

A STRONGER RULE OF LAW

UNITING AND PROTECTING
IN A PLURALISTIC SOCIETY



THE COUNCIL FOR PUBLIC

ADMINISTRATION (*Raad voor het Openbaar Bestuur; ROB*) is an independent advisory body to the government and parliament. The ROB advises – when asked or on its own initiative – on the organisation and functioning of the public administration and the policy-related aspects of financial relationships between the central government, municipalities and provinces. Particular attention is paid to the principles of democracy and the rule of law.

STATUTORY BASIS

The ROB was established under the Act of 12 December 1996 (Public Administration Act, Bulletin of Acts and Decrees 1996, No 623). As from 1 July 2017, the advisory function of the Financial Relations Council (*Raad voor de financiële verhoudingen; Rfv*) was transferred to the Council for Public Administration. The Rfv was established under the Act of 21 February 1997.

The **HISTORY** of the Council for Public Administration (ROB) dates to 1960 when the Council for Municipal Finance (*Raad voor de gemeentefinanciën; Rgf*) was established.

The Council for Territorial Decentralisation (Raad voor de Territoriale Decentralisatie; RTD) was established in 1965. Both are forerunners of the current Council for Public Administration.

PROCEDURE

Requests for advisory reports can come from all ministries and from both Houses of the States General. The ROB bases its advisory reports on administrative knowledge and experience, state-of-the-art scientific insights and awareness of opinions and insights from society. The ROB also contributes towards the political, administrative and social debate on how the public administration and democracy functions through other activities (lectures, roundtable discussions, conferences, and introductions).

COMPOSITION

The Council consists of a chairperson and eight members appointed by Royal Decree and selected for their expertise and social experience. The Council may also appoint temporary councillors for projects.

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Foreword

The rule of law is a front-and-centre topic. Writers, thinkers, former and serving politicians have put pen to paper in recent years to record their views on how the rule of law currently functions. Ferdinand Grapperhaus's publication *Rafels aan de rechtstaat* (Frayed Ends of the Rule of Law) has probably stood out the most because he became Minister of Justice shortly after its publication. In its 2019 Annual Report, the Council of State will also pay attention to the theme of equilibrium in the rule of law. Most of these publications were written from an – often vague – concern about the state of the rule of law. Apparently there is a feeling that our rule of law is not heading in the right direction. The Council for Public Administration's own unexplained apprehension two years ago was also an important motive for starting a process then to investigate the state of our rule of law. Not far from home, we see how democratically elected leaders are using their mandate to undermine the principles and institutions of the rule of law. We hear concerns about diminished knowledge of the principles of the rule of law not only among young people but also among people's representatives, for example. On the other hand, the Netherlands tops international lists in comparisons of the rule of law and good public governance. But surely that doesn't mean we need not worry?

And that brings us, therefore, to a reflection on our rule of law. We have taken the trias politica, the separation of powers, as our starting point. The trias politica doctrine prevents power from being overly concentrated in one hand. Legislative, executive and judicial power should each stay within their respective limits and respect each other's competences. The checks and balances within the trias politica work only with a pure division of roles in which everyone assumes their responsibility. That's how it should work in theory, but practice is more complicated. For example, if there is criticism of judges because they are occupying the legislator's seat. Or vice-versa: observations that the legislator leaves rules too open-ended, so that others, including judges, have to interpret the standard that should actually be set politically. And what about the 'ugly' face of administration and implementation, such as shortcomings in the Dutch Tax and Customs Administration's allowances, or citizens who are victims of the unintended effects of gas extraction in Groningen? This tests citizens' confidence in the effect of the rule of law. Confidence in the rule of law is essential: the rule of law exists only if people feel that it can actually protect them against arbitrary measures and abuse of power.

The rule of law in itself has to constantly find a new equilibrium, to keep the different powers in balance. But that requires a rule-of-law culture and constant maintenance to uphold it. Politicians, administrators, civil servants, judges, journalists and even ‘ordinary people’, individually or as part of civil society, all give shape to the rule of law. How they behave partly determines the rule-of-law culture in our society. The standards and values of our rule of law do not work of their own accord, they must be promoted and maintained. Our rule of law is vulnerable if it is not properly maintained and if awareness about its value is neglected through ignorance, ineptitude or indifference. With this report, the Council therefore proposes to invest in a rule-of-law culture by following the EU’s example and drawing up a rule-of-law agenda.

This report has been discussed with dozens of stakeholders. Their valuable insights have been incorporated in the advisory report, but the analysis in this report is obviously the Council’s responsibility. The Council has also tested analyses and ideas from this advisory report with experts and discussed them at conferences with mayors. The Council is grateful to all consultative partners for their contribution.

This advisory report has been prepared by a project group of Council members consisting of Frank van Ommeren, Huri Sahin and Kees Jan de Vet. The staff members who have supported the project group are Michael Mekel, Gerber van Nijendaal and Midas Dutij (from 1 May 2019 to 1 January 2020).



Han Polman
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Advisory Report: a stronger rule of law, uniting and protecting in a pluralistic society

'75 years [after the Second World War], freedom, democracy and a strong rule of law seem to be self-evident values. But anyone looking at the world realises how exceptional it is to live in a country where people can feel secure.

(...)

[The government wants to] build a society in which people feel secure and can have, keep or regain confidence in the future.

That confidence starts with a strong rule of law that protects against crime, arbitrary measures and abuse of power.'

