

Summary of the evaluation of the ‘Wet organisatie en bestuur gerechten’ (Organisation and Administration of Courts Act) and the ‘Wet Raad’ (Judicial Organisation Act)

Introduction

This document first of all summarises the legal objectives and the background to the situation at the time of the introduction of the amended Judicial Organisation Act (‘Wet op de rechterlijke organisatie’) on 1 January 2002. We briefly discuss the review and its progress, and then look in succession at the situation we discovered regarding:

- the integrated decision-making process and management of the judicial authorities, the small claims/small crimes/small claims/small crimes divisions and the external orientation;
- the position of the Council with respect to the judiciary system and the ministry;
- efficiency, quality and legal unity.

The review

The review had a number of specific characteristics: partly because of the rather late start, there was some pressure on the time; it concerned a very wide-ranging review, with various instruments used for the review (web questionnaires, self-assessments, interviews, etc.) and it involved many people and stakeholders. This initially led to some discussions regarding the issues to be covered by the review and how to best conduct it (including the self-assessment). As far as self-assessment is concerned, the dividing line between direct promotion of interests and advice from the supervisory commitment was breached once from the review perspective.

Background situation

Legal history, including the ‘Contourennota’ (outline amendment bills), reveals the following objectives:

- More unity in the operation of the judicial system.
- A nationwide approach to cases that involve judicial overlap.
- Administrative independence for the judicial system as a whole.
- Creating clarity with respect to the accountability structure for the working of the courts and tribunals.
- Retaining ministerial responsibility.
- Upholding judicial independence.
- Increasing the administrative powers of the courts through integrated decision-making and management.
- Preserving the advantages and the procedures of small claims/small crimes (small claims/small crimes) courts.
- Improving the external orientation of the courts.

The situation at the introduction of the Organisation and Administration of Courts Act and the Judicial Organisation Act on 1 January 2002 did not require an entirely new organisation to be set up from scratch. On the contrary, after 1994, partly through the introduction of the General Administrative Law Act (‘Algemene wet bestuursrecht’ – Awb) and through the work of ‘Toekomst ZM’ (project focusing on the future of the Bench), the project to strengthen judicial organisation (‘Project Versterking Rechterlijke Organisatie’ - PVRO) and the Leemhuis Committee, a lot of work has been done towards developing the organisation in the courts. The activities mainly focused on legal unity, even if there were differences between the divisions. However, an organisational point of contact had not yet been set up. The meeting of the court

presidents does serve as contact point for 'Toekomst ZM' and as joint-commissioning authority for the PVRO.

Moreover, there was hardly any nationwide coordination, for instance, of HRM and ICT or quality assurance, and the court organisations lacked clear powers to manage themselves. Only the Ministry of Justice had the power to manage, but also only had a multitude of contact points, while there were no means for effecting ministerial responsibility in the courts. The department did not know exactly how productive and efficient the courts were. From an institutional perspective, judges had a lot of independence before the introduction of the new law. Apart from the disciplinary powers of the court presidents, there were no management instruments in place with respect to the judges. The courts had, however, developed an external orientation, consisting of briefing judges and working arrangements with repeat players, with the public prosecution service (OM) and the legal profession.

Confidence in the wilfulness of individual judges and the autonomous culture within the judicial authorities in particular ensured that the imminent changes (also including output financing) have been awaited positively.

Findings

Integral decision-making and management

As regards the structure and set-up of the management, the courts that were reviewed comply with the law, and the indications are that the model functions reasonably to well in practice. In some instances, management tasks are shared, where it is striking that in smaller courts in particular, the president and the director of operations take care of the management issues. In larger courts, the usual practice is to allocate portfolios or set up committees. There is also a trend towards setting up executive committees, with the president and the director of operations, possibly with the addition of one division head, taking non-policy sensitive decisions for the management. Almost all the courts have drafted guidelines for dividing the time of division heads between executive and management duties and court hearings. At small and medium-sized courts, the ratio is roughly 70/30 (management/hearings) and at the larger courts, the executive members act full time.

