

The Secret of the Court in the Netherlands

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In her article, *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Majority-Minority Conflicts*, Nathalie Des Rosiers focuses attention on her therapeutic analysis of the roles of appellate courts in minority/majority conflicts.¹ Among many other fine observations, she writes that the dissenting opinion can be seen as “the writing of a letter to the loser.”² While the dissenting opinion might be regarded as a general, normal part of any legal procedure, in the Netherlands it is not.

The procedural organization of the legal system in the Netherlands is quite different from the North American model. The Dutch legal system forbids the publication of dissenting opinions. There is even a veil of ignorance about unanimity, created by what is called the “secret of the court”: justice is handed out in black and white terms, regardless of the judges’ motivations. This might create an image of unity and unanimity, and thus promote the legitimacy of jurisprudence,³ however, this secret of the court also prevents the effects of therapeutic jurisprudence, since those who have “won,” but even more so those who have “lost,” would benefit from insight into *why* the court has ruled and whether or not there was disagreement.

I will first look at the Dutch system from two perspectives: legal and sociological. I will then discuss the position of minorities in Dutch law, and finally make some concluding remarks.

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1. Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts*, CT. REV., Spring 2000, at 54.

2. *Id.* at 56.

3. For a fine historical overview, see J.P. FOCKEMA ANDRAE, HET GEHEIM VAN DE RAADKA-MER (1934).

I. THE SECRET OF THE COURT FROM A LEGAL PERSPECTIVE⁴

Nathalie Des Rosiers speaks of dissenting opinion writing as the writing of a letter to the loser. The Dutch legal system does not offer judges this opportunity.⁵ On the contrary, there is a formal-legal "secret of the court."⁶ This secret of the court ranges from the cantonal judge all the way up to the Supreme Court. The possibility of dissenting opinions is, obviously, only relevant if more than one judge is sitting on the same case. Many conflicts in the Netherlands, including those related to labor, rent, divorce, small and simple criminal acts (punishable up to six months imprisonment), family, public law problems, civil and public summary proceedings, small claims and social security are all decided in the first instance by a *unus iudex*: a single judge. In more serious or complicated criminal procedures and in certain civil procedures, a court of three judges handles the case in the first instance. The appellate court usually sits with three judges; the Supreme Court sits with three or five. Therefore, the possible occurrence of dissenting opinions is rather limited.

The possible occurrences are also limited in quantitative terms, since in the Netherlands, as in any other country, only a small percentage of conflicts reach the higher courts. Still, dissenting notions do occur, although not publicly. In 1973, the Nederlandse Juristen Vereniging (Dutch Lawyers Association) chose the desirability of publishing dissenting opinions as the theme of its yearly meeting. A large majority was in favor of this practice, though the statutes have

4. This discussion is an extremely rough sketch of the Dutch legal system.

5. Dissenting opinions are allowed, however, in the different international and supranational European Courts, as well as in some European countries like Switzerland and Sweden.

6. WET OP DE RECHTERLIJKE ORGANISATIE [R.O.] art. 28 (Neth.) (concerning the Formal Court Organization). This statute is originally from 1827, some 30 years after the Revolution, and creates, together with some other statutes, the Rule of Law in the Netherlands. Art. 28a of this statute prescribes majority rule in case of conflicting opinions. Further, violation of the secret of the court is a criminal act, R.O. art. 28a jo. art. 272, and recidivism is a ground for dismissal, R.O. art. 11(d)(4).

There used to be one exception: Wet op de Raad van State art. 56.3. J.M. Kan, a former member of this Raad van State (it is partly a court in some areas of public law, and partly an institute advising the government in important legislative questions), found, in the dusty archives of the Raad van State, that contrary to the opinion among legal scholars, this possibility was never used except on one occasion. J.M. Kan, *De dissenting opinion bij de Raad van State*, NJB 1796 (1991). In 1992, article 56.3 was abandoned.

