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THE JUDICIAL BRANCH: A PARTNER IN THE BUSINESS OF GOVERNING SECURITY?

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1. Understanding the judicial role in the governance of security

The concept of governance of security, as Johnston and Shearing perceive it, offers a framework for analyzing security programmes and strategies. Critical to this concept is the notion that it is to be distinguished from the ‘conventional’ terminology of policing. Not just because of the fact that policing itself has become a hybrid model, but also because of the fact that security programmes nowadays almost presuppose various partnerships, e.g. with ‘local businesses, voluntary agencies, statutory agencies and members of the local community’ (Johnston & Shearing 2003; 11), justifies the use of the concept of governance. The governance of security must therefore be considered to be a framework built on the ideas of partnership and shared responsibilities.

Using the concept of governance as they do, Johnston and Shearing themselves raise the question whether this approach is too broad. Reducing a complex of governing functions and strategies, including courts and judges, to a ‘simple, generic type’ might result in a denial of their specificities (Johnston & Shearing 2003; 18). Indeed, they recognize that, *for a better understanding of the specific functioning of these strategies*, their respective mentalities, procedures, structures, rules and practices must be kept in mind. In actually *describing the big*

picture of the governance of security, however, they seem to leave the question unanswered whether the ‘mentalities, procedures, structures, rules and practices’ of the respective institutions must be considered relevant factors. Because of the judiciary’s principal commitment to the Rule of Law and the democratic society it is associated with, an analysis of the role of the judiciary in governing security might give some insight in the relevance of the Rule of Law to the concept of nodal governance and the governance of security. This paper explores in essence that very question: the relationship between the governance of security, nodal governance and the judiciary from the perspective of the Rule of Law.

The question then is whether the judiciary is part of the node. And, if so, in what way is the nodal governance of security influenced by the judicial role in it? Or is it the other way round: in what way does its nodal role influence the administration of justice in criminal law? These are questions that, understandably, cannot easily be answered.

For instance, there are various and valid indications that the judiciary as an institution is not and will not be a key player in the field of the governance of security as described by Johnston and Shearing. Expectations in that direction must be questioned when put into the perspective of the judicial tasks and functions within the context of the Rule of Law. Let me address this matter by referring to the concepts of government and governance. In the following, I understand the concept of government primarily as a description of the legal order of a state (Raz 1979). In this respect, the use of the concept of the Rule of Law corresponds to constitutionalism. The concept of judicial governance is often used within this context, as it refers to models of judicial constitutional and organizational design (Piana 2010). The concept of governance in the sense used within the governance of security relates in my view to the body of regulations and practices of management and control of a certain societal phenomenon, e.g. security (Johnston & Shearing 2003). This definition clearly includes non-governmental agencies carrying responsibility for the management and control of certain societal phenomena. In some ways, this may correspond to what Raz called the political conception of government. Furthermore, from a governmental point of view, the concept of governance primarily relates to the more executive and policymaking practices. We cannot therefore take for granted a judicial role in the *governance* of security – it seems we can only evaluate the judicial role in the governance of security insofar as its governmental (or constitutional) role is concerned. Because both the concepts of government and governance are closely related to the views one has on the content and scope of the legal order of the state, in particular on the way the Rule of Law determines this (legal) order and

the functioning of the state organs, I will pay more attention to these concepts when elaborating on the concept of the Rule of Law and its relevance for the functioning of the judiciary in the Netherlands.

It follows that, while much of the literature on the governance of security deals with the position of the police, local authorities, private companies and, to a lesser extent, the legislator and the law itself, not much attention is given to the position of the judiciary. But, broadly accepting the notion, also for the Netherlands, that security matters are no longer an exclusive concern of the state and that the criminal justice system must be seen as a system in which partnerships and shared responsibilities exist, several questions arise.

Therefore, it is the purpose of this paper to identify if, and to what extent, the judiciary in the Netherlands is, from a governmental point of view, considered to be a player in the partnerships that shape the ‘governance of security’. Governmental strategies with regard to courts and judges can influence the relationships between the agencies within the criminal justice system as a whole and, in particular, the relationship between the judiciary on the one side and other stakeholders on the other. To what types of judicial functioning do these strategies refer to and how does this relate to the concept of the Rule of Law?

Secondly, when there are indications that the judiciary must at least partly be considered a partner in the governance of security, some normative implications need to be discussed. These implications do not only involve the shape and content of the partnerships, but also bring forward views on the responsibility and task of the judiciary, bearing in mind the apparent interrelated functioning within the context of the criminal justice system.

The above results in the following structure of this paper. First, some general remarks on the position of the judiciary within the context of the Rule of Law and the criminal justice system must be made. Types and functions of judicial partnership practices need to be elaborated. By way of concluding, some normative consequences of judicial functions becoming increasingly interwoven with other functions in the criminal justice system are explored.

