85] In addition, when read in combination with Article 93 and 94, it becomes possible to review Dutch laws against self-executing provisions of European and international law, especially those concerning human rights.[86] The latter role of the judges at all levels has also been confirmed by the interviews.

As to the effect of the *ex post* review carried out by Dutch courts to check if specific legislation violates provisions of European or international law, in case

81 de Poorter (n. 2 above), p. 91
82 Ibid, p. 92
83 Introducing the possibility for constitutional review has been on the agenda since the 1960s. However, past attempts have not been successful. See, Gerards (n. 6 above), pp. 213-217
84 de Poorter (n. 2 above), p. 92
85 Ibid, p. 101. Interview No. 4
86 de Poorter (n. 2 above), p. 93

of a violation judges can declare the law inapplicable in that specific case.[87] The law in question is not being annulled, which means the decision is valid within the confines of that particular case. Regarding the question whether the legislature is aware of such decisions, de Poorter explains that the Advisory Division of the Council of State gives feedback to the government on "problems found in the law by its judicial division", and argues that this system "could possibly be used more systematically, and possibly with the involvement of other judicial institutions".[88]

It becomes apparent that in the Dutch legal system both the judiciary and legislature share the responsibility for the protection of constitutional norms and principles. The judges identify problematic pieces of legislation and then, it is up to the legislature to make the necessary changes. As to the limits of judiciary's law-making powers in the process, de Poorter's summary of the reasoning of the Supreme Court in the *Arbeidskostenforfait* case[89] is enlightening:

> The reasoning is that it is the legislature that has supremacy but not the monopoly when it comes to law making. The judge should, in principle, rectify gaps in the law by forming new law if it is clear what that new law should be, based on the legal system or by looking to cases that are already regulated by law. However, if it is not clear, if a choice must be made between different solutions and general consideration of government interest or if other questions of legal-political nature play a role in making that choice, the judge must, *for the time being*, leave this choice to the legislature.[90] If the legislature fails to take its opportunity to rectify the problem found by the judge, it seems that it becomes the turn of the judge.[91]

When asked how the absence of a constitutional court and constitutional review affects judicial culture in the Netherlands, the predominant view among the judges was that it is not affected very much due to the possibility to test laws against international treaties instead.[92] As one judge put it "I think because we can always decide based on international treaties, every court in Holland is a general constitutional court".[93] According to another judge this decentralizes judicial culture to some extent,[94] and leads judges to see the importance of international law.[95] A Constitutional court is believed to carry the risk of politicization of the judiciary.[96] The advantage of the current system is the absence of

87 Ibid, p. 102. Interviews No. 2 and 4
88 de Poorter (n. 2 above), p. 102
89 Hoge Raad 12 May 1999, ***BNB*** 1999/271
90 Emphasis in original
91 de Poorter (n. 2 above), p. 94
92 Interviews No. 1, 3, 5, 6
93 Interview No. 6
94 Interview No. 5
95 Interview No. 1
96 Interviews No. 3 and 4

such an influence, which means that "[w]hen the Supreme Court decides that a statutory law in a given case is against the European Convention or against the principle of good governance, the Government doesn't even blink an eye, they just start changing the law immediately".[97]

Despite the belief that introducing a constitutional court or constitutional review will not change that much in practice, judges are still of the opinion that this would be a positive development for various reasons. This would be important for the "perception of the people",[98] to "underline the importance of our own constitution … It would also underline the fact that these rights are nothing external or foreign, but something from our own Constitution."[99] It would also reinforce the notion of the judiciary as the third branch of power.[100] The Dutch constitution is not a living instrument, and doesn't play a dominant role in public debates, and it would be good if it would do so.[101] The judges' preference is for the introduction of constitutional review that will be carried out by all courts in a decentral way.[102] As put by one of the judges, "[o]ne of the ways to enhance the role of the Constitution is to give judges, all judges, so not a special court, but all judges the role of testing formal rules with the Constitution".[103] This would not be a huge shift, as judges at every level already do this testing to check compliance with international law.

The issue of introducing the possibility for constitutional review has been debated since the 1960's,[104] and it is once again on the agenda.[105] The opinions of the judges interviewed are also in line with the official view of the judiciary requested by the Ministers of Interior and Justice (*Rechtsbescherming*) to be presented to both chambers of Parliament.[106] This view was prepared as a result of broad consultation with judges, senior judges, managers and other workers at the courts. To summarize it in a nutshell, the judiciary is of the opinion that it's in the interest

97 Interview No. 2
98 Interview No. 6
99 Interview No. 3
100 Interview No. 7
101 Interview No. 1
102 Interview No. 3 and 4
103 Interview No. 1
104 Gerards (n. 6 above), p. 222, see section 2.A of the article
105 It is on the agenda after the advice of the Venice Commission to that affect. See the Report of the Venice Commission, Opinion 1031/2021, "The Netherlands: Opinion on the Legal Protection of Citizens", adopted on the 128th Plenary Session, Strasbourg, 18 October 2021. Available online at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)031-e
106 "Zienswijze van de Rechtspraak op rechterlijke constitutionele toetsing" [View of the Judiciary on judicial constitutional review], available online at: https://www.njb.nl/media/4737/zienswijze-van-de-rechtspraak-op-rechterlijke-constitutionele-toetsing.pdf

of the rule of law and protection of rights of the citizens to provide each individual judge *ex post* with the possibility to perform judicial review against provisions of the Constitution. This will take place in addition to the *ex ante* check that can be done by the law-maker in the process of adoption of new laws. While the process is in place and moving, previous experiences show that constitutional changes of this kind are difficult to push through Parliament.

1.6 Comparison to the Western Balkans

A brief comparison between the judicial culture in the Netherlands with its long constitutional tradition of parliamentary democracy and separation of powers, reveals a stark contrast with the Western Balkan countries studied under this project, which became democracies only in the early 1990s. All three Balkan states have gone through decades of socialist/communist rule in the 20th century which was characterized by the doctrine of unity of powers and a subordinate role for the judiciary.[107] The interviews conducted with the judges in the region demonstrate that the legacy of the past is not easy to erase.

One of the prevailing features of judicial culture in the Western Balkan countries has been "legal formalism and excessive positivism"[108] or "ultra-formalism"[109] if you will. The "one right answer" type of judicial culture in which the authoritarian discourse dominated has left its mark deeply.[110] This one right answer is to "be discovered though a simplistic textual exegesis".[111] The judges see themselves as only applying the law rather than interpreting it and contributing to its development. When there is some interpretation involved, the preference is "for literal, grammatical and logical interpretation compared with other methods such as teleological, functional or systemic interpretation".[112]

Formalism is not just the legacy of the past. It is "linked to the working conditions of judges, fear of disciplinary proceedings, education or other extraneous reasons".[113] Unfortunately, "fear and intimidation are far more dominant than the sense of independence among judges".[114] In addition, excessive workload and backlog of cases lead to

107 See the Report 1 on North Macedonia, p. 9; Report 1 on Albania, p. 11; and Report 1 on Serbia, p. 15
108 Report 1 on North Macedonia, p. 11; Report 1 on Serbia, p. 15; and Report 1 on Albania, p. 18.
109 Report 1 on Serbia, p. 14
110 Report 1 on Serbia, p. 14
111 Report 1 on Serbia p. 15
112 Report 1 on Albania, p. 20
113 Report 1 on Albania, p. 21
114 Report 1 on North Macedonia, p. 10

poorly reasoned judgments.[115] Judges do not have the time to read, research and compare the practice of other courts.[116] They also make a limited use of other sources, such as international agreements.[117] While the latter contrasts with the practice of Dutch judges, the increasing workload and backlog of cases, which Dutch judges warn will inevitably decrease the quality of the judgments they render are overlapping complaints.

Another point of contrast is the existence of constitutional courts in the Western Balkans, while the Netherlands has no constitutional court. It should be noted however that while the Central and Eastern European Countries have chosen for strong constitutional courts with the power to constrain politics to some extent,[118] the same cannot be said for the constitutional courts of Albania, North Macedonia and Serbia. The fears of Dutch judges of political influence in the case of establishment of such a court in the Netherlands, has materialized in these countries. The points of critique vary from the composition of these courts and their limited jurisdiction in the area of fundamental rights,[119] to "extreme submissiveness to the executive and legislative branches of power" in Serbia,[120] and judicial self-restraint in Albania.[121]

115 Report 1 on Albania, p. 21; and Report 1 on Serbia, p. 16
116 Report 1 on Albania, p. 21
117 Report 1 on Albania, p. 19
118 de Poorter (n. 2 above), p. 90
119 Report 1 on North Macedonia, p. 22
120 Report 1 on Serbia, p. 22
121 Report 1 on Albania, p. 23

2. JUDICIAL SELF-GOVERNANCE IN THE NETHERLANDS

The history of judicial self-governance in the Netherlands is relatively recent. The Dutch Council for the Judiciary (*de Raad voor de Rechtspraak (RvdR)*) was established only in 2002, as part of a broad reorganization process of the judiciary.[122] Another catalyst for its establishment was the Recommendation of the Council of Ministers of the Council of Europe,[123] which advised, among other things, that the judges are appointed independently and that the judiciary is able to control its own working process. Till 2002, the management and supervision of the judiciary was entrusted to the Minister of Justice.[124] After that, these duties were taken over by the Council for the Judiciary, which was established in light of the Swedish model to act as a buffer between the government and the judiciary.[125] The most important underlying objective being undoubtedly to strengthen the independence of the Judiciary.[126]

The reorganization was deemed necessary, as previously, some experiments aside, "management in Dutch courts was almost completely absent".[127] The decision-making body was the *gerechtsvergadering*, a body that included all the judges of a given court. After the reorganization in 2002, as part of an integrated management structure, all the courts obtained (executive) boards for their administration and management. The management of courts and the allocation of the budget, among other duties that will be mentioned below, were to be overseen by the newly established Council for the Judiciary.[128]

122 For more details, see W. Voermans and P. Albers, European Commission for the Efficiency of Justice (CEPEJ), "Councils for the Judiciary in EU Countries", March 2003, pp. 100-104

123 "Recommendation on the independence, efficiency and role of judges", Recommendation No. R (94) adopted by the Committee of Ministers on 13 October at the 578th meeting of the Ministers' Deputies

124 Voermans and Albers (n. 122 above), p. 107

125 For the full array of responsibilities of the Councils of Judiciary under the Swedish model, see ibid, p. 107-108

126 See the Fact Sheet on the Dutch Council of the Judiciary. Available online: https://www.encj.eu/images/stories/pdf/factsheets/rvdr_the_netherlands.pdf

127 N. Holvast and N. Doornbos, "Exit, Voice, and Loyalty within the Judiciary: Judges' Response to New Managerialism in the Netherlands", 2015 (11(2)) ***Utrecht Law Review***, p. 54

128 The Supreme Court and the Council of State are not officially linked to the Council for the Judiciary. "In this way, the institutional independence of both courts is safeguarded in relation to finance." The Supreme Court's budget is part of the budget of the Ministry of Justice and Security, and the Council of State negotiates its budget with the Minister of Interior and Kingdom Relation. For details see, G. Boogaard, "Bipolar Constitutionalism in the Netherlands and its Consequences for the Independence and Accountability of the Judiciary", in E. H. Ballin, G. van der Schyff and M. Stremler, ***European Yearbook of Constitutional Law 2019: Judicial Power: Safeguards and Limits in a Democratic Society*** (TMC Asser Press, 2019), p. 110

2.1 Status and Mandate

All the above-mentioned changes were carried out with the enactment of two laws, the Organization and Management of Courts Act (*Wet organisatie en bestuur gerechten*), the Council for the Judiciary Act (*Wet Raad voor de rechtspraak*),[129] and a subsequent change in the Judicial Organization Act (*Wet op de rechterlijke organisatie*).[130] This means that the Council for the Judiciary does not have a constitutional status in the Netherlands, but only has statutory basis.