At division level, there are various organisation forms. These depend on the size of the organisation, but there are also differences between organisations with a similar size. Almost all the reviewed organisations have a division head and a division coordinator or division manager. In all the organisations, division heads have overall responsibility for drafting and implementing the policies in the relevant divisions as laid down in the Organisation and Administration of Courts Act. This includes the proposal of a divisional year plan and its management and implementation. Division heads have very few substantive managerial tasks; they spend a lot of time on external meetings, hearings and executive tasks.

As far as the human resources policy is concerned, this is not yet thriving. Management development, training and development and strategic human resources policy have, in fact, gained priority on the executive agenda in recent times, but are still not yet structured and systematic. The aforementioned points, however, are not accommodated in a policy plan and/or an integrated human resources policy. Generally, courts have only developed policies at a number of levels of the human resources spectrum. This can usually be seen in the lack of training programmes, career development projects and MD programmes.

All the courts and appeal courts have tailored their internal accounting system to the structure of four-monthly reports and annual reports to the Council for the Judiciary. The progress of the year plan is mostly monitored on a monthly or two-monthly basis by means of management reports. The board members are very satisfied with the internal transparency and have access to management information from the other divisions. In some of the courts, the management report is primarily an issue for the president and the director of operations.

Finally, the court meetings have an important role as sounding board or advisory body. These meetings take place in all the courts, varying from once to twice a year. Staff councils also have a place in the organisation; the Organisation and Administration of Courts Act and the Judicial Organisation Act appear to have had little impact on this. The staff councils busy themselves with the customary issues concerning internal organisation (including the human resources policy and relationship with the directors).

In each division, contacts are maintained with organisations in the field; from time to time, gatherings are also organised where judges can obtain general knowledge about the fields in which they operate. Courts organise client satisfaction surveys, and complaints procedures are in place and operating everywhere.

As in the other divisions, the small claims/small crimes division has a very autonomous position in most of the courts. In this context, the organisation of the small claims/small crimes division still strongly resembles the old set-up. In other words, the impact of the Organisation and Administration of Courts Act appears to be smaller than one would expect. One of the objectives of the Organisation and Administration of Courts Act was to encourage cooperation between the small claims/small crimes division and other divisions within the courts. This appears not have been successful for a number of reasons. The fact that this is not symptomatic of the small claims/small crimes division is confirmed by the view that there is hardly any rotation between the other divisions either. Cooperation between the small claims/small crimes and the other divisions is hardly any different than before the introduction of the Organisation and Administration of Courts Act; the cooperation mainly existed and continues to exist between smaller courts. All in all, the advantages of small claims/small crimes jurisdiction have been maintained. This outcome appears to be in line with the limited impact of the Organisation and Administration of Courts Act on the organisation of and cooperation between the divisions. After all, as soon as the impact is reduced and the organisation and culture of the small claims/small crimes division is not undermined, the procedures, and thus also the advantages of small claims/small crimes jurisdiction, will also not change.

The relationship between the Council and the courts

Following a start-up period from 2002 to 2005, the administration of justice is now funded on the basis of output and with the aid of the cost-benefit system. This system has not yet been fully developed, but it is expected to be fully implemented in 2007. The essence of the funding system is the calculation and determination of $P \times Q$ (price multiplied by quantity) and the associated quality. During the initial years, a lot of attention was focused on developing an instrument to make the quantity and the price of the administration of justice transparent, and only in the past year has there been a greater focus on quality, also with respect to the subject matter of judges' work.

As far as the funding model is concerned, we have the following comments:

- The initial design was refined during the period from 2002 to 2005.
- The funding model is complex, but transparent.

- Forecasting work inflow is the core of the model.
- The court administrations still have to develop their role in the cost-benefit system.
- The courts accept the funding model, but they must still get used to the system and its exact impact.

The courts are generally happy with the planning-and-control cycle, and they notice improvements in relation to 2001. The organisations do not yet know how to cope with the work pressure it brings and the higher demands made on staff and courts in this field. As far as the introduction of the cost-benefit system and the intrusiveness of the direction given by the Council at the beginning are concerned, some resistance, in addition to agreement, can also be detected in the courts because of the detailed information increasingly required from them.

