Independence of the judiciary

Dr. René Ch. Verschuur
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1. Introduction

Coming from a relatively comfortable northern country I do realise - looking back to still recent history - that also in my country we have had sad experiences. During World War II the Netherlands were occupied by Germay from 1940 till 1945. Early during this occupation already in 1940 all jewish members of the Dutch judiciary were removed; among them was the jewish President of the Dutch Supreme Court Visser. The subject of today's conference is therefore an important subject of current interest all over Europe and not only in those countries which are in transition now.

When speaking about judicial independence, it is tempting to fall back on the doctrine on the trias politica of the Montesquieu expressed in his famous work of 1748 "De l'esprit des lois". We must concern ourselves, however, with todays society which is quite different from the three types of state which Montesquieu distinguished and besides we want a different type of judiciary and judges than Montesquieu had in mind. We do not want today judges which literally apply the law as laid down by the legislator, but judges who perform their task having as their first aim a fair and effective judgment. It is in this respect that we must approach today the principle of the independence of the judiciary.

When addressing you today I have been lead by four important international instruments:

- Recommendation R (94) 12 of the Committee of Ministers of the Council of Europe, on the Independence, efficiency and role of judges;
- European Charter of Judges;
- Opinion no 1 (2001) of the Consultative Council of European Judges (CCJE) on standards concerning the independence of the judiciary and the irremovability of judges;
- The Bangalore Principles on Judicial Conduct of 2002..

Besides I`m guided by the preparatory work of the working party for this year's Opinion of the CCJE on the role and missions of Judicial service commissions and High Councils for the judiciary, in order to guarantee the self-governance of the judiciary in respect of its independence; in this context I have used the reports prepared by Mme Martine Valdès-Boulouque and Lord Justice Thomas.

In my today's presentation I will mainly concern myself with the independence of the judiciary as an institution, which is mainly a constitutional issue, but also as mentioned in the First value of the Bangalore principles with the aspects of the individual independence of each individual judge which is of the utmost importance for our day to day functioning.

2. Independence as a concept

I believe that nowhere in Europe the separation of powers - legislative, executive and judicial - and in consequence the independence of the judiciary are questioned as a concept, though in some countries in reality there may be difficulties. In many constitutions the principle of independence has been laid down, in other states it is pre-supposed. The first value of the Bangalore Principles sets out:

> *Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial.*

Further it is said in this First value that independence is not a prerogative or privilege in the interests of the judges themselves, but that it is there in the interests of the rule of law of those seeking and expecting justice. As to the interest of the rule of law in our draft opinion of this year we further explain this as a reconciliation of independence and democracy.

The commentary to the Bangalore principles, which has been published last March, mentions three minimum conditions for judicial independence:
a. security of tenure as a safeguard against interference by the executive or other appointing authority in a discretionary or arbitrary manner;
b. financial security: a right to salary and pension established by law;
c. institutional independence: i.e. with respect to matters of administration that relate directly to the exercise of the judicial function.
Lord Justice Thomas includes further in his recent report for the CCJE:
a. provision of finance and administration for the courts;
b. the appointment and promotion of judges bases on merit (only) and proper training for judges;
c. the observance by the judiciary of ethical conduct and the discipline of those who transgress.
Also immunity from civil liability is seen by may as a prerequisite.
Besides this year's working Group of the CCJE mentions in respect to independence the responsibility towards the public, e.g. by transparency, accountability and reporting.
Some of the abovementioned conditions relate particularly to the individual independence, others to the institutional independence. We must bear in mind that only when both aspects of independence are guaranteed both the reality and appearance of independence are assured.

3. Fulfilment of conditions
This years Opinion of the CCJE has as its object the Role of a High Council (or similar body) to organise and guarantee the self-governance of the judiciary for the sake of the community. In this respect also the composition of such High Council will be considered; a.o. there will be attention for the influence of judges, but also for influence from others like the executive and parliament, and - as as particular the case in Belgium - the public influence.
In this paragraph I will pay attention to some of these conditions.