J.E.F.M. Duynstee, a High Court judge, has argued that art. 28 Wet R.O. will not survive a confrontation with art. 10 of the European Convention on Human Rights (ECHR). J.E.F.M. Duynstee, *Dissenting en concurring opinions revisited*, NJB 51 (1990). Although Dutch law does not have a constitutional review, both Dutch statutes and the Dutch Constitution can be overruled by international conventions and treaties like the ECHR.

yet to be changed.⁷ This notion takes us from the legal context to the social context.

II. THE SECRET OF THE COURT FROM A SOCIOLOGICAL PERSPECTIVE

From a sociological point of view, the secret of the court casts its shadow on many topics related to the legal system.⁸ First, the secret of the court is guarded informally, inside as well as outside the court buildings. Inside the court building, when judges of different chambers meet at the lunch table, the only question permitted is: "Did you reach a decision?" The two acceptable answers within this institutional setting are: "Yes" or "Not yet." Outside the court building, during small talks at social gatherings, judges tend to keep this secret of the court considerably better than lawyers and doctors, who have a comparable duty to guard client or patient privacy. High court judges, uncertain about a difficult decision, disclose in conversation with friends or relatives as little as possible and in general limit their discussion to facts and legal arguments that are public and thus knowable from the proceedings or the sentence. In this way, they avoid violating the secret of the court.

Second, the secret of the court is so strongly rooted in the Dutch legal culture that the recently-appointed "press judges" are not allowed to comment on the legal arguments of the court.⁹ They are appointed in an attempt to balance the ever growing public relations activities of lawyers and representatives of the prosecutor in (mainly) criminal cases who use the media as a tool to influence public opinion and, eventually, the court itself. However, the press judge is sent into the arena, hands and feet tied during the process and without any additional arms after the proceeding, and is not allowed to reveal any argument that is not published in the sentence.

Third, the winner appears not to care about the motivation and justification of the sentence, verdict, or judgment.¹⁰ The winner is

7. See Kan, *supra* note 6, at 1797.

8. The description of behavior of high court judges is based on personal observation and interviews. On this topic, there is no systematical empirical research in the Netherlands.

9. Police and attorneys, especially in criminal cases, started using the media. Next, the police in the bigger cities appointed special "press police officers." Then, the DA offices appointed "press officers" to clarify issues for the public, and possibly the judges, both in preparation for and during criminal procedures (the jury is unknown in the Netherlands). Finally, many courts, recently high courts too, appointed "press judges" with media training, to state in the media the official point of view of the court.

10. See F.H.M. Crombach & P.J. van Koppen, *Rechtvaardigheid: kwestie van inhoud of vorm* [Justice: A Matter of Content or Form], in DE MENSELIJKE FACTOR: PSYCHOLOGIE VOOR JURISTEN [THE HUMAN FACTOR: PSYCHOLOGY FOR LAWYERS] 245-56 (1991).

content, even without any justification. However, the loser cares very much. The loser is more likely to willingly accept her or his loss if the process was thorough. Publishing the dissenting arguments of judges might make the acceptance easier, but Dutch legal scholars apparently assume that a clear united front leading to the final outcome is the better way to induce acceptance. Lawyers opposing the publication of dissenting opinions use a dogmatic argument: the unity of the legal system. This argument stems from the idea that the certainty and security of the law benefits from hiding controversies, ambiguities, and alternative solutions.

Fourth, no one is allowed to be present at the decisive meetings of the judges. Research on the Dutch Supreme Court and the secret of the court, a project conducted by interviewing judges, lawyers, and others, involving plaintiffs and representatives of insurance companies, does lift the veil minutely.¹¹ The investigation presents information about leadership styles and how judges of the Supreme Court try to convince their colleagues.

Another source of information about the secret of the court is the retiring judge, especially the retiring Chief Justice.¹² Every now and then, on a rare occasion, he¹³ gives a speech, often dealing with general topics like the renewal of the law, the freedom and limits of the Supreme Court, and the ever growing influence of "Europe."¹⁴ This is, of course, not a dissenting opinion; on the contrary, it makes the final decisions in general more legitimate.