2. Some general remarks on the position of the judiciary within the context of the Rule of Law and criminal law (enforcement)

2.1 The Rule of Law and the judiciary

It is common knowledge that views on the content and scope of the Rule of Law vary greatly and range between (more) formal and (more) substantive conceptions (Craig 1997, Tamanaha 2004). In this respect, the Rule of Law is to be understood as a normative requirement regarding the validity of the law. Whereas the more formal interpretations of the Rule of Law stress the sources of the law and the principle of legality and are in particular silent when it comes to determining whether laws that meet these standards are good or bad laws, substantive conceptions of the Rule of Law, building on the formal requirements, stress this normative quality by referring to moral principles included in the Rule of Law: law must also be *good* law. The formal conceptions of the Rule of Law require among other things that the law be prospective, general, clear, public and relatively stable (Raz 1979). These requirements correspond closely to the principle of legality, as promoted for example by Beccaria. Substantive conceptions include requirements like the protection of individual rights (rights conception, Dworkin 1978) and are expanded to include positive obligations to improve the life of people (social welfare conception, see for an overview Tamanaha 2004). In its report to the Dutch government, the Scientific Council for Government Policy (WRR 2002) distinguished four basic positions regarding the Rule of Law: the Rule of Law as a value-oriented system (Fuller), as a formal constitution of a legal order (Rawls), as a requirement for a free market economy (Hayek) and the Rule of Law as an ideology (Unger).

In discussing the Rule of Law and its implications for the judiciary it is imperative to keep in mind the various conceptions of the Rule of law as well as their respective translation into state and legal orders. Some requirements relate to the (legal) order of the state and to the state organs and their mutual relationships, some to the functioning of the respective branches of government. With regard to the judiciary, that means in particular that the discussion on the adherence to formal or substantive conceptions of the Rule of Law is about its adjudicative function: to what extent does the judiciary have an autonomous role in the development of the law and the principles and policies underlying this development?

Differences between common law and continental European jurisdictions are relevant to understanding what is exactly meant by ‘the Rule of Law’. For example, developments in continental European jurisdictions show a diversity in conceptions of the Rule of Law, relating to two ideal-type families: the *Neo-Latin* and the *Rechtsstaat*-oriented conception (Guarneri and Pederzoli 2002). The French or Neo-Latin type of judicial governance originates from the (Montesquian) strict adherence to the law made by the will of the people and results in a relatively minor role for the judiciary. The German type of judicial governance is usually referred to within the context of the *Rechtsstaat*, with traditionally a stronger judiciary. Furthermore, doctrine has made clear that the German concept of the *Rechtsstaat* does not completely correspond to the Rule of Law (WRR 2002, Palombella 2010).

In the following I will primarily focus on the way the Rule of law is to be understood in the Dutch system of government. In that respect, I will speak of the *rechtsstaat*. The Scientific Council for Government Policy came to the conclusion that the principles lying at the heart of the Dutch *rechtsstaat* are: a government bound by law, a separation of powers, and a guarantee of judicial independence (WRR 2002). It is this working definition that I will adhere to in the following.

The constitutional and institutional structure Beccaria is referring to in his treaties on crimes and punishment derives mainly from the work of Montesquieu. The framework built by Montesquieu was developed against the background of the preservation of liberty of the citizen and the protection of the citizen against the arbitrary use of state power. In order to achieve these objectives, it was necessary to separate the legislative, executive and judicial branches of power: between the government, the law and the citizen, the judiciary was the guardian against the arbitrary use of state power (Montesquieu 2006).

The promotion of the Rule of Law, and in particular the principle of legality, by Beccaria (building upon the ideas of Montesquieu) led to a certain type of judiciary. Beccaria recognised the absolute primacy of the legislator in laying down the law. In the interpretation of the law the judge’s role is limited: the judge’s task is merely to ‘construct a perfect syllogism about every criminal case: the major premise should be the general law; the minor, the conformity or otherwise of the action with the law; and the conclusion, freedom or punishment. Whenever a judge is forced, or takes it upon himself, to construct even as few as two syllogisms, then the door is open to uncertainty’ (Beccaria 2003;14).

Both the separation of powers and the principle of legality, Foqué and 't Hart claim, serve the effectiveness of the criminal justice system and the protection of the individual who is subject to state powers (Foqué & 't Hart 1990). In this respect, however, Dupont shows that in the writings of 18th century penal theorists the principle of legality did not only stem from the desired protection of citizens against the arbitrary use of state power. Legality was also perceived to shape a modern strategy of crime control – a criminal justice system managed by rationally determined goals and foreseeable and calculable effects. Upholding the principle of legality also had important positive effects on the organisation of the criminal justice system. Managing a criminal justice system based upon the principle of legality necessarily implied a *system* of criminal justice and therefore an institutional, organisational framework (Dupont 1979). Legality therefore has had, besides a protective connotation, also a utilitarian and organisational dimension. Beccaria himself recognised the utilitarian goals behind his theoretical framework (Beccaria 2003; 103-105).