As to the mandate of the Council for the Judiciary (henceforth; the Council), to begin with its most controversial task, it is responsible for the budget. It negotiates the annual budget for the entire judiciary with the Minister of Justice and Security. The budget covers not only the expenses and costs for the activities of the Council, but also the costs of all courts under its responsibility, including the salaries of judges. It allocates the budget to the courts on the basis of an output-based funding system, which has been heavily criticised by judges for putting quantity over quality.[131] It also has the task of enhancing the management of the courts, which it does by appointing the Presidents of courts (as well as their boards), and meeting regularly with them in the *Presidenten-Raad Overleg* (Presidents-Council Consultation (PRO)) format.[132]

The Council also plays a role in the judicial training and appointment of judges. The training of judges is organized by the National Judicial Training Centre (*Studiecentrum Rechtspleging (SSR)*), which is partly (2/3) owned by the Council and partly (1/3) by the Procurator-General's office. The Council is responsible both for the organization and supervision of the SSR. As to the appointment of judges, they are appointed by the Minister for Justice and Security based on the recommendation of the Council. The Council forms its recommendation based on the opinion of court boards and the advice of a selection committee. Unlike its counterparts in the Western Balkans or Central and Eastern Europe, it is noteworthy that the Council does not have competence in the area of disciplinary proceedings, dismissal or suspensions.[133] But it has a role in promoting judicial ethics, such as facilitating the amendment of the Code of conduct for the judiciary.[134]

129 Text available online. See, https://zoek.officielebekendmakingen.nl/stb-2001-583.html

130 Holvast and Doornbos (n. 127 above), p. 54. One of the two most important legal instruments regulating the status of the Council for the Judiciary is the Judicial Organization Act. It dates back to 1827 and was amended on 6 December 2001 in relation to the establishment of on the Council of the Judiciary. ***Staatsblad*** 2001, 582. See, ibid.

131 See the Manifests of Leeuwarden and that of the Backlight movement (n. 37 above). Interviews No. 1, 3, 4, 6, 8.

132 Also criticised by some judges, as these meetings are purely informal and have no basis in law. Interviews No. 4, 5, and 6

133 See the Fact Sheet (n. 126 above).

134 See, ***Matters of Principle: Codes on the Independence and Impartiality of the Judiciary*** (Den Haag, Judges for Judges), pp. 81-85. Available online: https://www.rechtspraak.nl/SiteCollectionDocuments/Matters-of-principle.pdf

Another important competence of the Council is to promote the quality and uniformity of the law. The uniform application of the law is being promoted by the adoption of common guidelines in different fields of law. The operation of the LOVs (*Landelijk Overleg Vakinhoud*) that existed in different fields of law are now facilitated by the Council for the Judiciary. The LOVs are expert commissions composed of judges working in different fields of law that come together to develop guidelines and recommendations on topics that they see fit, such as sentencing guidelines in the area of criminal law.[135] The LOVs are a good example to informal practices that aim to contribute to the proper functioning of the judicial system, even though they are also being criticised for reasons that will be mentioned below.

The Council provides legislative advice to the government and Parliament on draft bills and policy proposals that affect the judiciary. It can provide this advice on request as well as on its own initiative. It acts as the spokesperson for the judiciary both nationally and internationally. It is also responsible for international cooperation.[136] It is notable that all these tasks are of operational nature. The Council forms part of the judiciary, "but it doesn't administer justice itself".[137]

2.2 Composition and Selection of Members of the Dutch Council of the Judiciary

According to the Judicial Organization Act (JOA), the Council should consist of 3 to 5 members.[138] It is up to the Council to choose the actual number of members, which was 4, but increased to 5 as of mid-September 2022 (3 judges and 2 non-judge members).[139] Members are appointed by a Royal Decree upon the recommendation of the Minister of Justice and Security for full-time for a period of 6 years, which is extendable for maximum of 3 years (Article 84(3) JOA). The President of the Council is always a judge, which meant that when the Council had 4 members, in the case of a tie, he had the casting vote.

135 Interview No. 1. More info on the LOVs, the commission on criminal law, see: https://www.rechtspraak.nl/voor-advocaten-en-juristen/reglementen-procedures-en-formulieren/strafrecht/paginas/orientatiepunten-voor-straftoemeting.aspx

136 See the official web-site of the judiciary: https://www.rechtspraak.nl/English

137 Ibid

138 See the Fact Sheet (n. 126 above).

139 For the appointment of the 5th member, see: https://www.rijksoverheid.nl/actueel/nieuws/2022/07/15/benoeming-vijfde-lid-raad-voor-de-rechtspraak

2.3 The View of the Judges

As to the judges' views on the *RvdR*, they all agree that "something" was needed as a buffer or shield between the Ministry of Justice and the Judiciary. The interviewed judges think this model is suitable for the Netherlands. The overwhelming majority is of the opinion that the *RvdR* has the right competencies and responsibilities. However, some also point out that in reality it has limited powers or a limited mandate.[140] Therefore, one has to be careful when comparing it to other Judicial Councils with different sets of responsibilities and powers. Overall, judges are of the opinion that the Council does not need more powers. It has found the right balance of competences, which seem to work well in the case of the Netherlands, despite the existence of some discrepancies with existing international standards on the topic.[141]

Almost all judges agree that the Council is independent,[142] and contributes to the independence of the Judiciary (except for financial independence). They also agree that, even if in theory there is room for political influence because of the way the Council members are selected and appointed, in practice, there is no evidence to suggest that this takes place. However, this does not mean they have no points of concern or criticism. Some point out to the existence of a gap between the Council and the judges who do the work on the floor.[143] Others criticize the whole finance structure and the increasing workload it brought onto judges.[144] The appointment of the Court Presidents and boards of courts by the Council is another important weakness.[145] Overwhelming majority of judges criticize the way the members of the *RvdR* are selected and appointed. Only two expressed doubts regarding whether in practice the results would be better if judges were to be elected by their peers.[146] All judges agree that it is better for the judges in the Council to be in the majority, and that adding the third judge member was long overdue. It is not possible to enumerate all the critique

140 Interviews No. 3 and 6

141 To provide one example, Opinion No. 10 (2007) of the Consultative Council of European Judges (CCJE) as well as the more recent update (Opinion No. 24 (2021)) provide the following regarding the composition of the Council for the Judiciary: "judge members should be elected by their peers, without any interference from political authorities or judicial hierarchies, through methods guaranteeing the widest representation of the judiciary".

142 Two judges were suspicious of the position of the Council. According to one, the Council finds itself in between the Ministry of Justice and the judiciary; hence, it's not entirely free to advocate the needs of the judiciary. Interview 8. According to another, the two non-judge members are not independent, because they are selected from a pool of civil servants. The other two belong to the judiciary elite and they are not always in sufficient direct contact with what's really happening in courts. Interview 4

143 Interviews No. 1, 4 and 10

144 Interviews No. 1, 3, 4, 6, and 8

145 Interviews No. 1, 3, 4, 5 and 6

146 Interviews No. 2 and 8. The reasoning of the 2nd interviewee is that "sometimes a very good judge might be bad manager and a bad fighter for the judiciary". Whereas, the 8th interviewee thinks "[t]he choices for the members of the Council, until now, haven't given rise to any protest". There is no guarantee that elections will deliver better results.

here, but few others are that the judge members of the Council are not representative of the whole judiciary or only to some extent,[147] that the Council could fight better for the interests of the judiciary,[148] that judges are not involved in the development of the standards in the LOVs (it is mostly the team leaders/managers),[149] that judges are not always consulted on the points of discussion in the PRO meetings, and the reports of the discussions are, similarly, not always made available on the website of *RvdR*,[150] and lastly, that judges are not protected in high profile cases because the Council doesn't have the means to do so.[151]

As to the strengths and benefits of the Council, in addition to its independence, the fact that it has coordinated discussion on financing for the judiciary is seen as a strength.[152] Judges acknowledge the fact that they don't know about money, and some kind of intermediary was needed between the Ministry and the Judiciary on the issue.[153] In this respect, many judges are also positive on the role of non-judges in the Council. Especially those with a financial background or management skills are seen as assets.[154] The fact that the Council develops and enhances uniformity between courts is also seen as a plus.[155] Another benefit is the fact that they draw the attention of other powers in their annual reports to legislation that gives rise to systemic problems.[156] They also remind politicians they should be less explicit about judgements in the hands of the judges.[157] Overall, some judges appreciate that they have an organ that speaks on behalf of all the judges.[158]

Regarding the role of the Council in promoting the uniform application of the law, opinions are divided. The primary way to do that is through the LOVs that were mentioned above. For some judges, their work is beneficial as it ensures unity and uniformity of the law, which in turn helps maintain the trust of society in the judiciary.[159] Others criticize the fact that LOVs have no basis in law, and that regular judges are not

147 This is mainly due to the small number of judges part of the Council, previously 2 and now 3, and partly due to the fact that the members appointed are mostly former Presidents of Courts and former board members. Interviews No. 1, 4, and 5

148 Interviews No. 2 and 4

149 Interviews No. 4 and 6

150 Interview No. 4. Another judge was also of the opinion that overall, "for the average judge, [it's] not very clear what's happening and how they [the Council] come to decisions." Interview No. 8

151 Interview No. 4

152 Interviews No. 2 and 7

153 Interview No. 6

154 Interviews No. 2, 7, and 10

155 Interview No. 5

156 Interview No. 3

157 Interview No. 1

158 This was the opinion of one judge despite the criticism that the members of the Council are a bit far from reality, as they don't work on the floor. Interview No. 10

