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Legal Consulting, Mediation and Publisher of the journal eJNR, ISSN 1871-5141

Role play in the Dutch legal system

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Summary

Is it possible to be both a substitute justice and a lawyer? We review the judicial roles where substitute judge and lawyer are fulfilled by one and the same person in the Dutch legal system, as practiced since 1996. These roles are fundamentally incommensurate and their objectives cannot reasonably be served by a sole representative. Distinct loyalties sworn in either role inevitably leads to compromised actions, decisions and statements. In effect, it sets up a legal system that is hard-wired to produce perjury. This Dutch invention appears to be unique, and is not known in neighbouring countries, all of which have legal systems founded on the Napoleonic Code. Its legal foundation is questionable.

Key words: Dutch legal system, Napoleonic Code, perjury

Historical background ^[1]

The combination of opposing roles in the judiciary was raised in the 1996 report “Integrity of the Judiciary” (*Integriteit Rechterlijke Macht - IRM*) which to this day continues to be daily practice in the administration of justice. ^[2]

Many citizens are victims of incorrect procedures, which should not occur in the Netherlands. Anger and discontent about injustice has turned into indignation. This has led to a passionate determination to rise above the details of individual experiences, reveal the failures of the **System** and denounce this objectionable judicial construction in a report. The lead was taken at the time by four people. However, it did not just deal with criticism – it also contained suggestions for improvement. The authors of the report tried to serve the general interests of **the** Dutch people.

The authors have in fact done justice to Article 6 ECHR, namely that citizens ARE ENTITLED to **professional, competent, experienced, independent** judges who issue high-quality judgments in accordance with the law, who act as they promised in their judicial oath, namely with **honesty, accuracy and impartiality!** It is indisputably clear that there are still many shortcomings. ^[3] There is still a prevalent belief among many citizens that the poor state of affairs outlined in the 1996 report, primarily in the civil law courts, has not changed and there is still room for considerable improvement. But what is integrity? If someone

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constantly says something, but does the opposite, then there is clearly a lack of integrity. However, many examples of breaches of integrity are found not only in law but also in national and international politics every day.

Integrity in the legal system continues to be under pressure due to conflicts of interest caused by ancillary positions.^[4] These conflicts of interest frequently manifest themselves in unacceptable behaviour and decisions which are eroded by the “institutional” status/system of **substitute judge and lawyer**, and this Dutch phenomenon has unique proportions in Europe. ^[5] The report was updated in 2006 and complemented with publicly available information by Nico Burhoven Jaspers, MBA, and ultimately ended up a casualty of an unprecedented and corrupt financial conflict of interest at the highest level. The authors of the report asked citizens and politicians for their views at the time on the actual reality and the conclusions.^[6] This led to some window dressing, but in essence, nothing has changed – instead it has only deteriorated. Time and again, it seems that interests prevail, the law is put aside and citizens are just tricked.

The following sections provide further details on the **core** of this fundamentally erroneous system. The reference framework is based on the oaths taken by the various professionals concerned, namely judicial officials, and lawyers.

The oath and duties of judicial officers (Judicial Officers (Legal Status) Act)

I swear/affirm allegiance to the King, and that I shall uphold the Constitution and all other laws.

I swear/declare that I have not given or promised, nor shall I give or promise, something to someone indirectly or immediately, under whatever name or pretext, in order to obtain an appointment.

I swear/affirm that I shall never accept any gifts or presents whatsoever from any person whom I know or suspect is subject to or will be subject to legal proceedings in which my official acts might come to pass.

*I swear/I affirm that I shall exercise my duties honestly, accurately and neutrally, without any distinction of persons, and I shall conduct myself as befits a good judicial officer.
So help me God Almighty!/ I solemnly declare and affirm! ^[7]*

The oath and duties of a lawyer as a representative (Section 3 Central and Local Government Personnel Act) ^[8]



“I swear (affirm) allegiance to the King and the Constitution and that I shall uphold the Constitution, that I shall respect the judicial authorities, and that I shall not recommend or defend any case that I do not believe to be fair.”