3.1 Provision of finance and administration to ensure that cases are heard promptly and without pressure
This has been worked out in several ways:
a. Court Service or Court Administration: independent and autonomous body which has ia its primary tasks the administration and management of the courts and the provision of facilities and services for judges (Ireland and Scandinavian Countries).
b. Council for the Judiciary with the function the administration and management of the courts (the Netherlands).
c. Ministry of Justice (till 2002 the Netherlands; Austria, Germany) or single Ministry (in fact England and Wales: Department for Constitutional Affairs).
d. other system (e.g. control by the Supreme Court as in Cyprus and Japan).
There can be no discussion that the judiciary or any special body that is entrusted with finance and administration will have to account for a proper handling of the budget and other means.
It is important in this respect which position the said body has in its State; if there is a constitutional guarantee or its position is otherwise suffciently guaranteed.

3.2.1 Appointment and promotion of judges
It is clear that the power of the Executive to appoint judges, advance their career, promote and train them can affect the independence. It is generally accepted though that appointments should be made only on the merit and made according to objective criteria, that there should be equal access and that judges are not selected because of their political views. Seniority alone is generally no more acceptable as the governing principle determining promotion. A

special consideration will have to be made to the appointment of the Presidents of the Courts, including the method used for their appointment.
Tenure is often guaranteed by the constitution or by the law; the CCJE considers irremovability of judges (see Opinion 1, recommendation 7) should be an express element of independence. When tenure is provisional or limited it is especially important that the appointment is left to an independent body according to objective criteria and a transparent method. Generally the matter of salaries and pensions is sufficiently regulated. Of course the level of salary and pension must be such that it prevents any possible form of influence, whatsoever, and attracts sufficiently qualified candidates.
In many states especially in south Europe, one of the main tasks of the High Council as an independent body is the appointment of judges or advise on it.

3.2.2 Training of judges

The organisation of and the responsibility for training should be separate from appointment and promotion as set out in Opinion (2003) 4 CCJE, par. 17 and 18. In the Netherlands the policy for it is developed by the Council in close cooperation with the Courts, but the training itself is left to a separate training institution, the Netherlands Judicial Training Centre. I have noticed that in many countries where the organisation of the training is left to the Ministry of Justice, this system is criticised.

3.3 Ethical conduct and discipline

Although there is often a close connection discipline and ethics must not be linked automatically. Ethics include more standards than may be connected with discipline; discipline on the other hand must not concern every aspect of ethical behaviour of the members of the judiciary.

3.3.1 Discipline

A disciplinary system must be provided for; it must be independent to guarantee a fair determination of a disciplinary case. It is questionable though if discipline should be the sole responsibility of the judiciary; Lord Thomas holds that there are arguments to give a role to the executive and legislator; besides the public might be involved in the making of decisions. During recent discussions regarding Opinion 10 most delegates endorsed this view.
In the Netherlands, however, it is generally felt by my colleagues that apart from a role for the legislator in setting up the system, matters of discipline have to be decided within the judiciary, in last instance by the Supreme Court as it is indeed in our system.
In respect of complaints the question rises if there is a role for an Ombudsman.

3.3.2 Ethics

The commentary to the first Bangalore principle reads:

> *A Judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.,*

It further mentions that the concepts of independence and impartiality are closely related, yet separate and distinct. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. Impartiality connotes absence of bias, actual or perceived. We must bear in mind that we can only claim independence when our impartiality is beyond criticism.
In this respect I stress the important role of the Bangalore Principles, especially now the Commentary is available. I also refer to CCJE-Opinion 3 (2002) on ethics and liability of judges. In many countries Codes of Ethics have been developed. In my own country, as a member of the board of the Dutch Association for the Judiciary, I have been on a Committee which has prepared the proposed text for "Guidelines for impartiality", which have been accepted by all courts in 2004. At present I'm active in the same capacity in a Committee preparing Guidelines for extra-judicial functions and activities, and a Code of Ethics. The

present aim is that both instruments will not only apply to judges but also to all other functionaries and officers active in the administration of justice like clerks and other functionaries in the administration of the courts. In my country it appears to be very difficult to agree to a general wording of standards in this respect. Besides I notice a certain reluctance with many members from our profession to accept these guidelines and code; it is felt in this respect that anyway we should not be pressed too much by the press and the public.