Passages from 'The King's Speech' (*Troonrede*), 2019.

Derk Wiersum, a lawyer, was murdered a day later, on the Wednesday of the Parliamentary Debate on 'The King's Speech' (*Troonrede*). Wiersum had represented the witness for the prosecution in the Marengo liquidation process. A visibly emotional Minister of Justice and Security said on camera, 'This is an attack on our rule of law, the people who work in it and who ensure your and my democratic legal system'. Other politicians also expressed their horror at the act.

In the debate on the Thursday, the Lower House immediately asked for substantial measures to be adopted. Extra capacity for police and the judiciary. Extra money and intervention teams in the 'ruthless' battle between the narco-state and the rule of law. Power to intervene and strike a 'real blow' to criminals. Improved exchange of information between the judiciary, mayors and the police. Special capacity and bundling of knowledge and expertise to force breakthroughs in handling complex cases.

It appealed to the government: 'Of course we must see to it that we do everything within the fundamental rights and observe the protection of privacy, all at your service, but that does not alter the fact that we ... [must] ensure that this is stopped,' said the Prime Minister.¹

So, what do we see happening? On Tuesday, the rule of law is a noble value. On Wednesday, it is assaulted and emotions are raw. On Thursday, it must be fiercely defended, with methods that skirt the edges of the rule of law.

1 Plenary report of the Lower House, 3rd session, Thursday, 19 September 2019.

Value. Assault. Emotion. Defence. Rhetoric. Testing the limits. Obstacle.

The rule of law in a nutshell, within 48 hours. A strong rule of law, instrument and safeguard. All at your service.

WHY THIS ADVISORY REPORT?

Although there are many reasons, we'll name four.

First, we see trapped citizens and floundering public authorities: citizens who lose their way in the thicket of rules and fall by the wayside, costly administrative derailments (national police, tax authorities) and professionals who have too little time left for their actual work. The credibility of our democratic legal system is at stake.

Second, according to the Advisory Council on International Affairs (AIV)², democracy based on the rule of law is entering the danger zone in several European countries (including Hungary, Poland, Russia and Turkey). In countries near and far, we can see that democratically elected leaders are using their democratically obtained mandate to tamper with the rule of law. In Poland, for example, it seems as though PiS, the governing party, is using its democratically acquired majority to bring the judiciary there 'under democratic control'. According to Kees Sterk, President of the European Network of Councils for the Judiciary (ENCJ)³, after a visit to Poland, the Polish judiciary is losing its independence. He reports that the Polish government claims judges are corrupt, lazy and communist. Relevant evidence is lacking, according to Sterk, but the Polish Ministry of Justice has paid for a billboard campaign against the corrupt judiciary along Polish highways. Meanwhile, the Polish parliament, dominated by PiS, has passed laws that increase the Ministry of Justice's power over the judiciary and facilitate the appointment of PiS loyalists.⁴

Closer to home: in the 2017 election year, a Netherlands Bar Association committee reviewed Dutch political parties' election manifestos based on the rule of law. The review revealed a troubled picture. In five of the thirteen electoral manifestos examined, the committee found measures contrary to the minimum requirements of the rule of law, often because they directly contravene fundamental human rights and freedoms or violate the right to due process.

2 AIV 2017.

3 Sterk, NBBlog 2 May 2017.

4 Sterk, in Nederlands Juristenblad 14 August 2018, issue 27.

This mainly concerns measures relating to terrorism, jihadism, refugees, Islam and immigration. Today's major social challenges are putting the foundations of our rule of law under pressure, but those wanting to preserve the rule of law must always look for the answer to external threats in measures that do not violate the rule of law itself, according to the committee. 'Whoever is prepared to undermine the rule of law itself to protect our democracy based on the rule of law (...), are themselves a threat to the freedoms that form the foundation of our society.'⁵

The last reason is organised crime and subversion, 'wicked problems' that can be disruptive. The underworld's infiltration of legitimate business is an almost invisible, stealth assault on the rule of law through improper influence, money laundering, misuse of permits and subsidies. The government wants to tackle these problems and the police and judiciary must therefore be given more powers. But it goes beyond that. The importance of safeguarding integrity is at stake. Not only in public administration when evaluating administrators, but also in relation to the integrity of society.

The Council for Public Administration has the statutory task of advising on the organisation and performance of the public administration, paying particular attention to the principles of a democracy based on the rule of law. In its previous periods, the Council's recommendations paid the necessary attention to the functioning of democracy. In this report, the Council focuses on the functioning of the rule of law: what is the current situation? Is there any collapse, threat or assault? Are there signs that the rule of law is at stake? Or is our rule of law in reasonably good shape? Is the rule of law strong enough to ensure that there is – and remains – a place in our society for freedoms, for forming one's will and fundamental rights?

Democracy and the rule of law, what are we talking about precisely?

The terms democracy, rule of law and a democracy based on the rule of law represent broad concepts to which different specific meanings are attributed in different contexts. For the sake of clarity, it is important to indicate what is meant by these concepts in this advisory report.

5 Netherlands Bar Association February 2017, p 11.

Democracy

Democracy is a form of state in which power lies with the people. Democracy has a power-sharing function: according to Perikles, power is in the hands of the many, not the few. Democracy also has the function of organising support for legislation: in a representative democracy, citizens elect their people's representatives, who in turn legitimately make decisions binding on everyone. A third function of democracy is to channel political oppositions: according to Popper, a government that we can get rid of without bloodshed.