In practice, it turns out that there is nowhere that so many lies are told as in civil law, particularly by lawyers. The conditions and requirements are theoretical in nature. Section 21, Code of Civil Procedure:

“Parties are required to fully and truthfully advance the facts which are important to the decision...”

and also

“The lawyer must refrain from providing facts both inside and outside of court, which he knows, or at least ought to know, are incorrect.”

Rules of conduct, 2018, rule 8. In those cases, the lawyer is practising a deceit. ^[9] In reality, this exists only on paper, as practice shows otherwise. ^[10]

A lawyer who knowingly lies about certain established facts in his role as a (sworn) lawyer is in breach of the lawyers’ oath, which can be considered an act of perjury. After all, a lawyer is a knowledge holder and bears witness to this knowledge while acting as a lawyer. The 2018 rules of conduct for lawyers of the Netherlands Bar Association state the following:

Section 10 (a) Central and Local Government Personnel Act:^[11]

“In the interest of good administration of Justice, the lawyer ensures for the legal protection of his client. For this purpose, when exercising his profession, the lawyer is:

- a) independent of his client, third parties and as such the matters in which he is acting;*
- b) biased towards protecting the legitimate interests of his client;*
- c) professional and able to possess sufficient knowledge and skills;*
- d) ethical, and refrains from any act or omission that does not befit a respectable lawyer; and*
- e) a trusted representative and observes confidentiality within the limits imposed by statutes and the law.”*

It ought to be stressed that the **lawyers’ oath**, the core values and the statutory disciplinary standard and the rules of conduct should prevail over other codes of conduct, guidelines and best practices that are used in practice. Lawyers can therefore not be bound by other codes of conduct when they conflict with the lawyers’ oath, core values, statutory disciplinary standard and these rules of conduct.



The consequences of lawyers' oaths when lawyers exercise duties as a substitute justice.

Officials entrusted with the administration of justice take an oath which remains in effect throughout their lives, as they are appointed for life. Lawyers also take an oath for the performance of their duties. When exercising their role as lawyer substituting a judge/justice, both oaths continue to apply **at the same time!** This simultaneous nature implies an inseparable inner conflict, which despite all of justifications and fine words has more to do with sophisms, since these are based on fundamentally conflicting principles.^[12]

The current legal **merging** of these two capacities under Section 8 of the Judiciary (Organization) Act makes the combination intrinsically wrong and contains contradictions due to the different content, scope and objectives of oaths.

Substitute judges are appointed for life, as are permanent judges, but have not followed a six-year trainee judicial officer (RAIO) course at Training and Study Centre for the Judiciary (SSR). This also means that doubt may be cast on the competence and quality of a substitute judge/justice.

By allowing the **original ban** concerned to expire and amending it raises these two incompatibilities under Section 8 et seq. of the Judiciary (Organization) Act, namely that judges cannot also be a lawyer or civil-law notary, the possibility of simultaneously serving two masters emerges.^[13]

A brief comparative study

A simple comparison demonstrates the sharp and irreconcilable contrast between both professional groups and their oaths. Judges and justice substitutes swear an oath and are appointed for life. They serve a **general public** interest for the fair administration of justice towards the parties concerned.

After all, an officer entrusted with the administration of justice should be acts in the general social interest whereas a lawyer should have an individual interest and in this sense is biased.

It is assumed that a lawyer **cannot** distance himself from his oath as a lawyer if he acts as a substitute judge/justice. His performance can never be considered separately from the rules of conduct, the lawyer's oath and the core values dictated the representation of interests of **one side**. By definition, a judge/justice represents the interests of **both sides**. It is not



possible to reconcile these two tasks! This has nothing to do with honesty, but instead everything to do with the definitions of the two oaths.