159 Interview No. 3

involved in the development of these standards.[160] They are composed of the team leaders (managers) of the courts. According to one judge, the Council goes beyond promoting the guidelines developed by the LOVs to prescribing those, thereby going beyond its powers.[161] A recent Supreme Court ruling also seems to confirm the fact that LOVs do not represent the whole judiciary, which is the reason why each court is expected to develop its own standards on the matter brought in front of the Supreme Court.[162]

2.4 Comparison to the Western Balkans

As pointed out by one judge during the interviews, one has to be very careful when making comparisons between the Judicial Councils of different countries, as differences in their powers and mandate might turn them into a different kettle of fish. The Dutch Council of Judiciary is different from its counterparts in the Western Balkans in that it has a more limited mandate. While the Councils in Albania, North Macedonia and Serbia play an active role in the selection, evaluation, promotion, dismissal and disciplinary proceedings concerning judges,[163] the Dutch Council does not have these powers, except its role in the appointment of judges at the very beginning of their careers.[164] In the Netherlands, the evaluation and promotion of judges as well as disciplinary proceedings take place at the courts where these judges are employed, whereas the Supreme Court handles more serious cases concerning suspension and dismissal.[165] This difference undoubtedly affects how judges view their Councils for the Judiciary. In North Macedonia for instance, "fear, distrust and sense of alienation from the [Judicial Council]" is the prevailing feeling, which leads to "passivity and apathy and in certain circles to clientelism".[166]

To begin with the most important commonalities, the main mandate of all the Councils for the Judiciary is to safeguard judicial independence, and insulate the judiciary from political influence.

160 Interviews No. 4 and 6

161 Interview No. 4

162 The issue brought before the Supreme Court was the rule that in cases of appeal the lawyers are not allowed to make submissions that exceed 25 pages. See, ECLI:NL:HR:2022:824. It's interesting that in practice the courts were 'encouraged' to adopt the same rule so as to preserve the uniform application of the law. Interview No. 6

163 See, Report 2 on Albania, pp. 7-8; Report 2 on North Macedonia, p. 15; and Report 2 on Albania, pp. 7-8

164 "Formally appointment of judges is by Royal Decree (i.e. the Minister of Security and Justice) after an extensive consultation round with the Judiciary. Appointment is in fact based on the recommendation of the Council, which in turn is based on the opinions of the court boards and the advice of the selection committee." See, the Fact Sheet (n. 126 above), p. 2

165 The Council for the Judiciary, ***The Judiciary System in the Netherlands*** (The Hague, 2010), p. 12. Available online: https://www.rechtspraak.nl/SiteCollectionDocuments/The-Judiciary-System-in-the-Netherlands.pdf

166 Report 2 on North Macedonia, p. 22

Despite multiple institutional reforms changing the mandate and composition of the Judicial Councils in Albania, North Macedonia, and Serbia, judicial independence of the Councils remains an objective to be reached. On paper, the Judicial Councils in all the three countries live up to the standards set by European and international networks on judiciaries: they are representative; (judges come from all echelons of the judiciary, minorities are represented, civil society too); judges are in the majority; they are elected by their peers; the Councils have their basis in the constitution of all three states etc. However, irrespective of formal rules, what happens in practice seems to form an obstacle to establishing independent Judicial Councils. In the absence of an entrenched culture of independence for which judges are ready to proactively fight, these institutions are sooner or later politicized, as both political and judicial elites see these institutions "as means to preserve control over the judiciary".[167] Old habits die hard or in political science terminology, "path dependency" kicks in. These habits are further perpetuated through the "socialization" or "cooptation" of younger judges.

As to the Dutch Council for the Judiciary, even if it was initially seen as the Ministry of Justice in different clothes by the judges,[168] by now it has gained their trust. This does not mean that judges don't see the shortcomings of their Council: they do. Almost all criticize it for not living up to international and European standards, i.e. the majority was not composed of judges until very recently, and judges are still not elected by their peers. But they are working on changing the aspects they disagree with, even if it takes quite some time to do so.[169] The judges also see that it isn't possible to have it all, and one has to make choices. While having only 2 or 3 judicial members in the Council makes proper representation of the judiciary impossible, it makes for a very effective body with *bestuurskracht* (administrative power).[170] Perhaps what makes the biggest difference between the judges in the Netherlands and those is the Western Balkans is that they are very aware of what judicial independence means in all its forms. They cherish it and work to ensure it is perpetuated both by formal means and informal practices.[171] Judges are aware that maintaining the values they cherish requires constant work and patience.

167 Ibid, pp. 21-22

168 Interview No. 1

169 Judges are not happy that it is the Council for the Judiciary that appoints the boards and Presidents of courts. Interviews No. 1, 3, 6. Work is being done to improve the voice of the working judge in decision-making. The Council in consultation with the Dutch Association of Judges and Prosecutors (NVvR) and people from different courts have decided on an alternative way of appointing the board members. This regulation is expected to be put into law soon. Interview No. 3

170 Interview No. 1

171 The curriculum at the SSR aims to provide a basis for ethics as well as the foundational values a judge needs to possess. These are further strengthened by what is practiced in the courts. For instance, when discussing a case in chambers, the youngest judges are always given the first word so that they can speak freely. In addition, they are assessed by the judges who coach them on whether they act independently. Interviews No. 2 and 7

3. THE ROLE OF HIGHER COURTS IN SECURING THE UNIFORM APPLICATION OF THE LAW IN THE NETHERLANDS

As to the third aspect of judicial culture examined under this project, namely the role of higher courts in the uniform application of the law, there are different mechanisms in place to ensure this. However, it is important to mention that uniform application of the law is not only a task to be ensured by higher courts. As discussed in Part 2, there is also a role to be played by other actors, such as the legislature (see CCJE Opinion No. 20) and the Council for the Judiciary (see section 2.1.). The focus in this part will be exclusively on the role of higher courts, and the role of the Dutch Supreme Court in particular. Before going into the crux of the matter, a brief overview of the Dutch system of courts will be provided to place the Supreme Court in context. In addition to the role of the Supreme Court, this part will also mention the most important mechanisms in place to ensure uniformity between the highest courts with jurisdiction in the field of administrative law. As in other parts of the study, it will conclude by comparing the role of the Dutch Supreme Court in ensuring the uniform application of the law with its counterparts in Albania, North Macedonia and Serbia.

3.1 The Dutch System of Courts

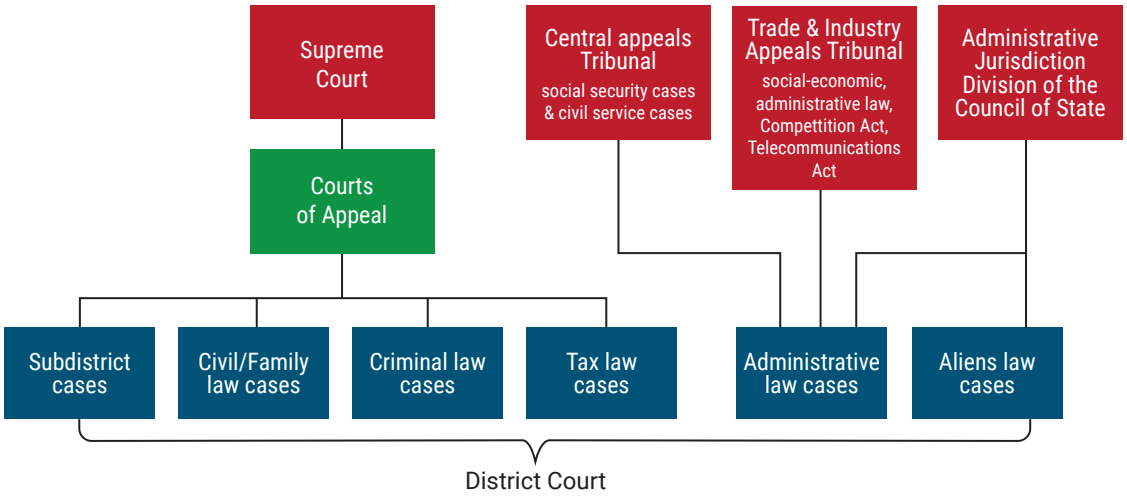
The Netherlands is divided into four judicial districts for courts of appeal (*gerechtshoven*)[172] and eleven for district courts (*rechtbanken*).[173] The district courts are courts of first instance and comprise a sub-district sector, a criminal law sector, a civil/ family law sector, and an administrative law sector.[174] Parties can lodge an appeal against a judgement delivered by a district court in front of one of the four courts of appeal in the areas of civil law, criminal law and tax assessments (in the capacity of an administrative court on the latter). These courts re-examine the facts of the case in question and reach their own conclusion. In most cases parties are also able to contest the court of appeal's decision in cassation in front of the Supreme Court.[175]

172 For more information on the courts of appeal, see: https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Gerechtshoven

173 For more information on the district courts, which are courts of first instance that deal with issues covering different fields of law, see: https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken

174 In the sub-district sector, a single judge decides on cases and people can argue their cases without a lawyer. In civil law, these are cases about rents, purchase and employment; and in criminal law, cases that deal with minor offences. For further details, see The Judiciary System in the Netherlands (n. 165 above), p. 10

175 Ibid, p. 12.



Source: The Council for the Judiciary, *The Judiciary System in the Netherlands* (The Hague, 2010)

The focus in the remaining part of this study will be on the role of the Supreme Court in the uniform application of the law. However, it is worth pointing out that while it is the Supreme Court that plays the most important role in this respect, there are three administrative law tribunals that serve as courts of last instance in the particular issue area over which they have jurisdiction. To mention them briefly, these are the Central Appeals Tribunal (*Centrale Raad van Beroep*), Trade and Industry Appeals Tribunal (*College van Beroep voor het Bedrijfsleven*), and the Administrative (Jurisdiction) Division of the Council of State (*Afdeling Bestuurrechtspraak van de Raad van State*). The first of these tribunals (the Central Appeals Tribunal) is the highest judicial authority in social security and civil service cases,[176] whereas the second one rules on disputes in the area of socio-economic administrative law and appeals relating to some specific laws, such as the Competition Act and the Telecommunications Act.[177] The third of these tribunals is the highest administrative court with general jurisdiction. It hears appeals against decisions of municipal, provincial or central governmental bodies.[178] The graph below sums up the organization of the system of courts in the Netherlands.

