



From the Managing Editor: Public Trust In The Judiciary And Judicial Elections: An Un-European Approach?

By Philip Langbroek

Some time ago, a Dutch politician expressed his distrust in the judiciary of the Netherlands. His prosecution for racism had been ordered by the appeal court of Amsterdam under charges of which he eventually was acquitted. The curious outcome of his distrust was a proposition that judges should be appointed for an initial six-year term. During that term, their judgments would be monitored by some objective standard to determine their predisposition in criminal adjudications. Where the outcome of the monitoring was that they were not too soft on crime, they would be considered eligible for reappointment. Some of those who shared the politician's political background and predilections pleaded instead for judicial elections in the Netherlands. The idea was widely and publicly mocked by persons of other political persuasions. Nonetheless, I want to briefly consider the idea of judicial elections.

In the Netherlands, judges are selected by a committee, a joint venture of the Ministry of Justice and the Council for the Judiciary. Candidates for judicial office must be lawyers and are eligible for appointment after successfully completing several tests, including a psychological assessment, and finishing a post-university training curriculum. Demands placed on prospective judicial candidates establish a high bar, but selection procedures are not particularly transparent. Judges can take decisions with dire consequences for the parties involved in a case. The law restricts the exercise of judicial discretion in most cases, but occasionally judges have broad latitude in deciding certain types of cases. The concept derived from the French Revolution that judges simply apply the statutes to fact situations was outdated many years ago. Even within narrow margins, judges exercise power. They do account for their decisions in their opinions by summarizing the justification for ruling as they did. Judges can be recused if they only seem to be biased, and parties disagreeing with a judgment have recourse to appeal to a higher court. In countries whose legal systems are based on the continental or civil law system, the legitimacy of the courts seems to be guaranteed by judges being subject to statutory law, and their performance subject to review by the higher courts.

In Switzerland, federal judges are appointed by the Parliament for an initial six-year term; appointment to subsequent term is almost guaranteed. Only where a judicial position is vacated on whatever grounds do Swiss politicians take the liberty to appoint someone else. The composition of Parliament in terms of the number of seats held by the competing political parties at any particular time defines which of those parties may propose a replacement candidate. Politicians strive for proportional representation in the political landscape in appointing candidates to the Swiss federal judiciary. Because Switzerland is a federation of 26 cantons and four language groups, the federal judiciary should proportionally represent those four language groups. Occasionally, a populist party will publicly debate the performance of a particular judge who may participate, but generally such debates do not draw a widespread public response. This partisan election does not affect judicial independence.¹ On the cantonal level judges are either elected by a popular vote or by parliament.

By comparison, the of status judges in the Netherlands who are members of a political party and who actively participate in the public debate may be vulnerable, even if the debate is not a political one. A Swiss judge may openly be connected to political party; that is considered normal, even though technically speaking, judges are supposed to refrain from engaging in political debates. For the same reason, judicial reticence is expected there. As in the Netherlands, judicial selection of candidates in Switzerland is not very transparent. On occasion, their expertise is questioned publicly, and opinion makers sneer that politicians appoint their friends to judicial posts.

In many ways, the USA is more democratic than the Netherlands. Many public functionaries have to run for election, particularly on the state and local levels. In many American states, state and local judges are elected rather than appointed. In some states, judicial elections are openly partisan, and prospective judges are required to run for elections

¹ Regina Kiener, Judicial Independence in Switzerland, in: Anja Seibert-Fohr [ed.], *Judicial Independence in Transition*, Heidelberg/New York/Dordrecht/London 2012, p. 403 – 445.

and to actively campaign against their opponents. Such campaigns cost money. If you are running for judicial office and you want to attract voters, you need to be visible. One way to achieve visibility is to have yourself sponsored. It is not unusual for judges in such partisan elections link up with organizations which donate funds to their campaigns. Research shows this has two consequences. First, judges who had their campaigns sponsored by businesses are inclined to judge in favor of businesses.² Second, citizens of those particular states are resigned to the possibility of judicial bias as a consequence of campaigning as a part of the bargain. Campaigning for judicial elections contributes to citizens knowing "their" judges, and they appreciate that.³ Judicial elections increase the legitimacy of judges, and they support acceptance of judicial exercise of power by their citizens.

Looking at the Dutch judiciary, in particular to the policies of the Council for the Judiciary, one can only conclude that the legitimacy of judicial decisions -- timeliness, consistency in sentencing, juridical content quality, acceptance of decisions by the general public -- is considered problematic by the Council, not so much because of the content quality, but because they want to maintain public trust in the judiciary. Public trust in the judiciary, however, appears to be strongly related to the confidence of the public in the government in general. Public trust in the judiciary is quite high in the Netherlands -- about 60%. Therefore, the problem is by no means acute; however, when public trust erodes, it can be difficult to stem that erosion. And the Dutch judiciary is not uncontested in Dutch public debates.

That problem seems to be much less evident in most of the States of the U.S. and in Switzerland. Public elections of judges in countries like the Netherlands, France or Germany seem out of reach both as a matter of tradition and, in addition, because their constitutions provide that judges are appointed for life. But public elections of judges would in one stroke change the vulnerable position of judges between public and politics into judges who are perceived as judges of the public. When looking at the very carefully elaborated system of initial selection of judicial candidates based on their merit as lawyers in the State of Arizona, combined with a very transparent system of individual judicial performance evaluation in relation to retention elections, it becomes clear that a combination of both worlds is within reach. Chief Justice White Berch explained the success of the Arizona judicial appointment system by indicating that judges who performed badly in their initial term opted not to run for retention; instead, they usually quietly resign their appointments. And that explains public satisfaction with most of the judges in Arizona.⁴

I am not certain if such an outcome is desirable in continental Europe. But I am certain that the subject is worth fundamental research into the relation between citizens and the judiciary and that such research could feed a serious (European) debate about judicial legitimacy.



² Joana Shepherd, Justice at Risk, An Empirical Analysis of Campaign Contributions and Judicial Decisions. American Constitution Society, June 2013.

³ Charles F. Jacobs; Wendy Scattergood and Dave Wegge, Judicial Elections and accountability: A Survey of Wisconsin Voters, Paper Prepared for the annual meeting of the American Political Science Association, August 30-September 2, 2012 New Orleans, Louisiana,

⁴ Presentation of Arizona Chief Justice Rebecca White Berch at a seminar on judicial evaluation at the International Institute for the Sociology of Law in Oñati, Spain, May 2013.