Rule of law

A rule-of-law state is a state founded on and bound by the law. In a rule-of-law state, citizens enjoy protection of their fundamental rights and freedoms, both against fellow citizens and against abuse of power by the government. It is characterised by the acceptance of fundamental rights, the separation of powers, the government's commitment to the law and the independent administration of justice. Legal equality, legal certainty and access to the law are important values of the rule of law. The applicable law is the sum of the laws and regulations of all tiers of government, including European law, unwritten law, legal principles and case law. In a rule-of-law state, citizens are bound by the law and must act accordingly. Briefly put, a rule-of-law state regulates behaviour, legitimises government action and safeguards fundamental rights and freedoms.

Democracy based on the rule of law

We speak of a democracy based on the rule of law when power lies with the people and the state is bound by the law. If one condition is met, the other condition is not automatically met too. Democracy guarantees that the law by which the state is bound is legitimised by the will of the people. A state under rule of law, in turn, guarantees that this democratically legitimised government does not degenerate into applying arbitrary measures, improper use of power by democratically elected leaders or tyranny of the majority.

A democracy based on the rule of law enables a pluralistic society by allowing everyone's voice to be heard, managing differences and legitimately resolving conflicts. Last, a democracy based on the rule of law contributes to a common identity and the unity of a political community.

This advisory report weighs the values of the Dutch rule of law. Not at all levels, we need to narrow its scope. We look at how our system of the rule of law works based on the powers. But modern society does not allow itself to be so closely and neatly aligned with the traditional powers. If we look at all organisations with a rule-of-law function, the picture emerges of a rule-of-law state in which power is not concentrated but dispersed. The rule-of-law state comprises many more organisations than just parliament, ministries and courts. For example, the news media are neither a ‘government’ or ‘state’, but they do fulfil a crucial rule-of-law function. We address the concerns of the different powers: what do we see when we add them together?

The Council sees raising awareness of rule-of-law values as a way of strengthening the rule of law. That is the purpose of this advisory report. But the Council goes a step further with its recommendations and wants to contribute towards strengthening the rule-of-law culture in government and society.

RULE OF LAW IN A SOCIAL CONTEXT

The rule of law can be viewed from different perspectives. You can look at it from a legal perspective, a construct of rules and legal standards. You can also look at it from an administrative perspective: the rule of law as an all-embracing concept that refers to an ideal situation, while the practice of governing in a rule-of-law state is often characterised by tension and conflict. You can also look at it from a socio-cultural perspective: we regard our society as a rule-of-law state and live by it, the national identity characterised by the rule of law. Legal systems do not emerge overnight, they result from historical traditions and constantly developing. Besides being a product of history, legal systems are also cultural products. This does not mean that everyone may give their own interpretation; every appeal to the rule of law would then become meaningless.⁶

Maurice Adams and Willem Witteveen wrote an essay⁷ in which they linked three dimensions of the rule of law with each other. The first two dimensions arise from the usual definitions of a rule-of-law state, namely (1) a respectable government and (2) an ideal image of a free society of citizens. The third dimension they add concerns reciprocity: a responsive government that takes public opinion seriously but does not necessarily adopt the opportunistic positions that exist in society or capitulate to social pressure. Conversely, this means that citizens sometimes have to accept that decisions taken run counter to their direct interests.

6 Van Ommeren 2003, p. 22.

7 Adams and Witteveen, in *Nederlands Juristenblad*, 23 August 2014, issue 27.

This reciprocal relationship between government and citizen – which political philosophers also call a social contract – is characterised by several seemingly contradictory attitudes: involvement and detachment, activism and acquiescence, protest and acceptance.

Kim Putters, director of the Netherlands Institute for Social Research (SCP), is concerned about whether the social contract is still effective and whether the institutions of the rule-of-law state still enjoy enough confidence.⁸ He argues that two social divides put a democracy based on the rule of law to the test: the divide based on level of education and labour market positions, and the divide based on ethnicity. Trust in democracy is high in the Netherlands, according to Putters. Approximately 95% of the population has confidence in the democracy. But confidence in the role of politicians and political parties has been declining for years. Democracy always requires reciprocity, including in communication between a government and its citizens. If this reciprocity does not exist, both the ‘traditionally’ underprivileged and the working lower middle class risk losing contact with the institutions of our democracy based on the rule of law first. These groups feel they are losing out in the current social climate, in which everyone sacrifices some of their freedom to benefit all.

In other words, if you have a lot, you also have a lot to lose. The Netherlands is a fine country to live in and we have many (civil) rights and achievements, but those rights and achievements are at risk for large groups of people. ‘I’m doing well, but we’re doing badly,’ is how the SCP has been summing up the mood in our country for some years now. The SCP shows time and again that people are mostly concerned about the state of values and standards in the country: ‘The Netherlands is no longer the Netherlands.’⁹ Understandable, because we can no longer assume a broad consensus exists in our society on how we can live well together. At one time, the Netherlands – like many other Western countries – was a well-organised society of people who shared a common pattern of values. Even though our country consisted of a few sharply divided sociopolitical blocks, they shared a Calvinistic vision of life with each other of frugality, working for your money and looking out for each other.¹⁰