176 For more information in this tribunal, which is based in Utrecht, see its web-site: https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Centrale-Raad-van-beroep

177 This tribunal is based in The Hague. For more info, see: https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/College-van-Beroep-voor-het-bedrijfsleven

178 For more information, see the web-site of the Council of State: https://www.raadvanstate.nl/talen/artikel/

3.2. The Role of the Dutch Supreme Court in Ensuring the Uniform Application of the Law

Ensuring the uniform application of the law is one of the three core tasks of the Dutch Supreme Court. The other two are contributing to the development of the law and protection of the rights of individuals.[179] The Supreme Court contributes to the uniform application of the law in different ways: first and foremost, as the court of last instance in cases of appeal in cassation, then, also as the highest authority in providing guidelines in the interpretation and application of the law, it plays a role in delivering preliminary references, and is also involved in other formal and semi-formal practices.[180]

The Supreme Court is the highest authority in civil law, criminal law and tax law cases. Its most important task is identified as cassation, which serves as a check on the quality of contested judgements delivered by lower courts, that is district courts and courts of appeal as regards the application of the law, the underlying legal reasoning as well compliance with appropriate procedure.[181] The aim of cassation is the preservation of legal uniformity, steering the development of law and safeguarding legal protection (i.e. the core tasks of the Court).[182] As important as the Court's role is, it should be noted that the facts of a case are established by lower courts, and the role of the Supreme Court is limited to checking whether the law has been applied correctly.[183]

"Supreme Court rulings serve as a guideline to the lower courts."[184] The interviewed judges have identified the rulings of the Supreme Court as one of the main sources they refer to should they be in doubt regarding the interpretation of a particular provision.[185] Where there is an ambiguity in the wording of a provision, judges at the district courts noted that if there is no ruling of the Supreme Court shedding light on the matter, they would also check for judgements of courts of appeal as well as judgments of other district courts that might provide some guidance or inspiration on the matter.[186] It should be noted however, there is no system of precedent (*stare decisis*) in the Netherlands,[187] and

179 See, https://www.hogeraad.nl/over-ons/

180 In the characterization of a procedure/ practice as formal, semi-formal, or informal, the definitions and examples provided in CCJE Opinion No. 20 are taken as a basis. See, CCJE Opinion No. 20 (2017) The Role of Courts with Respect to Uniform Application of the Law, Strasbourg, 10 November 2017

181 See the web-site of the Supreme Court: https://www.hogeraad.nl/english/cassation-the-main/

182 Ibid

183 The Judiciary System in the Netherlands (n. 165 above), p. 12

184 Ibid

185 Two of the judges identified the jurisprudence of the Supreme Court as the first source they refer to in cases in which they need guidance for the interpretation of a particular provision. Interviews No. 3 and 8

186 Interviews No. 4, 5 and 6. As one judge put it, the rule is "comply or explain". One has to explain why he or she needs to deviate from established case law. Interview No. 4

187 Interviews No. 1 and 8

a judge can deviate from the case law established by higher courts. However, there need to be good reasons for a judge to do so. Any deviation has to be well-substantiated.[188]

When a judge at a district court or court of appeal is faced with a case that entails a provision that has not been interpreted by the Supreme Court, they can make a preliminary reference to the Supreme Court for the interpretation of the provision in question, provided that the interpretation of this provision is necessary for the resolution of the case at hand, and provided that it is also necessary for the resolution of many other cases pending before courts. This is a procedure that directly contributes to the uniform application of the law as it provides guidance to all lower courts regarding the interpretation and application of a particular provision. Some of the interviewed judges indicated that they themselves or their colleagues have made use of this procedure.[189] While it was initially possible to make preliminary references only in civil law (since 2012) and tax law cases (since 2016), as of 1st of October 2022, lower courts can also refer questions in the field of criminal law.[190] The success of this procedure led to its adoption in all chambers of the Supreme Court.

Another contributing factor to the uniformity of judgments of the Supreme Court, are the independent advisory opinions of the Procurator General and the Advocates General, which form part of the Public Prosecution Service, which has an office attached the Supreme Court. As the name suggests, these advisory opinions provide recommendations based on the facts of a particular case, existing case law and scholarly opinion. The Supreme Court is free to deviate from these advisory opinions, however, it goes without saying that deviation requires sound reasoning. In civil and some criminal law cases, an advisory opinion is required, while there is no such requirement in tax law cases. These advisory opinions are made available online together with the judgments, which strengthens the uniform application of the law by providing access to all.[191] The role of the Procurator General is of particular importance, as he is empowered to lodge an appeal in cassation to the Supreme Court when he thinks it is in the public interest to address a particular legal question.[192]

In addition to formal mechanisms and procedures, there are also semi-formal and informal mechanisms (practices) adopted by the Court that serve to enhance the uniform application of the law. The

188 Interviews No. 1, 3, 4, 8

189 Interviews No. 5 and 6

190 See, https://www.hogeraad.nl/actueel/nieuwsoverzicht/2022/oktober/prejudiciele-vragen-mogelijk-strafzaken/#:~:text=Met%20ingang%20van%201%20oktober,en%20belastingzaken%20(sinds%202016).

191 All opinions and judgments are published on www.rechtspraak.nl. On the issue see also, https://www.hogeraad.nl/english/the-procurator-general-the-supreme-court/

192 See, https://www.hogeraad.nl/english/the-procurator-general-the-supreme-court/cassation-the/

first is the working method adopted by the Court, which is based on a system of weekly consultations in chambers whereby "judges who are not sitting on a particular panel in a particular case, can give their views on the matter at issue".[193] This practice aims to ensure uniformity within the Supreme Court itself. Another informal practice by the Justices of the Supreme Court is their visits to District Courts or Courts of Appeal with a view to entering into a dialogue with judges in these courts, and explain the rationale underlying some of their recent judgments. This latter practice, arguably, contributes to uniformity through all levels of courts.[194]

3.3. Other Means to Ensure the Uniform Interpretation and Application of the Law

As far as the role of higher courts in promoting the uniform application of the law is concerned two formal and one semi-formal mechanisms are worth mentioning. The first two were introduced on 1st of January 2013 when the Administrative Law Division of the Council of State, the Central Appeals Tribunal, and the Trade and Industry Appeals Tribunal decided to introduce the possibility in certain cases to ask an Advocate General (A-G) for a 'conclusion', and in some cases to refer the cases to a so-called 'grand chamber' of five judges.[195] The idea behind the 'conclusions' was to place an important unexplored legal issue in a broader context, which is not always possible with judgments. This means the A-G examines the legal history of the relevant law, jurisprudence of high courts and if need be, European and/or international law on the issue at hand. The legal issue(s) on which judges of the above-mentioned three tribunals can request a 'conclusion', arise in the context of a specific case, but the relevance and importance of the issue to be addressed by the A-G needs to go beyond the confines of that specific case, such as an issue of general administrative (procedural) law. The A-G conclusions could be compared to the opinions of the Advocate Generals at the Court of Justice of the European Union. They are believed to contribute to the development of the law, but they are not binding.[196]

The possibility to refer a case to a 'grand chamber' of five judges is available in cases where a legal issue is of interest to at least two of the highest administrative tribunals. The references are possible only in cases that are handled in a chamber of at least three judges. The reference always takes

193 https://www.hogeraad.nl/english/cassation-the-main/nature-cassation/ The Court consists of three chambers: the civil, criminal, and the tax chamber. For more information on how these chambers work, see: https://www.hogeraad.nl/english/cassation-the-main/the-chambers-the/

194 Interviews No. 2 and 5

195 See, the comment on the first case delivered in this format ECLI:NL:RVS:2014:188 on 29 January 2014, available at: https://www.mr-online.nl/grote-kamer-uit-de-startblokken/

196 See, https://www.raadvanstate.nl/@8250/introductie-van-de/ and https://www.raadvanstate.nl/bestuursrechtspraak/10-jaar-conclusie-en-grote-kamer/de-conclusie-in-10-vragen/

place in consultation with the Chair of the Administrative Law Division of the Council of State and the Presidents of the other tribunals, as they decide together on the composition of the grand chamber. Depending on the relevance of the legal issue for their courts/tribunals, the grand chamber could be composed of judges of two, three or all four (including the Supreme Court) of these courts/tribunals. The aim of the grand chamber is to ensure the uniform application of the law.[197]

As to the semi-formal or informal mechanism (as it has no basis in law) put in place to promote the uniformity of the law, it is a Commission for legal unity of administrative law (*Commissie rechtseenheid bestuursrecht*). The Commission is composed of four members (two judges and two supporting staff) representing each of the four highest administrative courts/tribunals (including the Supreme Court). The members of the Commission come together regularly to discuss issues of common interest since 2010.[198] As revealed by its name, its objective is to improve legal unity/ uniformity in the area of administrative law. It is important to note that this Commission does not aim to and cannot impose uniformity. The objective of the discussions is to share points of view that could be helpful in the decision-making process. These ideas or points of view are seen as authoritative, but have no formal legal status and for that reason are criticised by some judges.[199] While the Commission's initial work focused on eliminating inconsistencies in its case law, its role in the recent years has shifted to preventing such inconsistencies.[200]

3.4. Comparison To The Western Balkans

To make a comparison by exclusively examining the mechanisms and procedures available to higher courts to ensure unform application of the law in the Netherlands versus those available to the higher courts in Albania, North Macedonia, and Serbia would not be very meaningful or fair, as external factors play an equally important role in this respect. Frequent changes of legislation, insufficient funding and open political pressure on the judiciary make the work of the judiciary in the latter countries much more difficult than in the Netherlands.[201] Some of the common problems are the work overload and the understaffing of the judiciary,[202] however, the differences are numerous. Arguably, the most important difference is the self-perceptions of the judges themselves. The interviews revealed that

197 See, https://www.raadvanstate.nl/bestuursrechtspraak/10-jaar-conclusie-en-grote-kamer/de-grote-kamer-in-10-vragen/

198 See the 2018 and 2021 Annual Review of the Commission on Legal Unity, p.1. Available online at: https://www.hogeraad.nl/over-ons/publicaties/commissie/

199 Ibid. The criticism stems from the lack of legal status of this Commission and the fact that younger judges feel obliged to follow the points made by the Commission, even though they are not binding. Interview No 1

200 2018 Annual Review of the Commission on Legal Unity, p.1. Available online at: https://www.hogeraad.nl/over-ons/publicaties/commissie/

201 Report 3 on Serbia, pp. 18-19

202 Report 3 on North Macedonia, p. 17, and Report 3 on Serbia, p. 19

judges in these three Western Balkan countries do not see themselves as part of a separate branch of governmental power. There is "a lack of understanding of the role and position of the judiciary based on separation of powers".[203] This perception is a remnant of the socialist past when the unity of power doctrine prevailed. In contrast, the judges in the Netherlands are well aware of both their position in the *trias politica* as well as the limitations of it (see sections 1.3. and 1.4.).