Finally, legal literature could provide some information about secret dissenting opinions. Insiders might be able to reconstruct the influence of a specific judge, especially if one of the judges involved previously published scholarly articles on the topic.¹⁵ In all other cases, the individual influence of each judge will never be brought into full daylight. For example, one will look, even in prestigious law journals, in vain for concrete justifications of court decisions.

A well known example of such a justification dates back to 1911, when, in a long article, Chief Justice Eijssell, the President of the

11. FREEK BRUINSMA, *CASSATIERECHTSPRAAK IN CIVIELE ZAKEN. EEN RECHTSSOCIOLOGISCH VERSLAG*, [The Supreme Court in Civil Cases] (1988).

12. On March 31, 2000, Chief Justice S.K. Martens left the Supreme Court and gave in his farewell speech some insights in the "battle of styles": the more dogmatic judges versus the more social interest judges. See NJB 747-58 (2000). As could be expected, it contained only general developments and quotations from previously published material.

13. No "she" yet.

14. Apart from the European Union, there are other, partly overlapping, legal communities in Europe, sometimes with separate supreme courts.

15. This happened, for example, in the shift from guild liability to risk liability in traffic accidents.

Dutch Supreme Court, attacked proposed changes in the Civil Code concerning tort law. These proposed changes would have opened up the concept of tort to more social interests instead of adhering to the traditional statute-oriented approach. In this article, he defended a crucial 1905 Supreme Court verdict over which he had presided.¹⁶ There are no other important examples of shedding light on the secret of the court through law journals.

The secret of the court supports the unity and security of the law.¹⁷ From a sociological point of view, this might have been acceptable when there seemed to be a monolithic culture, a counterpart to the WASP culture in the United States. However, as early as 1870, there was a tendency among lawyers known as the "Young Liberals" to give more rights to workers, to the poor, and to women. The Dutch legal system did cope with those cultural and political differences. How these differences affected the social and professional interaction of the appellate court and supreme court judges remains unknown because of the secret of the court. All this adaptation, however, happened within the boundaries of a white, Christian culture and can be regarded as a normal process of social change.¹⁸ But new minorities came with an equal desire for social, economic, and legal recognition.

III. MINORITIES AND THE MULTICULTURAL SOCIETY

In the Netherlands, the minority/majority problem Nathalie Des Rosiers writes about is not related to territorial separatism; it is rooted in immigration.¹⁹

16. De Zutphense Juffrouw. See A.P.Th. Eijssell, *Het wetsontwerp omtrent de onregmatige daad en de rechtszekerheid* [The Concept Statute on Tort and Legal Security], RM THEMIS 568-617 (1911).

17. The main argument (as was formulated by members of the Staatscommissie Cals-Donner in preparing changes to the Dutch Constitution) is that the authority of the jurisprudence will be eroded by publishing dissenting opinions. See Kan, *supra* note 5, at 1798.

18. These critics, so-called "Young Liberals," started their own critical law review, *Rechtsgeleerd Magazijn Themis*. See G.E. van Maanen, WAS PAUL SCHOLTEN ZIJN TIJD VOORUIT? 21 (1999). The two founders, W.L.P.A. Moolengraaf and H.L. Drucker, subsequently became part of the legal establishment. Moolengraaf was appointed professor in civil law at Utrecht University. The Utrecht Institute of Private Law is named after him. The second, Drucker, became Chief Justice and introduced, at the start of the Twentieth Century, labor law and rent law in the Dutch Civil Code.

19. The separatist movements in the Netherlands were, on one hand, the Belgium independence struggle that succeeded in 1830, and on the other hand, the more recent "independence movement" in Friesland, a province in the North of the country, where every now and then separatists make statements. The Fries language, though, has been accepted as a distinct language, both in the Netherlands and in the European Union.