This consensus no longer exists. Social movements such as individualisation, technology and globalisation have detached people from social relationships;¹¹ they now make their own autonomous assessments of what is right and wrong. A joint study by the SCP and the Netherlands Scientific Council for

8 Putters and Van Noije, in *Nederlands Juristenblad*, 12 January 2018, issue 1. Cf. Putters February 2019.

9 SCP 2019 (1), p. 7.

10 Cf. for example De Rooy, 2002

11 Also see ROB 2010.

Government Policy (WRR) has shown that what was once a solid civil society has now fragmented into a collection of minority groups that also share different values.¹²

Of course, the arrival of migrants in our country has also increased pluralism. You could still say that the entry of newcomers was fairly clear-cut at first because it was dominated by Turkish and Moroccan Dutch nationals. Meanwhile, diversity has also become an established feature among new Dutch people. A recent study by the WRR¹³ has convincingly shown that newcomers from all over the world discover our country for different reasons.

KEY MESSAGE

Key message 1:

The rule of law ensures stability in a diverse society.

This relatively orderly society has thus become a pluralistic society. Diversity and difference are the new norm. Although people get in each other's faces and have spirited clashes at times, that need not be a problem. Where diversity in society is growing, the framework of a democracy based on the rule of law offers room for people to live together peacefully. And where the ability to deal with difference decreases, the rule of law protects values such as tolerance, equality and human dignity. In a world with a diversity of people, nationalities and religions and where prosperity is unevenly distributed, the rule of law is one of the most powerful forces that unites us.

The rule of law, therefore, is not an obstacle but represents a value in itself, a uniting force in a pluralistic society. It unites because everyone is bound by the law, including the authorities. It ensures that citizens feel protected by the independent administration of justice, but also that the government must abide by the law with respect to its citizens.

The rule of law safeguards against arbitrary measures and protects minorities against violations of fundamental values and legal rules. It thus provides legal certainty and stability. A strong rule of law unites and protects people in a pluralistic society.

¹² SCP and WRR 2014. ¹³

¹³ WRR 2018.

Key message 2:

There is a deficit in the rule of law. A rule-of-law agenda can contribute towards a rule-of-law culture.

The rule of law can fulfil its function only if there is a vibrant rule-of-law culture in a society in which all players subscribe to the values of the rule of law and follow its rules. However, the Council sees signs of erosion that suggest an emerging deficit in the rule of law. This happens if the government does not abide by its own rules or if there is a culture of ‘institutional bias’. The deficit exists when there is a lack of awareness of the rule of law among politicians, administrators, civil servants and the media. A deficit that does not diminish if investments in the institutions of the rule of law lag behind.

To reduce this deficit, the Council advises the government to develop a rule-of-law policy agenda to strengthen the rule of law and have an independent monitoring committee review it periodically. An agenda that can be held up as a ‘dynamic mirror’ to anyone with anything to do with the rule of law, to promote a rule-of-law culture.

LIVING TOGETHER IN DIVERSITY, WHAT DOES OUR RULE OF LAW MEAN IN THIS CONTEXT?

Is the rule of law impaired in the Netherlands?

Grave concerns are sometimes expressed about the rule of law. If government plans or actions are contrary to the rule of law, if powers are wrongfully exercised, or if prisoners are not treated properly. If access to justice is restricted or if politicians pass judgement on judges. Is the rule of law in the Netherlands in such poor shape? Or is it not that bad? How do we value our rule of law and what are we prepared to invest in it?

The Netherlands is doing quite well

We start with a reassuring statement: the rule of law in the Netherlands is in pretty good shape. According to the Rule of Law Index of the World Justice Project, the Netherlands has been in the top five countries with a well-functioning rule of law for years. If we compare the situation in Poland or Hungary – and of all Member States of the European Union – with the situation in the Netherlands, we see that no judges are being dismissed, the media can report critically and the state powers are properly balanced here. Sometimes an incident can cause an imbalance: a politician being prosecuted for discrimination, a judge ordering the Dutch state to do more to meet climate targets, a mayor ignoring the fundamental right to demonstrate, or the

intelligence services eavesdropping on the media. But even then, the rule of law appears to be resilient enough to achieve a new balance.

Even though the rule of law is a fragile asset

Little seems wrong with the procedural rule of law, but is it enshrined in society? Do citizens feel safe and protected by the rule of law? The rule of law is not self-evident, certainly not for all citizens, not even in our democratic system. Herman Tjeenk Willink believes that ‘because of the lack of legal and constitutional knowledge among politicians, administrators, civil servants and journalists (...) not only our democracy but also the rule of law is more vulnerable than necessary.’¹⁴ Thus, the rule of law is vulnerable if it is not properly maintained and if awareness about its value is neglected through ignorance, ineptitude or indifference.

On the whole, there appears to be little cause for grave concern, but the Council is concerned about system safeguards that must ensure the basic limit of the rule of law is met. In this advisory report, the Council argues there is a threat of a deficit in the rule of law in several areas. This calls for vigilance.

Rule of law and the powers

To start, the Council notes an increasing trend of legislation using open standards and framework rules. This is understandable because legislation does not easily resolve complex social issues. The public administration needs some room to provide customised solutions in certain situations, for example through decentralised democratic tiers of government such as provinces and municipalities. But a warning is in order. Because if the general interest that the legislator serves no longer corresponds to the normative power of the law, there is a risk that the normative function of the **legislature** will be eroded. As a result, there is a shift to others who will set the standard: from parliament to government and civil service, or to executives and private parties, or to the judiciary. Open standards and framework laws can thus create an excess of rules, the regulatory paradox. Sections other than the legislator produce implementing regulations, policy rules or protocols to reduce uncertainty in implementing or interpreting rules, promoting equality and avoiding uncertainty about court rulings.