A brief overview of the main mechanisms / procedures used by the Supreme Court of the Netherlands demonstrates three out of the four formal mechanisms identified by the CCJE in its Opinion No. 20 to ensure consistent case law are employed by it; namely, cassation (individual litigants' appeals), special appeal brought by a public prosecutor (the Procurator General), and the preliminary ruling procedure.[204] The semi-formal mechanism of regularly scheduled meetings of judges within a court is also in place.[205] There are also other semi-formal or informal mechanisms such as the work of the Commission on the unity of law. The work of such commissions is sanctioned only if it does not impinge on the independence of judges.[206]

As to the three Western Balkan countries, the High Court of Albania has been criticised for operating "more like a forum to solve private conflicts rather than focusing on its public function of unification of judicial practice".[207] Inconsistency between different panels of the Court turned out to be another problem.[208] These issues were expected to be remedied with the 2016 justice reform, which shifted the focus of the court on the uniform application and development of the law. However, the fact that some of the filters put in place to access the Court have proven ineffective,[209] is not promising for the reduction of existing backlog of cases. In North Macedonia, the principled legal opinions (the fourth formal mechanism mentioned by the CCJE in its Opinion No. 20) are the main formal mechanism of the Supreme Court to ensure consistency.[210] There is also a system for appeals in civil and criminal procedure; however, it has been found to be ineffective in securing the uniform application of the law.[211] Principled legal opinions or advisory opinions are one of the two formal mechanisms employed by the Serbian Supreme Court as well.[212] The other formal mechanism is the rulings on extraordinary legal remedies filed against the judgments of Serbian courts. The Serbian Supreme Court is being

203 Report 3 on North Macedonia, p. 15 and Report 3 on Serbia, p. 9
204 CCJE Opinion No. 20 (n. 180 above), para. 16
205 Ibid, para. 17
206 Ibid, paras. 18-19
207 Report 3 on Albania, p. 8
208 Ibid, p. 10
209 Ibid, pp. 11-12
210 See Report 3 on Macedonia, pp. 11-18
211 Ibid, p. 19-29
212 In the case of Serbia, they are called "legal opinions" / "legal considerations" / or "legal conclusions". They are delivered either on the initiative of the justices themselves or on the request of lower courts in pending cases. Report No 3 on Serbia, p. 22.

criticised for not taking "full advantage of its trial jurisdiction to contribute to a more harmonized and better reasoned case law".[213] It relies heavily on advisory opinions to that effect.

What is seen as problematic with these principled legal opinions/ advisory opinions is that these are interpretative statements usually delivered *in abstracto*, in other words, they are not related to a specific case. Hence, the argument that they represent a "quasi-legislative activity" and thereby breach the principle of the separation of powers.[214] This is indeed different than the instruments available to the high courts in the Netherlands. The 'conclusions' of the A-G and the 'grand chamber' formation of the highest administrative courts are always related to a specific case. What comes closest to these legal opinions are perhaps the preliminary references that are sent to the Supreme Court, as they can be formulated in broader terms (due to the requirement that the legal issue requiring interpretation has been raised in many other cases). The obvious difference is that the reference is still made in the context of a specific case, and that the interpretation in question is needed to resolve that case.

Principled legal opinions or advisory opinions have been found to encroach also on the individual independence of judges. Lower courts perceive these opinions as binding, even though legally speaking that might not be the case.[215] Judges find it safer to follow opinions and guidelines of higher courts as that reduces the risk of their judgments being quashed.[216] To some extent, that is also the case in the Netherlands when it comes to following guidelines drafted by Commissions such as the LOVs or the Commission on legal unity. More experienced judges criticize these Commissions on the ground that they have no basis in law or because their members are not representative of the entire judiciary. While they do not feel obliged to follow the guidelines prepared by these Commissions, they claim their younger colleagues find it safer to follow them. Others point to the advantages offered by these guidelines as they ensure similar offences committed in different parts of the country get similar fines/punishments. It is argued that this is not only in line with the principle of equality before the law, but it also serves to increase the overall trust of citizens in the justice system.[217]

Other important differences to be mentioned are the problems with (or rather lack of) legal reasoning in the judgments of higher courts in the three Western Balkan countries,[218] and problems experienced with the timely publication of judgments.[219] In the

213 Ibid
214 Report 3 on North Macedonia, pp. 9-10
215 Ibid, p. 16
216 Ibid, p. 17
217 On the former arguments, see interviews No. 1 and 4; on the latter, interview No. 3
218 On reasoning, see Report 3 on Albania, p. 22 and p. 24 on publication; Report 3 on North Macedonia, p. 19; and Report on Serbia, p. 9
219 For an example, see Report 3 on Albania, p. 24

interviews, Dutch judges have emphasized time and again the importance of providing sound reasoning in their judgments. That is what enables them to act independently and deviate from judgments of higher courts when found necessary: as one judge put it, the rule of "comply or explain".[220] As to the publication of judgments, they are made available on the official web-site of the judiciary at: www.rechtspraak.nl. There has been a steady increase of publications every year: from the publication 17.100 cases in 2007 to the publication of 45.100 cases in 2021. 27.000 of these cases in 2021 are from the district courts, and 10.400 belong to the courts of appeal. While the rate of publication of district courts is approximately 54 per 1000 judgements, that is 267 per 1000 for courts of appeal.[221]

Semi-formal practices are also important to ensure consistent application of the law. As mentioned above, this is ensured via weekly meetings of all judges in chambers of the Dutch Supreme Court. While similar meetings take place in the case of the Serbian Supreme Court,[222] in the case of Albania,[223] inconsistent application of the law by different chambers of the High Court could have perhaps been avoided by the adoption of a similar practice.

Last but not least, there is constant reflection in the Netherlands in order to take stock of shortcomings of the system,[224] and work to refine it via small gradual steps. Similarly, the Commission on legal unity is working on the best mode of cooperation between the Supreme Court and the Administrative Division of the Council of State.[225] New mechanisms and procedures are first tested on a smaller scale before introducing more sweeping changes. For instance, the preliminary reference procedure was extended to the tax chamber and criminal chamber of the Supreme Court only after it had had a successful track record in the civil chamber. This is in stark contrast to the Western Balkan countries which have experienced sweeping changes in their system after their transition to democracy post-1990.

220 Interview No. 4

221 See Tables 12 and 13 of Rechtspraak Jaarverslag 2021 [2021 Yearly Report of the Judiciary], pp. 63-64. Available online at: https://jaarverslagrechtspraak.nl/wp-content/uploads/sites/3/2022/05/Jaarverslag-Rechtspraak-2021.pdf

222 Report 3 on Serbia, pp. 22-23

223 See Report 3 on Albania, p. 10

224 For reflection on how to prevent future injustice that was done in the childcare benefit cases, see 2021 Yearly Report of the Judiciary (n. 221 above), pp. 10-11

225 Rapport van de Commissie rechtseenheid bestuursrecht, ***Rechtseenheid tussen de Hoge Raad en de Afdeling bestuursrechtspraak van de Raad van State***, Augustus 2016. Available online at: https://www.internetconsultatie.nl/bestuursrechtspraak/document/4975

4. THE INDIVIDUAL INDEPENDENCE OF JUDGES IN THE NETHERLANDS

Section 1.2. above briefly discussed judicial independence as part of the judicial culture in the Netherlands. The interviews revealed that judges find all facets of judicial independence important, including individual or internal independence, which is the last dimension of judicial independence examined under this project. The Guide to Judicial Conduct of the Dutch Association for the Judiciary (*Nederlandse Vereniging voor Rechtspraak (NVvR)*) calls this aspect of judicial independence 'autonomy', and defines it in the following way:

> Autonomy – which is also referred to as internal independence – relates to the judge's room for manoeuvre within his own organisation. He substantiates this autonomy in his independent performance and independent passing of judgment while, at the same time, forming part of an organisation which is required to comply with the precepts of efficiency and lawfulness.[226]

Internal or individual/ personal independence is the ability of the judge "to form his opinion in complete independence",[227] without any outside interference or influence including that of his superiors or colleagues. This also directly relates to the legal position of the judge, and to "the guarantees that are built into [this] legal position regarding appointment and dismissal, pay, assessment, promotion, incompatibilities, duration of the appointment, protection against transferal and dismissal, disciplinary sanctions, handling of complaints, and other elements".[228] Following the structure of the reports on Albania, North Macedonia and Serbia, this part will focus on the guarantees provided on the basis of three of these elements: the appointment, promotion and dismissal of judges.

Judicial independence is considered an essential principle in the Dutch legal order.[229] However, it is not a principle explicitly mentioned in the Dutch Constitution. The only provision of direct relevance is Article 117(1) of the Constitution as it lays down one of the most important procedural safeguards for the independence of judges, that is their appointment for life. They "cease to hold office on resignation or on attaining an age to be determined by Act of Parliament" (Article 117(2)).[230] Other aspects of their legal status is to be regulated by Act of Parliament (Article 117(4)). Accordingly, further guaran-

226 The Guide further provide that "The judge is independent and therefore autonomous in his deeds with regard to the organisation in which he is working and to the colleagues with whom he is working. The judge is responsible for his own decisions, even though he may consult his colleagues in this regard." See, "NVVR Guide to Judicial Conduct", in ***Matters of Principle*** (n. 134 above), p. 100

227 R. de Lange and P.A.M. Mevis, "Constitutional Guarantees for the Independence of the Judiciary", (May 2007) ***11 Electronic Journal of Comparative Law***, p.7. See also, E. Mak, ***De rechtspraak in balans*** (Nijmegen, wlp 2007), p. 133

228 Ibid

229 Ibid, p. 1

230 According to Article 46(h)(2) of the Act on the Legal Status of Judicial Officers that age is 70.

tees for judicial independence are to be found in Acts of Parliament, that is statutory law. The most important two acts in this respect are the Judicial Organization Act (*Wet op de rechterlijke organisatie*) and the Act on the Legal Status of Judicial Officers (*Wet rechtspositie rechterlijke ambtenaren*).[231] The guarantees contained in these instruments are partially based on the ECHR.[232] ECHR requires all courts in the country to be independent and impartial.[233]

When discussing the independence of individual judges, it is important to mention the role of the national association for the judiciary, that is the NVvR, as it is "officially recognized by the government as the organization which represents the whole of the Dutch judiciary".[234] About 70% of the judiciary (judges and public prosecutors) are members of NVvR. The association plays an important role in negotiations over the legal status, primary (salary) and secondary employment conditions of its members.[235] As described by one judge, "[t]here is one very important rule, and we just fought hard to keep it that way. That everything that has impact on the independent position and the salary of judges, every rule, law or not law, can only change if the national organization of the judiciary gives its consent. This is a very good position, and we are the only organization of the judiciary in the Netherlands."[236]

In light of the interviews discussed above, it comes as no surprise that in the most recent survey conducted by the European Network of Councils for the Judiciary (ENCJ), Dutch judges rated their independence with 9.4 (out of 10) and that of their fellow colleagues with 9.2.[237] These rates are among the highest in Europe. When asked specifically if they experience any case-related internal pressure in the last three years, it appeared that none of the 775 judges who filled in the questionnaire experienced such internal pressure.[238] As to the other side of the coin, how the general public in the Netherlands perceives the independence of courts and judges, within the EU, the country has the fifth highest score of trust in its justice system.[239]

231 For the former, the last major amendment was in 2001; see, n. 130 above. For the latter, see Act of 29 November 1996, ***Staatsblad*** 590

232 de Lange and Mevis (n. 227 above), p. 1

233 This is by virtue of Articles 92 and 94 of the Constitution (see section 1.5. above). It should be noted however, that "independence and impartiality" have an autonomous meaning under Article 6 of the ECHR. Ibid, pp. 4-5; see also, R. Dijkstra, P. Langbroek, K. Bozorg Zadeh, and Z. Turk, "The evaluation and development of the quality of justice in The Netherlands", in *Handle with care: Deliverable1.6: Report- The evaluation and development of quality of justice in the Netherlands* (2017), pp. 227-276.