In essence, the substitute judge/justice system permitted under Dutch law is a monstrosity that perhaps arose from a temporary need, but it has no basis in law nor in the completely different roles of both professions. In many practical cases, this has led to unacceptable results with dramatic consequences for those involved. In general, this matter is different for legal scholars, professors and academics, who not being lawyers do not take an oath that may conflict with judicial administrators' oath. The professional group comprising notaries and receivers, who are mostly lawyers, was not part of this research.

Perjury by breach of oath

The practice and existence of the combined **substitute judge/justice and lawyer** automatically and implicitly causes the risk of perjury through breaches of either of the oaths. The words of a lawyer are believed, as they are after all obliged to tell the truth!

Some lawyers are able to predict the outcome of legal proceedings or a disciplinary judgement a year in advance. It is hard to conceive of better evidence of the existence of corruption.

[14]

Examples

A large number of examples included in the IRM report bear witness to this fatal system, such as the Interregional Crime Squad (IRT) affair and the OHRA/Rem affair. This raises the question as to whether anything has changed since then. No it has not. The 1996 IRM report 1996, still reads as daily practice, only the names are different.

More recent examples are J. Ekelmans, substitute justice and lawyer, C. Breederveld, and many others.

Conclusion^[15]

The legal machine procedurally acts as an open system without any feedback.

Allowing interests to prevail is clearly the main cause of this failing, boundary-crossing legal (and perjurous) behaviour which comes at the cost of access to fair justice!



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Under Article 6 ECHR, citizens are entitled to fair treatment.

The system and practice of substitute judges/justices should be eliminated as quickly as possible from legal practice in the Netherlands! ^[16]

Eindhoven, June 2018



REFERENCES

- ^[1] This text is an adaptation of the text taken from the introduction to the IRM report 1996.
- ^[2] *Advocatenblad*, 12 May 2012; issue dated 6/2012.
- ^[3] Assigned an objection of 29 November 2011, 's-Hertogenbosch, 238553/EXRK 11-205 Court
- ^[4] *NRC Handelsblad: Het OM (The Public prosecution service)*, May 2018.
- ^[5] There are 126 substitute judges, of which 492 are also lawyers. There are 128 substitute justices, of which 598 are lawyers. (figures in 2012).
- ^[6] The editors and initiators of this report are Henk Brake, Rob van der Vaart, Nico Burhoven Jaspers MBA and Mr. Paul Ruijs.
- ^[7] The judicial officer is required under the act to maintain the confidentiality of the data which he becomes aware of during the performance of his task and which he knows or reasonably should suspect is of a confidential nature, except where this he is required to report this under any statutory provision or the need to report this arises from his duty. The judicial officer entrusted with the administration of justice is required to maintain the confidentiality of everything expressed in the council chamber about pending cases. The judicial officer entrusted with the administration of Justice must not in any way consort with parties or their **lawyers**, counsel or representatives about any pending dispute or any dispute which he knows or suspects may be come before for him.
- ^[8] 'Advocateneed verdient nadere beschouwing (Lawyers' Oath deserves further consideration), N. Christopoulos, April 1999, *Advocatenblad*.
- ^[9] ECLI: NL: PHR: 2013:918.
- ^[10] *Kwade zaken, De moraal van het juridisch beroep, (Evil business, the moral of the legal profession)*, Hendrik Kaptein, *Ars Aequi*, 2006, page 176 et. seq.
- ^[11] *Vademecum advocatuur 2018, laws and regulations*.
- ^[12] *Advocatenblad*, no. 6, 12 May 2012.
- ^[13] Nowhere is this conflict of interests better articulated than in the 1996 IRM report.
- ^[14] Judgment of Supreme Court, case number 11/02501 dated 10 August 2012, and summary judgment 237154/KG ZA 11-706 of 31 January 2012.
- ^[15] This damaging corruption which leads to hundreds of suicides each year, should be condemned outright.
- ^[16] See also the recommendations in the report *Herziening Rechterlijke Organisatie; "onverenigbaarheden"*, (Review of judicial organization; "incompatibilities"), Government Committee 1976.