Open standards and framework regulations have become a fixture; legislation without them is a utopia. To remedy their shortcomings as far as possible, it is important to find compensatory measures.

14 Tjeenk Willink, in S&D, 20 December 2017.

The Council notes another development that affects the functioning of the rule of law: governance through agreements. Complex social tasks are increasingly tackled by a coalition of different social parties and authorities. This method of policy and decision-making raises questions about the democratic legitimacy, effectiveness and added value of the agreement as a governing arrangement.¹⁵ Some view the legislature being reduced to a ‘rubber stamp’ as one risk of using agreements.¹⁶

Room for the public administration – the **executive** – to give its own interpretation of standards meets the desire to solve problems and be able to perform effectively. Every administrator sometimes feels that rules get in the way or that their powers are too limited to deal with an undesirable situation. But if interpreting a rule or using a power varies too much, a legitimacy problem arises because people lose confidence in rules if the interpretation or implementation of the standard is unclear. If interpreting a standard takes a direction that is not to parliament’s liking, a minister is swiftly called to appear before the Lower House and explain exactly why. The public administration is not called to account only by parliament, but also by supervisory authorities, ombudsmen, audit offices, investigative boards, the media or public opinion. While this is good for checks and balances, it limits the room for manoeuvre. And it triggers an administrative reaction of risk aversion: new rules are often promised if a major incident occurs or there are problems in implementation, in a knee-jerk reaction (risk-regulation reflex).

There is cause for concern. In a rule-of-law state, the government abides by its own rules and citizens are protected against the government. Reservations have been expressed in several high-profile cases. The Dutch Safety Board stated that people’s safety did not play a role in the gas extraction process in Groningen.¹⁷ A committee led by former Minister Donner referred to the ‘institutional bias’ of the Dutch Tax and Customs Administration in relation to suspicions of fraud.¹⁸ And The Hague District Court ruled that the State knowingly did not enforce the ban on shrimp fishing with fishing vessels whose engine power exceeds 300 hp.¹⁹ A government that does not respect the rule of law feeds social dissatisfaction and anti-democratic senses of justice.

15 ROB 2020.

16 Council of State, 2018 Annual Report, p. 32.

17 Dutch Safety Board (OVV) 2015.

18 Adviescommissie uitvoering toeslagen 2019.

19 ECLI:NL:RBSGR:2006:AX0431. Also see: NOS 28 September 2019.

Of all the state powers, the **judiciary** enjoys the most confidence among citizens.²⁰ That's a good thing, because a citizen must be able to rely on the independence and impartiality of the judiciary. Yet the judiciary is struggling. Judges are overburdened, costs are out of control and digitisation has failed. Economic arguments dominate the cost of justice (p x q) and access to the courts. This goes hand in hand with subsidised legal aid cuts and attempts to increase court registry fees. The business approach is obscuring the view on the value of proper judiciary in a rule-of-law state. Citizens should know that the rule of law is there precisely for them.

The standing of the judiciary is the subject of political and other debate. *Trouw* analysed the effect of the trias politica and concluded, 'The judge speaks, the government postpones.'²¹ On important subjects such as CO₂ emissions and nitrogen, the court raps the government over the knuckles. The politicians in the Binnenhof parliamentary building feel uncomfortable and those same politicians then publicly take the judge to task. According to *Trouw*, the rulings also cause ministers and state secretaries to procrastinate.

Do judges have increasingly more influence on policy, or should the Lower House check more closely that laws are properly drafted? Government and parliament have both criticised court rulings. 'The judge is occupying the executive chair,' was the argument put forward by the State in the appeal before the Supreme Court of the Netherlands in the case brought by Urgenda. The State believes this is typically an issue better decided by the political authorities (the legislator) than by the civil courts.²² The Supreme Court disagrees.

On the issue of the *Court and political domain*, the Supreme Court states, 'In the Dutch form of government, it is up to the government and parliament to decide whether to reduce greenhouse gas emissions. They have considerable freedom to make the necessary political decisions. It is up to the judge to assess whether the government and parliament have decided within the limits of the law by which they are bound. Those limits arise from various sources, including the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The Constitution requires the Dutch courts to apply the provisions of the ECHR. The judge must do this in accordance with the interpretation given by the European Court of Human Rights. This instruction to the judge to offer legal protection, including against the government, is an essential part of a democracy based on the rule of law. The Supreme Court's opinion is in keeping with the above. (...) The order given leaves it up to the State to determine which concrete measures it will use to

20 SCP 2019 (2), p. 3.

21 *Trouw*, 21 November 2019.

22 ECLI:NL:PHR:2019:887.

comply with that order. If legislative measures are needed for this purpose, it is for the State to decide which specific legislation is desirable and necessary.’²³ This still leaves plenty of room for the legislative power to fulfill its function.