234 See the web-site of NVvR: https://nvvr.org/the-dutch-association-for-the-judiciary/

235 For the status of the most recent negotiations, see: https://nvvr.org/dossiers/cao-rm/

236 Interview No. 4

237 European Network for Councils of the Judiciary (ENCJ), ENCJ Survey on the Independence of Judges 2022, p. 61

238 Ibid, p. 71. The specific statement on which judges had to respond was: "During the last three years I have been affected by a threat of, or actual, disciplinary or other official action because of how I have decided a case". 100% of the respondents strongly disagreed or disagreed with this statement. When asked if they experienced any pressure to decide an individual case in a particular way by the management of their court management during the last three years, the percentage of strongly disagree or disagree drops to 98%. See, ibid, p. 72

239 The only four countries that precede it with higher scores are Finland, Denmark, Austria and Luxembourg. See, European Commission, ***The 2022 EU Justice Scoreboard***, COM(2022) 234, p. 40

To shed light on how this high level of trust has been reached and maintained, the paper first examines how judges are appointed, and then, how they are evaluated and promoted. After a brief discussion of two informal practices that strengthen judicial independence, the findings are briefly compared to those in Albania, North Macedonia and Serbia.

4.1 Appointment

One needs to discuss the recruitment and initial evaluation of judges before discussing their appointment, as the quality of this process (from recruitment to appointment) is arguably the first step in ensuring the proper functioning of the entire system. At the end of a recruitment and training process, judges are appointed by a royal decree by the Minister of Justice. However, it is the Council for the Judiciary as an institution that manages the process of recruitment, selection and training. This is done in consultation with the management boards of the courts.[240]

The actual 'selection' process is done by a national selection commission (*Landelijke selectiecommissie rechters*) comprised mostly of "judges, lawyers and some scholars".[241] The Council and the selection commission have developed a profile based on which the candidates are selected. "[P]ublic engagement, intellectual and analytical capacities and elements such as persuasiveness and empathy"[242] are some of the required qualities. It is important to note that what is tested is not the 'knowledge' of the candidates, but their 'intellectual and analytical capacities'. Candidates need to have the necessary virtues to be judges already, as these are not things they can learn later.[243] Some other requirements are Dutch nationality and a law degree from a Dutch university. Moreover, candidates need to have a minimum of two years of experience outside the judiciary. The length of the subsequent training depends on the length and relevance of the candidate's prior work experience.

The candidates who are found to be eligible for the judicial training apply for a position at a specific court. Next, they need to take an analytical test to prove their "verbal, language and abstraction skills".[244] Successful candidates need to take further personality assessment tests that demonstrate their "intelligence, decisiveness, and integrity among other things".[245] This is followed by several conversations with the members of the selection commission "to gain insight in personal capacities, societal involvement and societal vision."[246] The names of the candidates that pass these tests and are selected by the commission are forwarded to the respective courts. The decision whether or

240 Dijkstra et al (n. 233 above), p. 233
241 Ibid
242 Ibid, p. 234
243 Interview No. 6
244 Dijkstra et al (n. 233 above), p. 234
245 Ibid
246 Ibid

not to hire the candidate in question belongs to the court boards.[247] Overall, this means that "it is the judiciary that decides who will enter into it. There is no external influence governing the appointment of judges".[248]

The initial judicial training that successful candidates (by then called 'judges in training') follow is provided by the Judicial Training Institute (*Studiecentrum Rechtspleging (SSR)*). The training takes between 15 months and 3 years depending on the prior experience of the 'judge in training'.[249] The duration of the training has been brought down from 6 years. Some of the more experienced judges are concerned that this might result in deterioration of the quality of judges in the long run.[250] However, as far as independence of judges and the general values of the judiciary are concerned, the SSR is said to put a lot of emphasis on these topics, in addition to the specific fields of expertise, such as family law or criminal law.[251] This is confirmed by one of our interviewees who is a judge in training. According to him, "…there is a lot of training and attention put into how you would from your opinion independent of others, but also independent of your own prejudices and preconceived notions".[252] To facilitate their smooth integration into the work of their courts, the judges in training are also assigned coaches, who are senior judges at their courts. These judges play an important role in the co-optation or the socialization of judges in training. In addition, they have to asses, among other things, whether the judge in training is able to act independently.[253]

As a last point, it is worth mentioning that the selection process over the years has led to the appointment of more female candidates. Today %60 of judges in the Netherlands are women.[254] This should come as no surprise, as the majority of students studying law are also women.[255] While this can be seen as the success of the women's emancipation movement, an area in which judiciary has failed is ethnic diversity. There is more diversity among supporting staff at courts,[256] however this is not considered enough. Therefore, one of the five of the current objectives of the judiciary's agenda, is to make it more inclusive and diverse.[257] Time will show how much and how quickly success will be booked in this area.

247 Ibid, p. 235
248 Interview No. 7
249 For more details, see Dijkstra et al (n. 233 above), p. 236
250 Interview No. 4
251 Interview No. 3
252 Interview No. 7
253 Ibid
254 See "Vrouwelijke rechters in de meerderheid: geslaagde emancipatie of gebrek aan representativiteit?", 13 July 2021: https://www.ru.nl/rechten/studenten/@1321281/vrouwelijke-rechters-meerderheid-geslaagde/
255 In the 2018-2019 academic year, 64.8% of the law students were female and only 35.2% were male. See the chart on "Students in higher education". Available online at: https://www.cbs.nl/nl-nl/nieuws/2019/46/in-een-derde-van-beroepen-op-hoogste-niveau-is-meerderheid-vrouw
256 Dijkstra et al (n. 233 above), pp. 235-236
257 See "Vijf doelen verwoord in de Agenda van de Rechtspraak": https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Paginas/mva.aspx

4.2 Evaluation and Promotion

This section will briefly mention but not delve into discussing the efforts and programmes to evaluate the judiciary and the courts. It will merely attempt to map out aspects of evaluation of individual judges that play a role in their promotion. These two however, are not always easy to disentangle. An example of the former is RechtspraaQ, the national quality management system that was introduced in 2002. This system has formed an umbrella for all activities and measures that have to do with quality within the judiciary. In the meantime, it has been renamed as *kwaliteitszorgsysteem* (quality care system).[258] The information generated by this system aims at improving the quality of the judiciary at the court level and "is not used for the systematic and individual evaluation of individual judges".[259] However, since it has some elements that are used to measure the quality of judicial performance at individual level, it is worth to briefly outline it.

RechtspraaQ (now *kwaliteitszorgsysteem*) relies on two main components: the first provides for "an overarching normative framework", and the second one is composed of "systems to measure the quality of the judicial system".[260] The normative framework consists of two pillars: quality regulations and the judicial performance measurement system. On the former, the Council of the Judiciary has identified the following quality norms: "permanent education, reflection, clear and comprehensible judgments, speed and promptness of case flow and a minimum proportion of cases with a three judge panel".[261] In addition, the courts also develop their own quality regulations and corresponding programs. As to the judicial performance measurement system, it is based on values considered essential, namely "impartiality and integrity, expertise, treatment of litigants and defendants, the consistency of case-law, and speed and promptness".[262] Each of these have their own indicators.[263] In addition to the indicators, it is also important to mention the instruments to measure or asses these values. These consist of, but are not limited to "peer review visits, audits, staff satisfaction surveys, customer satisfaction surveys and court-wide position studies".[264] Moreover, every four years the entire system with all its courts and the Council for the Judiciary is audited by an independent commission (*visitatiecommissie*) in order to check whether it is able to live up to the aspired

258 Protocolcommissie, ***Visitatieprotocol Rechtspraak 2022***, p. 4. Available online at: https://www.rechtspraak.nl/SiteCollectionDocuments/Visitatieprotocol%20Rechtspraak%202022.pdf

259 Dijkstra et al (n. 233 above), p. 237

260 Ibid, p. 238

261 Ibid, p. 239. These nation-wide quality norms are to be found on the web-site of the Judiciary. See, https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Raad-voor-de-rechtspraak/Kwaliteit-van-de-rechtspraak/Paginas/Kwaliteit-rechtspraak-verbeteren.aspx

262 Dijkstra et al (n. 233 above), p. 239

263 For more details, see ibid

264 Ibid

quality norms and to identify what its weaknesses are.[265]

Looking more specifically at the evaluation process of individual judges, this happens at the level of the courts. The management boards of courts are responsible for improving "quality and the uniform implementation of the law" (Article 23(3) Judicial Organization Act). Since 2013, each court has someone responsible to improve quality at the court. In addition to these quality officers, there are also judges responsible for increasing the quality of the individual judge and the operation of the entire court. These judges are respectively called 'training coordinators' and 'quality coordinators'.[266]

The core values for judges are identified as "impartiality, independence, integrity, expertise and professionalism".[267] The first three of these values are secured through procedural safeguards such as the possibility to challenge a judge when in doubt about his impartiality and the rule that judges are appointed for life. The use of the complaint procedure at the courts might also reveal areas to work on by judges and other staff at the courts.[268] As to the last two of these values, that is expertise and professionalism, they are to be achieved through different forms of peer review, permanent education and the use of centers of expertise. While peer review can involve feedback between colleagues, it might also be in the form of peer-to-peer coaching, co-reading or discussing specific judgments in bigger groups. Permanent education is promoted by the requirement set by the Council for the Judiciary that each judge spends 30 hours a year on personal training. Courts can decide which courses to accredit or whether there is need to organize in-house trainings. As to expertise, which is no longer listed as one of the core values on the web-site of the Council for the Judiciary, there are six centers of expertise, which are hosted by different higher courts. They share their knowledge with universities as well as the SSR.[269]