The funding model ensures fair allocation of resources and is transparent at the same time. The courts have recently been confronted with an increase in their work, but are prudent by nature in preparing their estimates. The consequence of this prudence is that there has been more work than estimated in recent years (the estimates of the Council, however, have been higher than those of the courts. Because the courts were subsequently reluctant to take on new staff (or had no other choice), the organisations' work pressure increased. The work ethos is high in the courts, which means that they do not wish to see an increase in the workload. This led to an increase in productivity. This increase in productivity then also explains the complaints about work pressure. Because this productivity/work pressure reached a peak in 2003/2004, and the measuring still used today also took place during that period, the effects can still be noticed. A similar effect can be seen for 2005 of a bigger work increase than anticipated and, at the same time, a decrease in the work. This means a drop in the actual cost, because production is higher with the same resources.

Because the funding model focuses on the realised cost (which makes sense in theory), it can create the picture that courts can work even more efficiently. The rapid increase in the shareholders' equity of a number of courts is the effect of the situation sketched above. The courts retrospectively receive far more money than expected because they have been more productive, but they had not counted on it and apparently do not spend it. The court administrations therefore actually still have to develop their role in the cost-benefit system. Some court administrations explain the work pressure internally as a result of decisions taken by the Council; the judges then blame the high workload on the Council. On the other hand, it is striking that people sometimes give the impression of not fully understanding the funding model.

The Council is still defining its role in relation to the courts. In this context, there is some tension between maintaining and developing integral management at the courts and using the expertise and knowledge of the Council. Coordination between the Council and the courts run through various bodies, including the meeting of the court presidents and directors' meetings. Although the meeting of the presidents is not referred to in the Act, it has an important role in the relationship between the Council and courts as far as policy is concerned. This meeting serves, among other things, to create support for initiatives, increase the unity between courts and to draft proposals to the minister. However, the role of the meeting of the presidents in the official reporting remains underexposed.

It is remarkable that it appears at times as if the directors are not always fully behind decisions they take jointly. This sometimes makes the Council the scapegoat, because the court administrations refer to the Council as being responsible for joint projects, such as ICT, for example.

Moreover, the Council does not report separately about its own functioning and the Council's administration. Judges and some courts also consider this to be remarkable.

The relationship between the Council and the Ministry

The Council very clearly created a distinct profile in relation to the Ministry. This led to some heated discussions, and slowly the relationship appears to be becoming more professional. The Council reports about the operations of the courts only by means of annual reports, year plans and annual budgets, and also by virtue of the requirements set by the information protocol for the department. The financial management takes a prominent position whereas the policy-based or substantive facilitating of the legal work – because of the Council's view on this – is far less prominent.

Efficiency

The significant increase in production in the period from 2002 to 2005 presents a somewhat distorted picture because most of the growth took place in the small claims/small crimes division – it mainly concerns less complicated cases. Furthermore, in the production figures in the 2005 annual report, the Council hardly refers to the big staff increase in 2001 (756 FTEs) in the 2003 to 2005 annual reports. If both these aspects are duly included in the analysis, it will show that judicial efficiency increased by about 8% between 2001 and 2006 based on the weighted production and the increase of staff in FTEs.

It appears as if the courts are actually caught between the social pressure and their own professional attitude to immediately deal with new cases and to keep down turnaround times and the need to keep to 'normal' working times and at a realistic price. Because the courts repeatedly settle all the cases, even if they are short of time, the average cost per case is falling. This subsequently sends off signals to the Ministry of Justice that there may still be room for manoeuvre in the funding. Under the current practice, this only appears to a limited extent.

Quality

Both the self-assessments and the group discussions show that the courts are greatly concerned about the lack of attention with respect to the legal quality of the courts' work. The outcomes of the survey show that this is a less serious matter than appears from the interviews, but there is nevertheless reason for concern about the lack of time that almost half the judges say they have to deal with special cases. The effect of the new funding systems means that the emphasis within the judicial organisation has been on setting up proper production records and financial accounts. Perhaps partly as a result of this, the main focus of the court administrators and the Council for the Judiciary until the middle of 2005 had not so much been on guaranteeing high legal standards. This shift in emphasis was caused by the introduction of the new funding system that had been in preparation since 2002 and became fully operational in mid-2005. According to many of the people we spoke to, this is because of the Council's policy, but the choice of many court administrations to emphasise the need for increased productivity and sometimes cut back on training courses also play a role in this.