Another example is the ‘nitrogen crisis’ purportedly caused by the Council of State. The result: a minister wanting to use a ploy for the opening of Lelystad airfield to go ahead. And MPs who sigh that ‘huge uncertainty’ is being unleashed on the country and warn against the potentially ‘disastrous’ consequences of the Council of State’s ruling.²⁴ And ‘Nitrogen ruling brings the housebuilding industry to a standstill’²⁵ according to the construction industry. But what is wrong with the courts holding the government to laws and regulations? Is that not precisely where the strength of the rule of law lies? The Nitrogen Problems Advisory Board lays the responsibility with politicians and parliament again: ‘Given the considerable social urgency, the Advisory Board calls on politicians to make bold choices, take decisions and implement them.’²⁶

It seems as if morals and customs have changed, that it is fashionable to criticise judicial decisions instead of complying with them, as should happen in a rule-of-law state. Is the trias politica under pressure or is the rule of law functioning optimally because the different powers are keeping each other in balance?

In any event, this raises urgent questions about the stabilising effect of the rule of law and its impact on government authority.

The political and administrative field has changed in recent decades: from a pillarised society to a network society, from consultation to results, from facts to emotion, from politicised issues to task-oriented work. The relationship between political administrators and **civil servants** is also changing: from advice on policy content to guiding the administrator through the forces at play. This is all done in an information society in which information circulates at dizzyingly high speeds. You can then regularly hear a plea for professional skills and a reduction in management: ‘Leave it to professionals’ or ‘back to basics’. Professionals must be able to act in a way that respects the principles of a democracy based on the rule of law: in civil service, to act properly is to navigate between rightfulness, efficiency and legitimacy. Whether and to what extent space is created for this purpose depends on the organisational culture.

23 ECLI:NL:HR:2019:2006.

24 Source: https://www.tweedekamer.nl/kamerstukken/plenaire_verlagen/kamer_in_het_kort/debat-over-de-uitspraak-van-de-raad-van-state-over, accessed on 2 March 2020.

25 Source: <https://www.bouwwereld.nl/nieuwbouw/stilstand-woningbouw-door-stikstof-uit-spraak/>, accessed on 2 March 2020.

26 Adviescollege Stikstofproblematiek 2019, p. 1.

Implementing bodies such as the Employee Insurance Agency (UWV), the Social Insurance Bank (SVB), the Tax and Customs Administration and the municipality ‘make’ the rule of law concrete for citizens when a benefit, allowance or permit is granted or refused. Since the 1980s, implementing organisations have had to deal with a commercial approach to efficiency, the provision of digital services and staff cutbacks. Nobody will deny that the large-scale organisational changes and system changes (National Police) have caused problems in implementation. As the Lower House also wonders, why is it so complicated to guarantee the quality and continuity of services?²⁷ Among other things, a parliamentary inquiry must answer the question about the role of the legislator.²⁸

A free press serves the public interest in news provision. For this purpose, it has to meet criteria such as accessibility, pluralism, independence and quality. Internationally, the Netherlands is high on the lists of freedom of the press and information gathering. But concerns also exist. Economic rationality prevails over rule-of-law rationality: the pressure to make money prevails over the creation of public value. Continued cutbacks in the public broadcasting sector and steady declines in advertising revenue are gnawing at journalistic quality. Publishers and broadcasters have lost their monopoly and distribution positions to the end user and thus a significant part of their revenues to platforms such as Google and Facebook.

The Netherlands has always been good at seeking consensus. **Civil society** and the **institutions** are characteristic of this. For a long time, they provided stable policy networks that shaped social security, public housing, care and education. It’s no coincidence that these are the themes incorporated in fundamental social rights. They represented values shaped by trial and error throughout history. As a result, institutions are also bearers of rule-of-law values. They ensure support and reciprocity. Institutions were ‘orphaned’ after depillarisation; they no longer belonged to anyone: no longer to the pillars, to the citizens, or to political bodies. At first sight, this does not seem like a great loss to the rule of law, but when their lubricant has run out and self-evident nature is no more, how much legitimacy do institutions still have? How should we value institutions today? Despite a lack of legitimacy, policy is often created by letting the parties concerned figure it out together. Look at the hard-won pension agreement, for example.

27 Lower House, session year 2019-2020, 35 300, no. 12.

28 Namely the role and information position of the Lower House itself and how the enforceability of policy can be better safeguarded in the parliamentary process. Source: Lower House, session year 2019-2020, 35 300, no. 12.

Responsive rule of law

For a long time, the image of good legislation was legislation that fits into the legal system and is easy for judges and lawyers, the professionals, to handle. The citizen was supposed to know the law. The WRR published a report analysing the citizen's capacity to do what is necessary (*doenvermogen*).²⁹ What did that turn out to be? The legislator and government often use an unrealistic picture of the citizen as their starting point. The citizen is not a rational actor and does not deal sensibly with rules and law. Citizens often want to but simply cannot comply with all the rules. Their capacities and skills are often inadequate. The National Ombudsman made a similar analysis of 'my incomprehensible government'.³⁰ Above all, people want a government that is honest and understanding, that responds quickly, and that guides them in an informed manner.