Regarding the consequence of judicial evaluation for the promotion of judges, it is noteworthy that it is the court boards that decide on the matter. Since this is a sensitive issue, the courts use rotation guidelines that include selection criteria that are known by all. In the District Court of Rotterdam for instance, a selection committee composed of judges of all sectors of the court evaluates the

265 This commission (***visitatiecommissie***) is composed of 12 members, 8 of whom are not members of the judiciary. For more on this commission, see note 243 above, p. 12-13

266 Dijkstra et al (n. 233 above), pp. 240-241

267 Ibid, p. 240. For a detailed discussion of how these values are enhanced and measured, see ibid, pp. 240-247. The web-site of the Judiciary today lists only four of these as core values. See, https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Raad-voor-de-rechtspraak/Kwaliteit-van-de-rechtspraak/Paginas/Kwaliteit-rechtszaak-en-vonnis.aspx

268 Over the possibility to challenge a judge and file a complaint, see the web-site of the Judiciary: https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Raad-voor-de-rechtspraak/Kwaliteit-van-de-rechtspraak/Paginas/default.aspx

269 Dijkstra et al (n. 233 above), pp. 244-245

promotion applications. Their advice is forwarded to the board of the court, which after interviewing the applicants, decides who will be promoted and who not.[270] Two of the selection criteria that the Court of Rotterdam uses are participation above average in the jurisdiction and having an exemplary role. This means that judges are eligible if they are involved in training and coaching young judges or are active for instance, as quality coordinators. If a judge is consistently behind with their work or permanent education, that can be taken into account as a negative factor. To be promoted to become senior judge A (the most senior position for a judge at a District Court),[271] which only few judges manage in their career, one has to "participate in activities such as publishing, teaching and have national prominence".[272]

As to promotion, or rather appointment as a Justice to the Supreme Court, there is a special procedure laid down in Article 118(1) of the Dutch Constitution, and Articles 2(1), 4, 5, 5c(6) of the Legal Status of Judicial Officers Act. The Justices are appointed for life by a Royal Decree. When there is a vacancy for a Justice, the Supreme Court prepares a list of six candidates which is forwarded to the second chamber of Parliament. Next, the permanent commission on Justice and Security chooses three of these candidates, and presents them to the government. The first name on the list is appointed as a Justice by a Royal Decree.[273]

4.3 Dismissal

The most important safeguard for judicial independence is the fact that judges are appointed for life so that they do not need to fear repercussions for the decisions they take. Judges cannot be dismissed on the ground of their decisions or performance.[274] This does not mean that they cannot be dismissed at all, but that "such a dismissal is surrounded with special guarantees".[275] The first guarantee would be that this takes place only on limited grounds provided by law, more specifically by an Act of Parliament, and the second guarantee would be that the body carrying such authority would be designated at constitutional level.[276] Article 117(3) of the Constitution provides that this body needs to be a court and is to be designated by an Act of Parliament.

The Act on the Legal Status of Judicial Officers gave the competence to decide on cases of suspension

270 Ibid, p. 248

271 The career steps in Courts of First Instance go from a judge to senior judge to senior judge A. See, ibid

272 Interview with Jasper van den Beld and Antoinette Opstelten, Judicial Board Member and Secretary of the Board, Court of First Instance Rotterdam (Rotterdam, 9 May 2017), cited in ibid.

273 For more details, see the web-site of the Supreme Court: https://www.hogeraad.nl/werken-bij/benoemingsprocedure/ For more details on the procedure to be followed within the Supreme Court, see the last item on the following link (***Protocol werving en selectie raadsheren in de Hoge Raad***): https://www.hogeraad.nl/reglementen-protocollen/protocollen/

274 de Lange and Mevis (n. 227 above), p. 11

275 Ibid. For the procedural safeguards on judicial independence, see also Mak (n. 227 above), p. 137

276 de Lange and Mevis (n. 227 above), p. 11

and dismissal to the Supreme Court. This is important not only because the Supreme Court is the highest judicial organ, but also because it falls outside the remit of the Council for the Judiciary, which administers all other courts.[277] The Supreme Court takes such a decision only when the procedure is initiated by the Procurator General of the Supreme Court, who, like the judges, is also appointed for life.[278] This is all to ensure that these decisions are taken independently, without any political influence.

The rules on dismissal are to be found in Chapter 6a of the Act on the Legal Status of Judicial Officers. The cases in which a judge can be dismissed range from specific cases such as being "permanently unsuited to fulfil his duties because of long term illness", "loss of Dutch nationality" to "final conviction for a serious criminal offence". As to more vague cases falling under "result of action or omission, seriously prejudicing the proper functioning of the administration of justice or the confidence that is to be placed in it", it should be noted that the ECHR requirement for grounds of dismissal to be sufficiently "accessible and foreseeable applies".[279] De Lange and Mevis claim that due to the broad formulation of this provision, conduct that falls thereunder might lead to a "disciplinary measure of a written warning", but not to a dismissal "as long as this ground does not become more concrete".[280] It should be noted that in practice, the procedure for dismissal is hardly ever applied.[281]

In cases of a possible dismissal, judges can be suspended from their duties "once a ground for dismissal as mentioned in the law is presumed to be present".[282] The guarantee of independence provided by Article 117 applies to cases of suspension too, hence, the assignment of the Supreme Court to take a decision on these cases, upon the request of the Procurator General.

In addition to dismissal and suspension, the Act on the Legal Status of Judicial Officers provides for the "written warning" as a disciplinary sanction. The presidents of courts have the power to give such a warning as a disciplinary sanction. This is possible only after the judge in question has been heard orally or in writing (Article 46e(1) the Act on the Legal Status of Judicial Officers). The sanction can be appealed in front of the Central Appeals Tribunal (Article 47(3) the Act on the Legal Status of Judicial Officers). It is worth emphasizing that this sanction can only be imposed by a judge and not by the management board of a court, as the latter contains members who are not judges. All this is to preserve the independence of the judiciary.[283]

277 All courts except the Supreme Court and the Administrative Division of the Council of State are administered by the Council for the Judiciary. See, Dijkstra et al (n. 233 above), p. 230

278 de Lange and Mevis (n. 227 above), p. 13. See also the info on the web-site of the Supreme Court: https://www.hogeraad.nl/over-ons/bijzondere-taken-hoge-raad-procureur-generaal/schorsing-ontslag-rechters/

279 de Lange and Mevis (n. 227 above), p. 13

280 Ibid

281 Ibid, p. 14. This was also confirmed in interview No 1.

282 Ibid, p. 14

283 Ibid

Regarding the possibility to file a complaint, as mentioned above when discussing the *kwaliteitszorgsysteem*, it is possible for parties to proceedings to complain about the conduct of a judge, that is about the way they have been treated, but not about the content of a judgment.[284] Article 26 of the Judicial Organization Act requires each court to draw up procedures on how to handle these complaints. Since the "settlement of complaints is not intended to have legal consequences", this power "does not need to be explicitly reserved to the judiciary".[285]

4.4 Informal Safeguards for the Independence of the Judiciary

In addition to formal rules and procedures, to complement the discussion on the individual independence of judges, it is worth mentioning two conventions that have bearing both on the institutional as well as individual independence of judges: the conventions of co-optation and *sub judice*. They are believed to strengthen judicial independence as they "increase the distance between politics and the judiciary and thus help prevent individual judges or individual decisions becoming a political football".[286]

Conventions are formed when existing practice coincides with normative beliefs, which lock actors into particular types of conduct or action.[287] The normative basis underlying the first of these conventions, namely co-optation, is the belief that "judges, in principle, are best suited to appoint one another".[288] We see this in the organization of the judiciary, where the selection of new judges has largely been left to the Council for the Judiciary. This can also be observed in the passiveness of the second chamber of the Parliament in the special procedure for appointment of justices to the Supreme Court, in which they play a role. The shared belief (by the Parliament and the Supreme Court itself) is that "the Supreme Court itself knows best who is appropriate to reinforce its ranks".[289]

The second convention, *sub judice*, requires politicians to abstain from commenting on cases that are pending in front of the courts. Boogaard observes that this term may not be entirely appropriate as it relates "to the prevention of members of a jury becoming influenced by inappropriate commentary

284 On the latter, see: https://www.hogeraad.nl/reglementen-protocollen/regelingen-klachtenregelingen/klachten-rechtelijke-beslissingen/

285 de Lange and Mevis (n. 227 above), p. 15

286 Boogaard (n. 127 above), p. 113

287 Ibid

288 Ibid, p. 114

289 The same is valid for the state councillors at the Administrative Jurisdiction Division of the Council of State, who like the Supreme Court justices are subject to a special appointment procedure in which the Parliament plays a role. See ibid, p. 114

from parliamentarians".[290] Even though compared to members of a jury, judges are less likely to be influenced by such comments, members of the Dutch parliament do confront each other when they breach this rule.[291] However, according to one judge, there are many more attacks on judges in Parliament these days, attacks on specific individual judges. "The judicial culture in the broader sense is getting much harder. … The Council for the Judiciary does not have the means, such as the money and the people to step up to its role on protection [of judges]."[292]

4.5 Comparison to the Western Balkans

Judicial independence can be seen as a product of the legal and political culture within which it operates.[293] As aptly summed up by Caka, "even the most comprehensive reforms, drafted based on the best international standards, are not enough to secure the perfect environment for judges to work free from pressure and intimidation. The informal practices and the local environment will always play an important role in how certain reforms are implemented."[294] This explains the stark contrast between the personal or individual independence of judges in the Netherlands versus those in the Western Balkans.