For about 35 years, Dutch society has confronted what is now called the multicultural society. Historically, foreigners came to the Netherlands, among them the Iberian-Jewish refugees from the late 15th and 16th centuries, the French Protestant Huguenots, Hungarians in 1956, and people from the former Dutch colony of Indonesia.²⁰ They contributed to the general development of the Netherlands and its culture. The image of a tolerant society stems from these waves of immigration. All of these immigrants assimilated rather smoothly into social and professional life, though sometimes through a rather minority-based social network. This picture changed starting in 1963 when large groups of migrant workers from the Mediterranean area, peoples from other former Dutch colonies, and refugees from all over the world came to the Netherlands seeking access to safety and wealth.²¹

This multiculturalism has been confusing to professionals in the legal system, from police officers to judges. Some research has been done on the reaction and the interactions where the traditional Dutch culture meets these other cultures.²² Since the very white magistracy and the often not-so-white defendants do meet in the courtroom, cultural differences can lead to misunderstandings. One example is shown in the research of Wibo van Rossum from the department of Sociology of Law at the University of Amsterdam: in order to show respect, many Turkish defendants behave in a way which, in the traditional and dominant Dutch culture, could be seen as a sign of dishonesty and even a lack of respect.²³ Other empirical research shows the same results in the Netherlands as well as elsewhere: consciously or not, signs of differences can lead to different, if not discriminatory behavior. That can cause hurt or provoke misunderstanding.

20. See J.H.L. PUTS, *ASIELZOEKERS TUSSEN RIJK EN GEMEENTEN* [Refugees Between the State and the Local Authorities] 15-29 (1995).

21. From 1971 to 1997, the percentage of ethnic minorities grew from 1.6% to 9.4%, among them some 20% from Suriname and Turkey and 16% from Morocco. See SCP SOCIAAL EN CULTUREEL RAPPORT 1998 25 JAAR SOCIALE VERANDERING [Social and Cultural Report. 25 Years of Social Change] 241 (1998).

22. See, e.g., L. Koppelaar, F.W. Winkel & J.C. van der Steen, *Psychologische kant-te-keningen bij artikel 27 Sv: een experiment rond ethnische origine, ritmisch gedrag en verdacht zijn* [Psychological Comments at art. 27 Code of Criminal Procedure: An Experiment Regarding Ethnic Origin, Rhythmic Behavior and Being Suspect], 16/1 *DELIKT EN DELINKWENT*, 25-37; F.W. Winkel & L. Koppelaar, *Politie en alloctonen: nonverbale communicatiefouten en verdacht zijn* [Police and Alloctonen: Nonverbal Miscommunications and Being a Suspect], 9 *PROCESS*, 232-40 (1986); A. Vrij & F.W. Winkel, *Culturele verschillen in spreekstijl van Surinamers en Nederlanders* [Culture Differences in the Way of Talking of Suriname and Dutch People], 11/1 *RECHT DER WERKELIJKHEID*, 3-15 (1990).

23. W. VAN ROSSUM, *VERSCIJNEN VOOR DE RECHTER. HOE HET HOORT EN HET RITUEEL VAN TURKSE VERDACHTEN IN DE RECHTZAAL* [Appearing Before the Judge: The Do's and Don'ts and the Ritual of Turkish Defendants in Court] (1998).

Recently, legal and sociological researchers have paid attention to the impact of multiculturalism on both criminal and civil procedures.²⁴ Civil law, especially family law, is very much confronted with legal rights and duties as formulated in the law of the countries of origin.²⁵ This is partly caused by dual nationalities. For example, a couple with Moroccan roots can be married under two different legal systems at the same time: the Dutch and the Moroccan. A Dutch divorce does not automatically imply a Moroccan divorce. On returning to Morocco, the divorce is suddenly no longer valid, with consequences for the legal position of the (former) wife, children, and (former) husband.²⁶

In criminal law, multiculturalism leads to questions about honor, damage, insult, and the like. Should different values lead to new definitions of criminal acts? And should those different values lead to other concepts of guilt, assignment, and accountability? One could even imagine that the concept of tort could change according to multicultural background. In public law, like schooling, welfare, medical care, religion, funerals, Christian-based holidays, media and so forth, comparable implications exist.