The problem is that an approach that considers the citizen's ability to do what is necessary does not fit in well with legal thinking. As Michiel Scheltema says, 'This will all have consequences for the legislator, administrative bodies, and the courts. Adhering to rules or to a fixed line of conduct will not always be acceptable any longer. Equality sometimes needs to be shaped in a different way, even though this is a core issue of the rule of law. But surely a rule-of-law state that requires the citizen to act in a way that the citizen is simply not capable of acting, is not a rule-of-law state?'³¹

Scheltema distinguishes between the bureaucratic rule of law and the responsive rule of law. The former enshrines the safeguards of the rule of law in law and in institutions. But whether citizens notice any of this remains unclear. The responsive rule of law is about citizens actually experiencing the safeguards of the rule of law and noticing in their dealings with the government that the rule of law is ultimately about them. In a responsive rule-of-law state, the legislator puts the perspective and possibilities of the citizen first. This means paying more attention to the consequences of a law for the citizen.

²⁹ WRR 2017.

³⁰ National Ombudsman, 2012 Annual Report.

³¹ Scheltema, in *Nederlands Tijdschrift voor Bestuursrecht* 2019, issue 6, no. 24.

THE BINDING FORCE OF THE RULE OF LAW

As set out in the 2019 ‘The King’s Speech’ (*Troonrede*), the government envisages a strong rule of law. In policy terms, this means strengthening government bodies such as the police and the judiciary and channelling more money to the judiciary. Although important, this is still an instrumental and bureaucratic perspective on the rule of law. And while we do want to take the rule of law into account – ‘All at your service’, as the Prime Minister says – it also must not get too much in the way.

All while the rule of law stands for so much more. The rule of law is not there for the government but should support society, how we want to live together with all our differences. The rule of law as a foundation for equality and security.

Over the past 50 years or so, our society has changed dramatically. We are past pillarisation; religion and philosophical beliefs are no longer the cement of society. Social ties have become looser: individualism coupled with globalism has taken its place. Ideologies have lost their dominance both politically and socially. So, what still unites us?

If the Netherlands wants to remain an open society, in freedom and with room for its own values and those of others, then it is a democracy based on the rule of law that unites us. Where diversity in society is growing, the democratic concept offers space for minorities to participate in our society. And where the ability to deal with difference decreases, the rule of law protects values such as tolerance, equality and human dignity.

Tom Bingham said, ‘In a world divided by differences of nationality, race, colour, religion and wealth, the rule of law is one of the greatest unifying factors, perhaps the greatest.’³²

The rule of law, therefore, is not an obstacle but represents a value in itself, a uniting force in a pluralistic society. It unites because everyone is bound by the law, including the authorities. It ensures that citizens feel protected by the independent judiciary, but also that the government must abide by the law with respect to its citizens. The rule of law safeguards against arbitrary measures and protects minorities against violations of fundamental values and legal rules. It thus provides legal certainty and stability. Stability in a sensitive society. Stability in a world of diversity. A strong rule of law unites and protects.

32 Bingham 2010, p. 174.

Many organisations and institutions share certain functions that add up to the rule of law. One organisation alone does not make the rule of law and become solely accountable for its quality. Each organisation plays a role in the rule of law to a greater or lesser extent.

Based on this, the Council has concluded that a single problem identified in this advisory report is perhaps not in itself a major threat to the rule of law, but viewed in cohesion with other problems can lead to a deficit in the rule of law, which – like a funding deficit or a lack of enforcement – must be as small as possible. The sum of ignorance, ineptitude and indifference makes the rule of law vulnerable. It is accordingly vital to raise awareness of the rule of law among all those who contribute daily to its establishment, for example by applying the principles of good governance. It is not just about looking at the internal logic of one's own organisation, but about assuming responsibility for the organisation's broader rule-of-law function. According to the Council, the rule of law thus means looking at the whole integrally. The rule-of-law culture can also be expected of managers and administrators or public administration experts; it is not only lawyers who are needed for this. The rule of law belongs to, and is for, all of us.

Because society is constantly changing, so is the practice of the rule of law. The effect and strengthening of the rule of law is always determined by interaction between the state's institutional organisation and the country's political and legal culture.

The importance of the rule of law can thus not only be viewed as a formal structure; cultural elements also play an essential role. The rule of law is not a static idea, but the sum of the interactions between all organisations with the rule of law as an outcome. A dynamic concept that can and must be updated in line with social developments.³³ Nor is there a single, correct blueprint for the rule of law; even the countries high on the Rule of Law Index have major differences in their practice of due process and administration of justice, type of constitution and institutional design of their separation of powers, and their rule-of-law culture. As such, we must always ask ourselves what seemingly separate policy and organisational developments and social and political changes mean in the broader light of the rule of law. Authorities must also act in the spirit of the rule of law as a matter of course. This culture should inspire citizens to support and guard the rule of law.

Raising awareness starts with knowledge and forming a proper image of the rule-of-law practice within which we function. This concerns everyone who is part of the rule of law: politicians, administrators, civil servants, judges,

33 Advisory Council on International Affairs 2017, p. 17.

journalists and even ordinary people. For professionals, this means there must be a suitable offer to expand the rule-of-law culture within the powers through better dissemination of knowledge. And it already helps enormously if education and media try to make people more aware of the effect, merit and values of the rule of law.³⁴

CONCLUSION AND RECOMMENDATIONS

Conclusion

The rule of law is vital for the proper and democratic functioning of a pluralistic society with diverse interests. Power and countervailing power are also essential. For this system of checks and balances to function properly, the responsibility of each power must be respected by the other powers making up the rule of law. According to the Council of State in its 2019 Annual Report³⁵ (not yet published), these powers must always strike the right balance between themselves.