The consequences of the Beccarian theory for the criminal justice system were considered by other 18th century penal law scholars, as Dupont convincingly shows. Both systemic effectiveness and individual protection against the use of arbitrary state power were pursued emphasized. One striking feature Foqué and 't Hart put forward is the emphasis on transparency and accountability of the functioning of state powers. Beccaria's and Montesquieu's views on the lawmaking primacy, on the interpretation of the law and on the determination and execution of sentences are ultimately traceable to a critical analysis of the arbitrary use of state power. Transparency and accountability of the institutions of the criminal justice system are a prerequisite for safeguarding an optimum in personal freedom. As Foqué and 't Hart point out: Montesquieu's and Beccaria's concept of the separation of powers is meant to prevent the unlimited use of state power. Binding both the state and the citizen to the rules of the law makes those powers visible, transparent, which contributes to the legitimate use of state powers. Additional concepts for accountability emerge once the conception of the Rule of Law changes, as can be seen in the following description of the balance-of-power doctrine and the institutional changes the Dutch judiciary has gone through.

2.2 A balance of power – partners in the business of law

This is not the place to exhaustively discuss how the judicial function has developed since the 18th century. It is widely known that the separation-of-powers doctrine in the Netherlands has shifted towards a balance of powers. The legislative, executive and judicial branches of the state all have their own and separate tasks and responsibilities. Nevertheless, doctrine and practice point to a system of checks and balances that places the state functions in an interdependent relationship with each other (Witteveen 1991). That leads for example to the conclusion that, within certain limits, the judiciary is a recognised partner in the business of the law (Rijpkema 2001; WRR 2002). Much has already been written on this subject, with many examples of a (more or less) legitimate judicial contribution to the development of the law. One example is the development of the criminal law on euthanasia in the Netherlands (Buruma 2007). Another is the contribution of the judiciary to the system of checks and balances in the enforcement of public and private law in the Netherlands by declaring rules of administrative policy (at both state and local level) under certain conditions to be rules of law, the application of which is subject to judicial review.

It must be noted, however, that the legitimacy of judicial law-making in civil-law oriented countries like the Netherlands is more problematic than in common-law countries. Within this context, the legitimacy of the use of judicial power is not primarily tied to the constraints Beccaria has put on the judge's discretion. But not only a more activist attitude of the judiciary has raised legitimacy questions. Values like transparency and accountability, deriving from the principle of legality, needed modification in the light of the changing societal and political demands made upon the judiciary in the Netherlands. In that respect, some remarks on institutional changes in the Dutch judicial system are in order here.

2.3 Institutional changes in the Dutch judiciary – additional parameters for accountability

At the beginning of the 1990s, the judiciary was facing severe problems in the field of human resource management, in the implementation of new technologies and with respect to accountability. The quality of the administration of justice in general was seriously questioned. Cases were pending too long, people could not get proper access to the courts and, as described, in certain areas of law, the courts' decisions had the appearance of

arbitrariness. In the structure it had at the time the judicial organisation could not resolve these problems on its own. Hence proposals were made to restructure the judicial organisation. This development is not exclusively Dutch and can be seen in many other jurisdictions (Voermans 2007).

In outline, the underlying idea of restructuring the judiciary was to give it responsibility for its own functioning and thereby strengthen its independence. Until then, the Minister of Justice was responsible for managing the judiciary, which was physically performed from the Department of Justice. Today, the physical management and control of the judicial organisation are separated from the Department of Justice and from the Minister. The Council for the Judiciary was founded to execute the managerial powers over the judiciary.

But the Council for the Judiciary was not only given powers in respect of managerial matters. The Council was also designed to improve *the quality in the administration of justice* and to *promote uniformity in the application of the law*. In this respect the foundation of a Council for the Judiciary was a real breakthrough in the organization of the judiciary. Never before there was an administrative judicial body equipped with powers that (within certain limits) went to the heart of the judicial work, adjudication.

To live up to expectations and to accept responsibilities, it was almost inevitable that the exercise of these powers would lead to some kind of policymaking by the judiciary. Besides pursuing traditional values in the judicial functioning like independence and impartiality, the judicial organisation pursued additional values and goals. Effectiveness and efficiency in the organisation and procedures before the court and a better communication with those directly and indirectly involved became part of the long term *strategy* of the judiciary.

In addition to the classical Rule-of-Law doctrine, in which notions of legality, separation of powers and the protection of fundamental rights of the citizen take prime place, the judiciary was influenced by what is known in the literature as the new public management theories. This coincides with a new way of giving meaning to the concept of accountability (Bovens 2006; Ng 2007). Mak refers to these theories as a truly new paradigm (Mak 2007; 33-36). Quality is the central argument in the new public management paradigm. In a certain sense the concept of quality is all about standards and goals and their relative importance. But as Ng points out, quality is also an issue of morality in the sense that it aims to realise 'the full potential that one is capable of with the resources one has' (Ng 2007; 29). Because of the

need for a more efficient judiciary, legitimacy and accountability of the judiciary became also an issue of quality control. Quality indicators with respect to the management and organisation of the judiciary thus became part of realising accountability. Ng reflects on the consequences for the judicial functioning and claims that they in itself pose no danger to judicial independence, because in the end it is the judiciary itself that determines the quality indicators, in cooperation with the communities it serves (Ng 2007; 31). There is a lot to be said about this claim, for instance that Ng seems very positive about the context in which these quality indicators are determined.