4. Independence vis-à-vis the executive and the legislator in other aspects

4.1 Advising and assisting on law reforms and drafting new laws

Lord Justice Thomas has remarked that such assistance, which is common in many states, should not rise to difficulties. Of course the judiciary will have to adjudicate independently afterwards. I also, as a member of my association, participate regularly in advising on new drafts. It is important however, that political issues are avoided in this respect.

In some countries individual judges are attached on a temporary basis to the legislative department of the Ministry of Justice more or less regularly .

4.2 Politicians and pending cases

Formerly in my country there was an unwritten maxim that politicians should not express themselves about cases pending before a tribunal. In recent years there have been quite some cases in which politicians, a.o. members of parliament and even ministers, expressed themselves on the seriousness of certain cases and even criticized judgments which were subject to appeal. The members of the Dutch judiciary are very uncomfortable about this development and we have expressed that we are displeased with it.

5. Final remarks as to the Dutch experience

5.1 The Dutch Council for the Judiciary, which exists as from 1st January 2002, was set up to increase the independence of the judiciary. It was created as a consequence of a far-reaching reform of the judiciary system, which is laid down in the Judicial organisation Act. This reform introduced the so-called integral management by the courts and a better organisation of the judiciary. The Council was set up to strengthen the efficiency and effectiveness of the judicial organisation in these respects and to strengthen the independence of the judiciary vis-à-vis the executive and legislative powers. Last year's evaluation of the new structure of the judiciary and the Council has shown that the functional independence of the judiciary has indeed been strengthened.

The Council is part of the judiciary. It is only accountable to the Minister of Justice as concerns the judiciary in general. Interesting is that the Council has an active role in the promotion of judicial quality in general.

Before 2002 the Minister of Justice decided on the funding of the courts; each court negotiated its own budget. Now the Council - after consultations within the judiciary - negotiates the budget for the whole judiciary with the Minister of Justice (seconded by the Minister of Finance); when there is no agreement, parliament will finally decide on the budget. The budget forms part of the budget for the Minister of Justice, but is a separate part of it..

The Council has five members; three of them - including the President - are judges. Two are not; one of those two is selected because of his experience in financial management. Appointment is by Royal Decree, based on a list of recommendation by the Minister of Judges; the list is made up in agreement with the Council after consultations. The members of the Council are appointed for six years, with the possibility of an extension of three years. Almost all judges-members so far have been former presidents of courts, with one exception: a former deputy-attorney general with the Supreme Court.

The Council has a large staff, about 150 employees. Some of them are judges working for the Council on a temporary basis.

The Supreme Court has its own budget and is no part of the system. The same applies to the Judicial Department of the Administrative Jurisdiction Division of the Council of State which is the Dutch highest court in some administrative matters.

5.2 As to selection, appointment, promotion and training the Council only develops a general policy for all courts. There is an independent body for the recruitment/selection of judges (the CALR; commission for the selection of members of the judiciary) and another independent body for training of judges (SSR; the Netherlands Judicial Training Centre). Appointments of judges are made by Royal Decree on recommendation by the Minister of Justice.

5.3 The law in article 91 of the Judicial Organisation Act provides the following tasks for the Council:

a. preparation of the common budget for the Council and the courts;
b. allocation of budgets to the courts;
c. assisting the management of the courts;
d. supervising the financial administration of the courts;
e. supervising the management of the courts;
f. assisting nation-wide activities regarding recruitment, selection, appointment and education of the personnel of the courts (including judges).

As said before article 94 of the Judicial Organisation Act provides that the Council assists the activities of the courts with regard to a uniform distribution of justice and the promotion of judicial quality.

Finally article 95 of the Judicial Organisation Act provides that the Council advises the Government and Parliament on new bills and policies regarding the administration of the courts; consultation of the courts is required.