Members of multicultural minorities in the Netherlands are not separatists, except, on occasions, the Frieslanders. Multiculturalism is to be seen as one of the layers of society, pervading everywhere. It is

24. See DE SOCIALE WERKING VAN RECHT [The social effect of law] (John Griffiths ed. 1996). This book is the third edition of the main Dutch textbook on sociology and anthropology of law. It contains one note entitled *Inequality in Law* (Petra Oden, pp. 735-40) and a more anthropological note called *Legal Pluralism* (Keebet von Benda-Beckmann, pp. 740-50). The first, *Inequality of Law*, is linked to the theme of positive discrimination (social security, the social and economical position of migrant workers and women). The latter, *Legal Pluralism*, explores the theme in non-Western societies. In 1992, a volume of the Dutch Journal of Sociology of Law was published addressing the impact of multiculturalism. See *Cultuur en Delict, in RECHT DER WERKELIJKHEID* (Jan Fiselier & Fons Strijbosch eds., 1992). In 1998, two books were published: *Inevitability of Legal Pluralism, [De onvermijdelijkheid van rechtspluralisme]* (G. Anders. S. Boemink & N.F. van Manen eds., 1998), and *The Borders of Communities, [Over de grenzen van gemeenschappen]* (K. Von Benda-Beckmann & A.J. Hoekema eds., 1998). In 1997-1998 two major research programs about multiculturalism and social cohesion were approved and will be financed by the Dutch Research Foundation. One of these programs is especially aimed at fundamental legal and socio-legal research. Generally, the attention within the Dutch legal system has been focused on human rights, *Inevitability of Legal Pluralism* [De Onvermijdelijkheid van echtpluralisme] at 31-40; crime and cultural defense, S. Bloemink, IDEM 53-68 (1998); and international private law and human rights, A.P.M.J. Vonken, SOCIALE COHESIE EN HET RECHT [Social cohesion and the law] 97-166 (P.B. Cliteur et al. eds., 1998). Researchers, mainly from the Leyden University and the University of Amsterdam, are involved in the program of the Dutch Research Foundation, investigating the effects of multiculturalism in other legal fields, like private law, business law, and public law.

25. The ties to the country of origin might be two or three generations away.

26. A former husband can claim authority over his former wife and over the children. The alternative: not getting married, according to the Moroccan law, means that the married couple can face certain types of difficulties, for example, if they want to stay in the same hotel room.

not territorial, although multiculturalism is mainly located in bigger cities and, more specifically, in certain areas of these cities. The legal system is starting to become sensible. By recognizing multiculturalism in law, the losers not only get a letter but a legal position as well.

IV. CONCLUSION

Nathalie Des Rosiers is right: articulating dissenting opinions is the writing of a letter to the loser. The legitimacy of the Dutch legal system would benefit if dissenting opinions were allowed and the secret of the court were thus limited. Time and again the majority of Dutch lawyers and legal scientists have rejected proposals to do so. Whether publishing dissenting opinions or the (pretended) security of the law through the unity of the court will lead to legitimacy and acceptance is, in the end, an empirical question and a crucial inquiry in therapeutic jurisprudence.

The secret of the court is about as well guarded as the secret of the palace, meaning that politicians are not allowed to leak any information after talking to the queen. This, too, is to be interpreted as protecting a dogmatic symbol: the unity of the Crown.²⁷ In the same way, the unity of the law is upheld by the secret of the court. In consequence, it is very hard to reveal through research the real motives of judges: what counts and what is disregarded. The final question: do people really matter in the High Court in a therapeutic jurisprudential way? As a consequence of the secret of the court, this question can hardly be answered empirically, except by interviews with the people involved and observations in the courtrooms, circling around and ultimately unraveling the secret of the court.

In view of the multicultural society, the need for social cohesion, the admittance of the newcomers to civil society, and the notion of being part of the country people live in, the participants in the legal system should be aware that many of the legal rules and decisions are, in the end, based on values and convictions that are a very specific to Western culture. Questions about what is reasonable, what is just, and what is fair cannot be answered without reference to notions outside the legal system. A letter to the loser, taking multiculturalism seriously, could bridge the gap and prove the insights of therapeutic jurisprudence.

27. According to the Dutch Constitution, the Crown (government) is made up of the King (Queen) and the Ministers.