We have to agree with Ng that the use of quality indicators is a matter of choice and morality. There can be no doubt about the institutional necessity of restructuring the judicial organisation. But with it came what several authors call a different paradigm – the new public management paradigm in which values like transparency and accountability gained new meaning. From that moment on the administration of justice did not only explicitly involve the realisation of the classical Rule-of-Law doctrine, but also accountability for the effective delivery of justice.

The above makes clear that the judiciary has its own institutional responsibility in the criminal justice system. As for any organisation in the public administration, transparency and accountability in its institutional functioning are, in addition to the legal infrastructure that defines the legitimacy of judicial decisions, a necessary feature of a modern, legitimate judicial practice. By linking the legitimacy of the judiciary in its organisational sense to societal and political demands, the judiciary becomes by definition a partner in the administration of justice – it demands an orientation towards these demands and a balancing between them and other ‘quality indicators’. It might be questioned however to what extent this additional focus of the judicial organization is in fact a new paradigm or, in line with Dupont’s analyses, a mere development of one of its defining characteristics – that it is part of a modern strategy of crime control.

As we have seen, the prevalence and acceptance in continental jurisdictions of a purpose-bound orientation of the judiciary is highly debated and raises serious objections. The realization of certain societal or ideological goals in the context of adjudication or conflict resolution infringes directly upon the more formal conceptions of the Rule of Law. In that case following rules becomes purpose-bound policymaking. But it must be stressed that all this concerns adjudication – the conflict resolution function of the judiciary. The institutional

changes as mentioned above do not directly involve judicial adjudication in the Netherlands. On the contrary, one might say, because this is explicitly excluded by Dutch legislation. But it is not the adjudicative function that has become purpose bound, it is the *organization* of the judiciary that has been subject to a changing set of demands and goals. Narrow and broad conceptions of the Rule of Law seem to converge: The necessity to meet the accountability rationale stems from the limiting and protective function of the Rule of Law. The determining factors for accountability, however, have been connected with societal en socio-economic rationalities. In that respect, a more substantive conception of the Rule of Law seems to appear. This converging picture of the rationales behind the Rule of Law finds a partner in the constitutional arrangements behind the balance-of-powers doctrine. Not only with respect to the adjudicative function, but also at the level of its organizational and/or bureaucratic functioning within the criminal justice system practices of balance, of interdependences and associations must be expected to exist. The appearance of judicial governance in the context of a balance-of-power doctrine therefore needs to be analysed not only from the perspective of judicial independence and impartiality, but also from its organizational entanglement in the criminal justice system. These practices are expected to reveal a mode of functioning that must be considered relevant to the manifestation of accountability as a requirement deriving from the Rule of Law (Piana 2010).

3. Two relational concepts in judicial partnerships: dependences and associations

In the following I would like to address relational concepts and judicial practices that might influence the behaviour of the judiciary in its functioning, even in the role in which the judiciary is assumed to be autonomous. The evolving role of the judiciary in the Dutch criminal justice system comes together with a nuanced view on the way judicial independence and impartiality are safeguarded and achieved. The effect which the founding of the Council for the Judiciary primarily had was an open centralisation of powers over the management over the judiciary. On the one hand, it strengthened the judicial independence, although its relationship with the government, in particular the Minister of Justice, is still under debate. On the other hand, granting the judicial organisation explicit powers in matters of criminal justice policy had an impact on the relationship between the judiciary and the others stakeholders in the criminal justice system. The relational practices described below functions within this context.

For a better understanding of the relational practices of the judiciary in the governance of security, I would like to focus on two levels of relational partnerships. Within this context, I speak of judicial *dependences* and *associations* that exist in the context of criminal law and criminal law enforcement. *Judicial dependences* concern and describe the way in which the judiciary, being an independent agency at a more constitutional level, is a dependent agency where its organisational or institutional functioning within the context of criminal law enforcement is concerned. Within these types of relationships, the judiciary is in essence a passive player, at the receiving end and not involved in or left with authority in the decision-making where the judicial function is concerned. This type of partnership is, generally speaking, connected with the classical (liberal) conception of the Rule of Law: dependences are a logical product of a judicial power separate from the legislative and executive branches. *Judicial associations* relate to the more complex and, from a normative point of view, more problematic arrangements in the criminal justice system where the judiciary is in fact, explicit or implicit, visible or invisible, an active partner in the criminal justice system with at least some authority where the judicial function or domain is concerned. While judicial practices in the more Neo-Latin (French) type of governance tend to remain within the boundaries of a strict application of the law and a non-activist judiciary, the balance-of-power doctrine seems to enhance the probability of such practices to occur. They relate to Soeharno's emphasis on the concept of reciprocity (Soeharno 2006). The concept of judicial associations inevitably carries a certain tension. On the one hand, these practices might be considered a logical step in the development of judicial governance within the context of the balance-of-power doctrine and contribute from that perspective to the legitimacy of the judiciary. On the other hand, the weak side of judicial governance by *associations* concerns its independent and impartial functioning.

A 'relational sub-concept' could be added to this latter scheme, although it does not (primarily) relate to partnerships with other stakeholders in the criminal justice system. There is a category of associations, which I call mutual consultative structures, from within the judicial organisation itself therefore, which is concerned with matters of criminal policy that are typical and explicit judicial matters or are left to the judiciary.