Judges have appeared to be very sensitive in respect of the volume of new cases. Quite a number of people we spoke to painted a mixed picture of the personality of average judges: on the one hand, stubborn and individualistic, and on the other, very law-abiding. To increase the number of new cases in the courts actually required little more than specifying targets and publishing benchmarks. Even if some courts have been doing more than had been agreed with the Council for the Judiciary for many years, there have always been courts or colleagues who have done proportionally more. Before the introduction of the new funding system in 2005, the Council had

tried to reduce the production differences between the courts by offering rewards for higher productivity. This was clearly a strong impulse for some courts to strive for an increase in production. However, this resulted in negative pressure on the judicial quality of the courts' work.

For roughly a year now, the Council and the court administrators have been agreeing targets to improve the judicial quality. The effects of these measures have so far been limited in the day-to-day practice, but this will probably change in the short term. Whether this additional focus on quality will also translate into money remains unanswered. Negotiations are currently underway concerning the rate per minute based on a measurement of the workload, about which there are huge differences of opinion.

Unity of law

According to our respondents, the considerable efforts to promote unity of law are not related to the introduction of the new legislation, but are based on the initiatives introduced much earlier, and later further stimulated by the PVRO. The efforts concerned include national and regional meetings, case law discussions, agreements and the setting up and maintaining databases.

As far as unity among the courts is concerned, we notice that there is also a lot of cooperation at regional level, both vertically (Court of Appeal - courts) and horizontally (among courts themselves). Both before and after the introduction of the new law, there have been major efforts to agree national schemes with respect to the essence of the rulings and the way in which cases are treated. These were mainly the efforts of division heads or their representatives. These efforts therefore largely circumvent the court administrations, even if it is their task to endorse and recommend a nationwide scheme to the judges in their own courts. These nationwide consultations are approved by the Council for the Judiciary, which is clearly taking a facilitating position rather than a directive one – as is indeed its legal duty.

Judges say that they do not experience the substantive and procedural agreements as restrictive. The substantive meetings with colleagues, in particular, are very much appreciated. A majority also does not experience a restriction in their professional autonomy following the introduction of the new law; roughly a quarter does experience it as such. An infringement of their professional autonomy hardly comes up as an issue in the self-assessments and during the interviews. A direct infringement of the judicial independence (as far as third-party interference with the way in which cases are dealt with or the substance or court rulings) is also not an issue at all. This perception of judges can be explained by the fact that they are seldom directly criticised about the substance of their rulings. Division heads and departmental heads have no desire to impose mandatory substantive rules on their fellow judges. However, from a legal point of view, court administrators are not prohibited from taking an interest in categories of cases (see section 23(3) of the Judicial Organisation Act). We believe that pressure on production has a substantial conforming affect. The review in fact shows that most judges hardly or never deviate from substantive or procedural guidelines.

Judges believe that they are more strictly bound by procedural guidelines than by substantive matters in dealing with cases. Especially pertaining to divisions in the administrative appeal courts, when there are deviations from agreed procedures judges do check one another more often compared to the small claims/ small crimes divisions, civil small claims/small crimes and criminal law divisions. In the courts of appeal, it is noticeable that judges in the family and criminal divisions do feel themselves bound by procedural guidelines, but judges in the commercial divisions much less so.

The organisational model of the Central Appeals Court encourages unity of law from the bottom up, from within the sections in that court). This respects the independence of the judges, and unity of law is effectively a non-substantive responsibility of the administration of that court, elaborated in the management regulation.

The ratings awarded by the judges and the courts themselves fluctuate around 6.5 (on a scale of 1-10); the administrative law boards award themselves around 8. Client satisfaction surveys reveal that people are not yet very satisfied with the level of unity of law achieved.

As far as unity of law between courts is concerned, please refer to the substantial amount of regulations produced for the different areas of the law and are published on www.rechtspraak.nl.