While the Netherlands is an established democracy with sound foundations which works on how to fine-tune its judicial system so that it works better, Albania, North Macedonia and Serbia have seen their systems overhauled quite a few times since their transition to democracy in 1990. What has been done in the name of improving the judicial system, such as vetting and major legal/ constitutional reforms, have contributed to the culture of fear, submission, distrust or apathy.[295] All three reports focus on the present rules governing the appointment, promotion and dismissal of judges in the respective Western Balkan countries, as these rules are vital for the individual independence of judges. There are major improvements in the legal framework of all three: major justice reform in Albania (2016) with further recent amendments (2021),[296] reforms in the post-Gruevski period in North Macedonia (since 2016-2017),[297] and the constitutional amendment of

290 Ibid, p. 115
291 Ibid, pp. 115-116
292 Interview No 4
293 Report 4 on Serbia, p. 5
294 Report 4 on Albania, p. 24
295 Report 4 on Albania, p. 26; Report 4 on North Macedonia, p. 7; and Report 4 on Serbia, p. 5
296 Report No 4 on Albania, p. 5
297 Report No 4 on North Macedonia, pp. 7-8

2022 in Serbia.[298] However, given the legacy of the past, all three reports are cautious about the effects of the respective reforms. The procedures on appointment, promotion and dismissal have often been "the main instruments and avenues through which the Judicial Council of [Republic of North Macedonia] (JC) is safeguarding the interests of certain political, but also judicial elites".[299] Dismissal and disciplinary proceedings have been "weaponized against the disobedient judges who then serve as examples for the rest of judiciary".[300] Evaluation of judicial performance is also used as an instrument for putting judges under pressure.[301]

According to Preshova, independence has been achieved only at structural level, in terms of formal rules. At the informal level, there are dependent judges, hence the paradox of "an independent judiciary with dependent judges".[302] Similarly Marinkovic concludes that "despite the fully fledged constitutional guarantees of separation of powers and judicial independence, judges in Serbia behave as if they live in a system of unity of powers".[303]

The sphere of fear and distrust prevailing among the judges in the Western Balkans is a far cry from the sphere of trust and cooperation that prevails in the Netherlands. Dutch judges trust each other and have faith in their system, even if they admit it might not be perfect. There is trust in the procedures for selection of candidates for judgeship, even if the shortened period of training is a source of concern for some judges. Promotions take place at the level of the courts in a transparent manner contributing to the sphere of trust. Evaluation and quality assessments aim to increase the quality of the judicial system and facilitate the proper functioning of the courts as well as the quality of the judges through permanent education, peer review and reflection. Dismissals are rare and they take place with all procedural safeguards in place to ensure a fair process to those under scrutiny. Equally important, if not more, is the fact that Dutch judges find their internal or individual independence of utmost importance. They are ready to go against the flow when they think that is needed, knowing that is only possible with well-reasoned and substantiated judgments. All in all, both the working environment as well as the self-perception of the Dutch judges could not be more different than that of judges in the Western Balkans.

298 Report No 4 on Serbia, p. 10
299 Report No 4 on North Macedonia, p. 7
300 Ibid
301 Ibid, p. 29
302 Ibid, p. 6
303 Report No 4 on Serbia, p. 19

CONCLUSION

This paper examined four aspects of judicial culture with a view to comparing judicial culture in the Netherlands with that in Albania, North Macedonia and Serbia. These were: 1) judicial culture and the role of judges in developing the law; 2) the principle of judicial self-governance; 3) the role of higher courts in the unform application of the law; and 4) the independence of individual judges. The reason for choosing these four aspects and examining informal rules and practices, in addition to the formal rules, was to be able to provide a more complete and meaningful picture of the state of the judiciary in these four countries, as examination of formal rules only could be misguiding. The findings in the regional reports confirmed the correctness of this underlying assumption. Since the findings concerning the four aspects of judicial culture were already compared in sections 1.6., 2.4., 3.4., and 4.5., those will not be repeated here. Instead, this conclusion will offer a few remarks on Dutch judicial culture and a few take aways from the comparative part of this study.

The most important qualities of Dutch judicial culture are hinted at in the title of this paper. The Dutch are pragmatic: with a rigid constitution at hand, they achieve the desired result by substituting it with international treaties. Their *poldermentaliteit* requires that everyone's views are taken on board in the decision-making process. The result is *poldering*, negotiations that involve all the stakeholders and try to create a *draagvlak* (support base) for the new rule or practice to be introduced. This ensures there is enough support to give what's novel a chance of success. The downside is that the process of negotiation can take quite long. But that is not a reason to give up. There is constant work at every level to improve different aspects of the judicial system. It is notable that in these processes, the Dutch pragmatism kicks in to find an acceptable way around an issue and make it work, such as the informal Commission on legal unity (*Commissie rechtseenheid bestuursrecht*) and the *LOVs*, which are not without their critics. It might not be a perfect system, but what counts is that it works, and according to the people using it, it works well.

As stated at the beginning, the Dutch model for organizing the judiciary is not the archetype of the 'European model'. It has its own peculiarities as well as shortcomings flowing from its historical development. However, what is noteworthy is that despite these 'shortcomings',[304] the judicial system operates quite well and both the judges as well as the citizens have high trust in the system. In the Western Balkan countries under examination on the other hand, successive reforms have been passed to ensure that institutions live up to the best

304 To name a few practices or characteristics of the system that can be viewed as 'shortcomings', constitutional rigidity, no financial independence, the fact that judges play no role in choosing the members of their Council for the Judiciary, the fact that the presidents and management boards of courts are not chosen by judges on the ground but appointed by the Council for the Judiciary…etc.

international standards, to find out that the result has been "old wine in new bottles". The single most important reason behind this difference is, arguably, the self-perception of judges and their views as to their role in the *trias politica*. While the independence of the judiciary, in all its facets, has been engrained in the minds of the Dutch judges as one of the most fundamental values of the system, which is to be cherished and protected, the judges in the three Western Balkan countries do not see themselves as a separate branch of governmental power. There is "a lack of understanding of the role and position of the judiciary based on separation of powers".[305] This perception is a remnant of the socialist past when the unity of power doctrine prevailed.

Another important difference is the fact that the judicial system in the Netherlands developed organically. The foundations were laid down two centuries ago and ever since, the system is being fine-tuned and refined. Whereas Albania, North Macedonia and Serbia transitioned to democracy only three decades ago, and are working hard to catch up. For these three countries, following the advice of the European Commission, the Venice Commission or the current international standards on the organization of the judiciary seemed like a safe bet. But the experience of the last three decades has, unfortunately, shown that that choice has not always paid off. Imposing ready-made institutional templates rarely works. It is dangerous to concentrate power (e.g. appointment, promotion and dismissal of judges) in a single institution (Council of the Judiciary), especially in countries that have had political systems based on unity of powers and have proven prone to abuse of power. In this light, it should come as no surprise that these institutions have become vehicles for "safeguarding the interests of certain political, but also judicial elites".[306]

What next? Unfortunately, there are no easy recipes. Examination of judicial (and political) systems that work well usually shows that it takes a long time (centuries rather than decades) to establish what works and what not. The safest bet for the three Western Balkan countries is to take stock of the reforms introduced in the last three decades, and find out what worked, what not, and why. International standards should be there as objectives to be achieved, but the how (the means) should be left to the local scholars and experts to create or discover, as they know their political and judicial culture best. Patience and perseverance are crucial in this process. In the end, Rome was not built in a day.

305 Report 3 on North Macedonia, p. 15 and Report 3 on Serbia, p. 9
306 Report No 4 on North Macedonia, p. 7

Appendix I

Interview No. 1 - Interview with a Senior Judge at the Administrative High Court for Trade and Industry, The Hague

Interview No. 2 - Interview with a Justice at the Supreme Court (de Hoge Raad), The Hague

Interview No. 3 - Interview with a Senior Judge at the Court of Appeal of The Hague

Interview No. 4 - Interview with a Senior Judge at the District Court of The Hague

Interview No. 5 - Interview with a Judge at the District Court of The Hague

Interview No. 6 - Interview with a Senior Judge at the Court of Appeal of Arnhem-Leeuwarden

Interview No. 7 - Interview with a Judge in training at the District Court of Rotterdam

Interview No. 8 - Interview with a Judge at the District Court of Limburg

Interview No. 9 - Interview with a Court Clerk at the District Court of Oost-Brabant

Interview No. 10 - Interview with a Judge in training at the District Court of Rotterdam

Appendix II

Links to the Reports

Report 1 on Albania - Judicial Culture and the Role of Judges in Developing the Law in Albania by
Report 1 on North Macedonia - Judicial Culture and the Role of Judges in Developing the Law in North Macedonia by Denis Preshova
Report 1 on Serbia - Judicial Culture and the Role of Judges in Developing the Law in Serbia by Dr Tanasije Marinkovic

Report 2 on Albania - Judicial Self-Governance in Albania by Dr Fjoralba Caka
Report 2 on North Macedonia - Separate but not Independent: The (In)Compatibility of the Judicial Culture with Judicial Self-Governance in North Macedonia by Dr Denis Preshova
Report 2 on Serbia - Judicial Self-Governance and Judicial Culture in Serbia by Dr Tanasije Marinkovic

Report 3 on Albania – The Role of the High Court in the Uniform Application of the Law in Albania by Fjoralba Caka and Arta Vorpsi
Report 3 on North Macedonia - The Role of the Higher Courts in Securing the Uniform Application of the Law in North Macedonia by Denis Preshova, Milka Rakochevikj and Boban Misoski
Report 3 on Serbia - (In)Consistent Application of the Law and Judicial Culture in Serbia by Dr Tanasije Marinkovic

Report 4 on Albania – Personal Independence of Judges in Albania by Fjoralba Caka
Report 4 on North Macedonia – Judicial Culture and Individual Independence of Judges in North Macedonia: Independence Judiciary with Dependent Judges? by Dr Denis Preshova
Report 4 on Serbia – Personal Guarantees of Judicial Independence and Judicial Culture in Serbia by Dr Tanasije Marinkovic

Information about the project

The underlying objective of this project is to *complement the European Commission's process of vertical judicial Europeanization with an internal, horizontal, initiative that would combine an academic and practical approach in detecting and noting the main shortcomings of our judicial culture,* and through consultations with international and regional experts, outline recommendations for future steps in the Europeanization of judicial culture.

The project is coordinated by the **Institute for Democracy "Societas Civilis" Skopje (IDSCS)** from North Macedonia, in cooperation with **T.M.C. Asser Instituut** from the Netherlands, the **Judicial Research Center (CEPRIS)** from Serbia, and the **Albanian Legal and Territorial Research Initiative (ALTRI)**, and supported by the **Dutch Fund for Regional Partnership (NFRP)/Matra**. The project will be carried out and have impact in **Skopje (North Macedonia)**, **Belgrade (Serbia)** and **Tirana (Albania)**.

Information about IDSCS

IDSCS is a think-tank organisation researching the development of good governance, rule of law and North Macedonia's European integration. IDSCS has the mission to support citizens' involvement in the decision-making process and strengthen the participatory political culture. By strengthening liberal values, IDSCS contributes towards coexistence of diversities.

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Link

This report is available electronically on:

https://idscs.org.mk/en/2023/01/12/comparative-study-on-judicial-culture-the-dutch-approach/

Research Chapter No.30/2022

Comparative Study on 'Judicial Culture': The Dutch Approach – Pragmatism, negotiation and constant fine-tuning

Author: Dr. Narin Idriz

-

November 2022

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