Theoretically, the above-mentioned partnerships can and must be distinguished. In practice, however, they will tend to overlap. Also, these types of partnership function as ideal-types in the argument, primarily aimed at focussing the discussion. They are primarily descriptive concepts, useful for understanding developments concerning the position of the

judiciary in governing security. That having been said, the shape of these partnerships necessarily derives from the normative paradigms of the separation or balance of powers.

4. Partner in the business of law (enforcement) – Exploring judicial partnerships in the criminal justice system in the Netherlands

With respect to the relational concept of dependence, two kinds of dependence can be distinguished: input and output dependence. The first deals with the fact that according to Dutch Criminal Procedure the judiciary is completely dependent on the Public Prosecution Service (PPS) for the cases brought to court.¹ The PPS itself, a monopolist in that respect, has since years developed a highly sophisticated and politically tuned (motivated, driven, expedient?) policy in respect of the settlement of criminal cases, both regarding the decision to prosecute and as regards the sentencing recommendation to the court. It follows that the judicial domain is determined not only by statutory arrangements on the formal and substantive jurisdiction of the courts, but also, and within the limits of these arrangements, by the policy developed by the PPS. What judges do in criminal cases must therefore be seen in relation to the criminal justice policy developed by the PPS. Changes in the penal climate in the Netherlands can therefore never exclusively be explained by referring to judicial practices (Downes & Van Swaaningen 2007). The output dependence mainly deals with the systemic arrangement that the execution of imposed sentences is not the judiciary's responsibility, but also a task primarily delegated to the PPS. It does however relate to the legitimacy of the judiciary, in particular considering the movement on Truth in Sentencing in the United States and/or the early-release debate (Shepherd 2002; Padfield, Van Zyl Smit & Dunkel 2010).

Judicial associations relate, as I stated, to the more complex arrangements in the criminal justice system where the judiciary is in fact an active partner in the criminal justice system with at least some authority in respect of the judicial function or domain. Their manifestation must be considered a direct result of the balance-of-power doctrine combined with the systemic and interdependent character of the criminal justice system. To actually describe these types of practice, and to actually analyse their merits, it seems necessary to draw a picture of the background of at least some of the practices of judicial partnerships.

¹ There is one exception to this: The procedure laid down in section 12 of Dutch Code of Criminal Procedure. That section provides a statutory power to the courts to undo decisions by the PPS to not prosecute and, instead, order the PPS to prosecute in the underlying case.

We have seen that, from a constitutional point of view, the judiciary is more or less absent in the governance of security, because the governance of security must in particular be seen as an executive issue. Expanding our view to a more institutional level, focussing on actual practices that occur within the judiciary, a more complex situation reveals itself. There are practices that point to the presumption that the judiciary should, in a sense, be regarded as a partner in the business of law enforcement. What kind of associations, what kind of practices are they?

A first distinction must be made concerning the scope of the partnerships. First and foremost, partnerships exist in the sense that within the judiciary itself a great number of consultative structures operate. These are the mutually consultative structures. Although these structures are not the primary focus as far as the concept of nodal governance is concerned, they do point to some extent to connections with and dependences on what might be called other stakeholders in the criminal justice system. These are the nodal consultative structures. In the latter kind of partnerships, where other stakeholders like the PPS or the probation service are involved, practices might point to the normative implications we are looking for.

Secondly, where partnerships occur, it is important to realise which aspects of judicial functioning these practices aim at. As we have seen, the organization of the judiciary makes a distinction between the administration of justice, in which (financial) planning and control are placed within a certain hierarchical structure, and matters of adjudication. In respect of the latter judges are considered to be autonomous. Organizational structures from within the judiciary can only support initiatives to promote the quality and uniformity in the application of the law. It is obvious, under the current legislation, that where consultative structures (whether they are mutual or nodal) lead to policies influencing judicial decision-making, the normative implications are the most pressing.

4.1 Managing the criminal justice system

Practices of judicial partnership occur on several levels of the criminal justice system. I expect that this does not come as a surprise to practitioners. The partnerships differ however in nature and in scope. To give an idea some examples of ‘partnership’ practices will be outlined in the following.

Managing input: covenants between PPS and judiciary.

The court must annually assess how many cases are likely to come into the judicial domain for settlement. On the basis of these and other factors, the number of the judicial, administrative and other supporting staff is determined. This assessment is made in close cooperation with the PPS, as research on existing consultative structures within the judicial organisation shows (Boone et al. 2006). Matters like these are regularly discussed between representatives of the PPS, other stakeholders and the courts. These consultations have multiple and various purposes. Their main function is to streamline the workflow. One striking example is the coordination taking place behind the scenes when so-called mega-cases are brought to court. Other purposes are to inform each other on existing problems and possible solutions. In times of cutbacks in the criminal justice system, representatives of the courts ask the PPS for example why there is a setback in the number of cases brought to court. Many courts also have informal meetings with (local) bar associations.

Managing input: Minors in the criminal justice system

One particular consultation structure struck my attention: it was the so-called juvenile district platform, established in the Almelo district in the Netherlands. Members of this platform are representatives of the court, the PPS, the probation service and the Child Care and Protection Board. This is clearly not merely a consultation structure for the purpose of streamlining the workflow of juvenile cases in the criminal justice system. Its purpose goes beyond that and it is for that reason that I will discuss it here, on the basis of a forthcoming article (co-)authored by Jeroen ten Voorde, within the context of nodal governance. It is not my intention to discuss this platform exhaustively. The only point I want to make clear at this stage is that it shows the interrelated and interdependent functioning of the court in the settlement of juvenile cases.

The Almelo juvenile district platform unites the executive agencies that carry responsibility for dealing with minors in the criminal justice system. It involves the PPS, detention-centres, the probation service, the Child Care and Protection Board, the National Institute for Forensic Psychiatry and Psychology, as well as members of the court and occasionally local governments (Dronkers & Ten Voorde, forthcoming). One of the goals this platform has set itself is to deal with young adults between 18-21. Because of their age, they are systematically *processed* through the regular criminal justice system. Criminal law however makes it possible that sentences available only for juveniles until the age of 18 can under specific circumstances be imposed upon young adults between the age of 18-21. Individualisation of intervention strategies for young adults was considered necessary. And although it is the PPS that determines whether a case is brought before a juvenile court, in the early stages of the prosecution the cooperation of (examining) judges is a prerequisite. One example may clarify this: about three days after his arrest, a young adult suspect is brought before the examining judge, who is a specialised juvenile court judge. Thereafter, when a suspect is put into pre-trial detention, suspension of the detention can be requested. At that time, reports must be available to the judge to determine whether or not this is the proper path to follow. In this process there is out-of-court judicial involvement in the policymaking concerning what to do with whom. This is clearly an example of the associations in which tensions between an effective settlement of criminal (juvenile) cases and quality in decision-making on the one hand and judicial independence on the other hand come to the forefront. Another example are the proceedings regarding fast-track settlements in criminal cases.

Managing input: Fast-track proceedings

Another example, showing the interdependences in the criminal justice system and highlighting some interesting features of the nodal role of the judiciary, stems from the general consultative structures as outlined above. It concerns the fast-track proceedings in criminal procedure (Mevis 2010). Two types of proceedings can be distinguished: ordinary fast-track proceedings in which cases are dealt with within fourteen days after arrest, and super fast-track proceedings that are dealt with within three days.

In recent years, (super) fast-track proceedings have in particular proved an attractive policy instrument for event-related circumstances. New Year's Eve, football games, demonstrations and suchlike are typical events where fast-track proceedings are provided for.

In addition, fast-track proceedings serve as a tail of the governance of crime and public order in urban problem areas.²

Serving as the tail of the governance of crime and public order, the judiciary is faced with the problem of being a reliable partner. In matters like these, where great organizational efforts are made to meet the demands of a speedy and effective administration of justice, quality parameters like due process are easily endangered. Proper cooperation between PPS and judiciary is used to agree on the use of fast-track proceedings, on the use of the media and on the effectiveness of these procedures and on sentencing factors. This type of cooperation might obscure the traditional point of view taken by the judiciary that a well-considered decision is preferably taken in a detached atmosphere and after a period of reflection. In practice this type of proceedings places judges in an awkward position. For instance, expectations by the PPS and the public regarding a quick and fierce intervention are high and put a load of pressure on the courts to meet these expectations.

4.2 Managing the quality of judicial decision-making

Mutual consultative structures

Uniformity in the application of the law is a central goal not only of the administration of justice itself, but also of the judicial organization. As stated above, structures within the judiciary can support initiatives and practices that relate to this goal. In matters of law and the uniformity of its application, the Supreme Court has the final say. There are matters of adjudication however in which the Supreme Court has only a marginal power because they are considered to be matters of fact rather than matters of law. The realization of uniformity in the application of the law in these matters is left to the so-called factual instances within the judiciary – the district and appellate courts. In general, these matters concern topics in which the legislator has left judges with wide discretion in decision-making. Mutual consultative structures have been developed to deal with issues like uniformity in decision-making on for example fixing the compensation in dismissal cases, on fixing alimony and on the sentencing decision (Schoep & Teuben 2006). As the Dutch judiciary lacks a constitutional and institutional basis for such structures, these policies are essentially developed in an informal setting.

² *Kamerstukken II 2009/09, 31 700 VI, nr. 83 (Menukaart snelrecht).*

Consultative structures on improving consistency in sentencing

One of the issues explicitly assigned to the judiciary was the sentencing problem – at the time primarily defined in terms of inconsistencies (Council of Europe 1992). The role of the judiciary in the development towards more consistency in sentencing, is a good example of how the judicial branch has changed over the years. Consistency in sentencing (policy) was by then primarily seen as a responsibility of the Public Prosecutor. Beside the fact that it made the PPS develop guidelines for the prosecution and the sentencing proposal, the judiciary was not very active on an institutional level to promote consistency in their sentencing decision. This does not mean that they were not paying any attention to this problem. Both the need for more information on sentencing decisions throughout the country and the application of lists of tariffs for sentencing can be traced as far back as the 1950s. It is well known that certain courts (district courts as well as courts of appeal) made use of internal lists for sentencing and of small local databases for sentencing. These lists and the way they were applied were not very structured. Revision was hardly organised, it was not known how these lists influenced the court in the sentencing decision and there was no information on how other courts organised their sentencing decisions and whether they were in line with each other. Research showed however that there was great interest in achieving more uniformity in sentencing through some kind of lists and receiving better information on the sentencing decisions of other courts (Fiselier & Lensing 1995). Over the years, the judicial attitude towards the problem of sentencing began to change. It became clear that the measures taken to promote equality and consistency in sentencing did not succeed. The National Conference of Presidents of the Criminal Chambers of the Courts of Appeal (NCPCCA) took this up and stated that they, the judiciary, should make efforts to promote consistency in sentencing. In 1998 this resulted in the formulation and issuing of so-called orientation points for sentencing. These were mainly based on existing lists and they therefore reflected to some extent the aforementioned lists of tariffs and the current sentencing practices of the courts. Orientation points now exist for multiple offences in the area of for example drugs, violence, drunk-driving and theft.

The legal status of these orientation points is debated. The Supreme Court does not regard the application of these orientation points as a matter of law, which leaves many of the legitimacy questions in the development and application of the orientation points unresolved. Regardless of their legal status, however, they do play a role in sentencing decision-making. But that is not our concern here. One aspect that does seem to be of interest is the substantive

part of the orientation points and the way they are being developed. In other jurisdictions, sentencing orientations, starting points or guidelines have primarily been developed by specific agencies, bodies that were specifically designed and equipped with authority to cover matters of sentencing policy (Freiberg & Gelb 2008). As the Dutch judiciary lacks constitutional and institutional powers for such bodies, these orientation points are essentially being developed in an informal setting. This raises serious questions and concerns as regards transparency and accountability. One cannot consider it necessary that the judicial organisation must support initiatives like the development of sentencing orientations in order to promote consistency in sentencing without allowing the same organisation the institutional structures that would address questions of legitimacy and accountability.

One aspect of sentencing policy raises particular concern. Since the development of a separate judicial policy on sentencing, questions have arisen on the balance between this policy and the policy developed by the PPS. This is still an unresolved issue and in some way it has been comfortably tucked away. The emergence of the use of public opinion on sentencing and sentencing policy by the PPS, however, spotlights this sensitive issue again. The PPS using public opinion polls on sentencing and sentencing policy puts the judiciary in an awkward position between democratic arguments on the one hand and perhaps Rule of Law based arguments on the other hand. What legitimate claim does the judiciary in the perception of the people have to put aside this sentencing policy?

5. The legitimacy of the judiciary under the governance of security

Many practices, of which only a few have been described above, give rise to the assumption that the judiciary is in many ways not only a partner in the business of the law, but also a partner in the business of law enforcement. It is a peculiar partnership though, interwoven as it is with criminal policymaking, and it raises some fundamental questions.

Boutellier asks himself the question how that relates to the ‘paradox of criminal law’ (Boutellier 2002). If criminal law and criminal policymaking have become more instrumental and more linked with societal interests and developments, where does that leave the judiciary with its traditional normative paradigm of *ultimum remedium*?

Let me first say that there is no clear answer to that question. One thing I would like to point out though is that Boutellier’s assumption that the *ultimum remedium* paradigm is one of the defining paradigms must be reconsidered. Even from a Beccarian rationality the *ultimum*

remedium paradigm must be nuanced as a defining principle of the organization of the criminal justice system. As regards its punishment mentality, the traditional Beccarian principles of proportionality and restraint, into which the *ultimum remedium* paradigm has been incorporated, another discussion comes to the fore (I do not understand what the author wants to say with this sentence). Being input-dependent as it (is it clear what ‘it’ refers to here?) is, the growing importance of administrative and out-of-court settlements paradoxically confirms the traditional normative paradigm of *ultimum remedium* of the judicial function. For the Netherlands this only seems the case by the grace of its declining domain. Security programmes tend to avoid, rather than involve judicial governance.

5.1 Constitutional domain and institutional focus

Within the constitutional domain, influenced by the balance of powers, the judiciary claims its own role and function by addressing and achieving institutional focus. The institutional focus we perceive has been twofold. It has been on what is known as the new public management paradigm. In the last decade one of the main focuses of the judiciary was to realise maximum quality out of the available resources. But the focus was also on topics related to the quality of decision-making, and on building a bridge between quality in decision-making and quality of the organisation. Besides the well-known, but difficult to measure parameters of efficiency and effectiveness, the attempts to improve the comprehensiveness of judgements, realise the principle of equality and improve the expertise and professionalism of judges did not necessarily lead to a lesser workload or a better workflow. So the institutional focus has been twofold and in recent years a shift in focus towards the latter has become clear, which can ultimately be traced to the normative paradigm of the Rule of Law. These institutional focuses, however, are primarily concerned with the exterior of the judicial functioning. It shapes the conditions under which a judgement is perceived to be legitimate. That is not surprising, but it leaves a blank spot where attitudes and mentalities are concerned. In that respect, there is uncertainty in some practices of judicial policy. By way of conclusion I can best make that clear with some remarks on discretionary judging and managerialism in the criminal justice system.

5.2 Nodal governance and *managerialism*

Normative consequences of the nodal functions of the judiciary occur when put in the light of the concept of *managerialism*, a concept that Bottoms used for describing and analysing international developments within sentencing systems (Bottoms 1995). He claims that in the last thirty years international developments have taken place that seem to have changed the positions of the agencies involved in the sentencing system. This is related to the growing importance of what Bottoms called ‘managerialism’, a concept which views the criminal justice system *as a system*, as a chain of functions and responsibilities that necessarily exposes the interdependences of the police, Public Prosecution Service, judiciary and legislator (see also Feeley & Simon 1992). According to Bottoms, the emphasis on the systemic character of criminal justice seemed to develop into four main features:

1. An emphasis on inter-agency co-operation in order to fulfil the overall goals of the system;
2. An emphasis on creating, if possible, an overall strategic plan for the whole of criminal policy (...) with each separate criminal justice agency having its own mission statement, integrally related to the goals of the remainder of the system;
3. The creation of key performance indicators (...), in order to measure aspects of efficiency and effectiveness (...);
4. Active monitoring of aggregate information about the system and its functioning (...), with special (though not exclusive) attention being given to information concerning the ‘key performance indicators’.

Some of the features described by Bottoms seem to correspond very well to the developments described above. According to Bottoms, the concept of managerialism has implications for the law, for the way in which the individuals are viewed in the context of the criminal justice system and, so he argues, for the courts. Where the position of the judiciary is concerned, his argument might meet with objections saying that these developments relate to executive agencies and cannot be ‘nearly so true of the courts’. While admitting that some of these objections are justified, he argues nonetheless that the language of (systemic) managerialism tends to embrace the courts within it. In addition, he claims that it is a mistake to believe that the courts can remain totally immune from its effects, even if it does not directly influence or constrain the courts or the judges’ discretionary powers. Thirdly, Bottoms points to the fact

that, with respect to the sentencing decision, it can directly be impinged by legislator, sentencing commission or whatever agency that functions on this matter within the rules and procedures of the specific jurisdiction.

Apart from its systemic aspect, managerialism has, according to Bottoms, two other dimensions, namely a consumerist and an actuarial dimension. Leaving the latter aside, the consumerist aspect of managerialism may be interesting to look into. The consumerist aspect derives, according to Bottoms, from the systemic aspect. This systemic dimension can lead to an increasing pressure from the legislative and executive branches for an 'efficient service delivery'. Bottoms argues that one (side-)effect of this approach is a growing orientation of responsible agencies towards the views of those to whom the services are delivered, 'to test whether the services are delivered satisfactorily'. This argument completes in my view the realisation in practice of what above has partly been described by Ng as quality as a neutral concept. The question of choice and morality lies in the orientation. Would a judiciary of the kind existing in the Netherlands in the end be strong enough to avoid this consumerist perspective?

5.3 Conclusion

The argument of Johnston and Shearing concerning democratic security arrangements, necessarily (but not everywhere) involves the judiciary as part of the system. As we have seen in the above, there are many judicial practices in the Netherlands that make it possible to put the traditional (Beccarian) judiciary into perspective and put emphasis on the 'partnership role' of the judiciary. While there is nothing new in this statement, the constitutional argument, derived from the separation of powers and shifted to the balance of powers, leaves the judiciary in theory some flexibility in developing its desired functioning. The independence of the judiciary still stands, but its organisation and its functioning within the criminal justice system are necessarily intertwined with the public prosecutor's office and the latter's criminal policy. That leaves us with a quest for new ways of giving meaning to the demands of control and accountability, as Ng and Make (amongst others) clearly put forward. A more activist role of the judiciary, in the shape of the growing importance of the associations as described above, must be seen as a direct result of the development of the judiciary in the Netherlands within the context of the balance-of-power doctrine.

Implications of the partnership role of the judiciary in the criminal justice system on the normative fundamentals underlying the *organization* of the judiciary became visible once they were confronted with theoretical models of institutional focus. The distinction between a Rule-of-law based institutional focus and a new public-management based institutional focus seemed useful for describing and understanding some of the judicial practices. Bottoms' *managerialism* has put, in addition, an emphasis on some substantive implications of an increasing entanglement (involvement?) of the judiciary in criminal justice policy. Dutch judicial policies, dependences and associations as described above do not show a clear inclination towards either side – in a way it must be considered reassuring that the Council for the Judiciary has put great emphasis on the substantive quality of judicial decision-making and made great efforts to support initiatives to increase this quality. But there are practices that must be maintained and are a matter of concern. The inevitable relevance of criminal justice policy for judicial functioning meets with fundamental objections when judicial policies are expected to converge or correspond to overall criminal justice policies. The Rule of Law and also the Dutch *rechtsstaat* require that the judiciary is left at least partly free to independently define the parameters for its accountability. Not isolated, but independently and with due regard to its controlling function. That would, in my view, be a parameter for partnership practices of criminal justice policy, with or from the judiciary.

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