In a rule-of-law state, all parties have their own position, they should not want to occupy someone else's chair. This is all to maintain and strengthen citizens' confidence in the rule of law.

The government and parliament must assess the public interest thoroughly, weighing up the rule of law and economic interests. Over the past twenty or thirty years, economic rationality has mostly prevailed. But the government is not a business and citizens are not customers. Thinking about the government is visibly changing: from the New Public Management paradigm to the Public Values paradigm. The focus on efficiency is shifting to a focus on quality. The Council considers this a positive development, and also links this to the view that a strong rule of law can have a hefty price tag.

This advisory report aims to raise awareness of the power of the law among everyone: people's representatives at central and decentralised levels, the legislator, public administration, the courts, civil servants, the media, civil society, and citizens. Indifference is not an option, we make the rule of law together.³⁶ It exists for a reason. It forms a foundation for our society and – if it functions properly – ensures stability in a world of diversity. The rule of law safeguards fundamental equality and ensures the protection and safety of people.

³⁴ Cf Tiemeijer, in Dijstelbloem et al. (ed.), WRR 2010, p. 236.

³⁵ Council of State, 2019 Annual Report (not yet published), p. 4.

³⁶ Cf. Commissie Uitdragen kernwaarden van de rechtsstaat 2008.

Politicians and administrators must help to preserve the system that protects the rule of law against everyday issues and private interests. This means that court rulings are enforced, legal obligations are fulfilled, and supervisory authorities and enforcers are adequately equipped to perform their duties properly.³⁷ It is therefore necessary to invest in the rule of law and its quality, so that society is spared the damage of a more vulnerable rule of law. The Council advocates strengthening checks and balances between the different powers and strengthening corrective capacity. That assumes a mutual receptiveness to unwelcome messages. In particular, this means that the assumptions and principles of the rule of law must always be included in the decision-making process, even if this seems less attractive from the viewpoint of effectiveness, efficiency and speed.

In this advisory report, the Council states that while there is no immediate threat to the rule of law in the Netherlands, the concerns identified, when added together, result in a deficit in the rule of law.

Recommendations

Like a financing deficit or a lack of enforcement, it is advisable for the deficit in the rule of law to be as small as possible. According to the Council, this is an important task for the national government to tackle as the guardian of the rule of law.³⁸ Not as the party exclusively responsible for the rule of law, because it is formed by all of us: society and government. But as the initiator of an instrument: a rule-of-law agenda, promoting a rule-of-law culture.

A rule-of-law culture is not an unchanging phenomenon. The rule of law includes not only formal structures; cultural elements also play an important role. It is simply a matter of how formal structures are handled. The culture largely determines what using the formal frameworks yields. For example, it must be obvious to government agencies that decisions always consider the interests of the rule of law and that authorities act in the spirit of the rule of law. This culture must inspire citizens to support and guard the rule of law.³⁹ And an individual has to be a real citizen, a citizen participating in society, to be able to do that. A rule-of-law culture is the collective responsibility of institutions and society.

³⁷ Cf. Brandsen and Mastenbroek, in Trouw 1 November 2019.

³⁸ ROB 2019.

³⁹ Cf. AIV 2017, p. 17.

Research shows that support for the rule of law and the appreciation Dutch people have for it is generally high.⁴⁰ On the other hand, citizens do not always (or no longer) understand their government because it does not take sufficient account of citizens' capacity to do what is necessary (*doenvermogen*). Against this background, the Council encourages and emphatically invites embracing the citizen perspective in legislation, administration and the judicial system. Because the responsive rule of law is about people actually experiencing the safeguards of the rule of law and noticing in their dealings with the government that the rule of law is ultimately about them. In a responsive rule-of-law state, the legislative, executive and judiciary put the perspective and possibilities of the citizen first. This requires an explicit culture of responsiveness towards citizens when implementing legislation and policy.

Language and communication play an important role in this regard. The Council warns against overestimating the feasibility and enforceability of rules and recommends that implementing agencies be given sufficient room to offer opposing views on the feasibility and enforceability of policy.

To keep deficits in the rule of law to a minimum, promote the rule-of-law culture in government and society, and enter into meaningful dialogue about this, the Council proposes that the government – with the Minister of Justice and Security, Minister of the Interior and Kingdom Relations and Minister for Legal Protection having primary responsibility – develop an agenda to strengthen the rule of law and have an independent monitoring committee review this periodically. An agenda that can be held up as a 'dynamic mirror' to anyone with anything to do with the rule of law. To flesh out and implement the agenda, it would be necessary for all local and regional authorities to be able to play a significant role.⁴¹

A 'Rule of Law' policy agenda should include:

- promoting a rule-of-law culture in government and society;
- promoting and exchanging ideas and best practices;
- transparency and access to information as crucial instruments for civil society and the media in the context of national checks and balances.

⁴⁰ Continuous Research on Civic Perspectives of the Netherlands Institute for Social Research (SCP) and the Eurobarometer survey of the European Commission. Also see section 1.4 *Support for the rule of law*.

⁴¹ In particular, mayors who, from their position in local government, feel a special responsibility for the topic of rule of law.

The ‘Rule of Law’ policy agenda must at least include:

- a programme to strengthen the rule of law, detailed below in several suggestions for possible elements of the rule-of-law agenda, including the clarification of institutional relationships;
- coordination across the various players involved in shaping the rule of law;
- monitoring coherence and putting overarching developments on the agenda.

Explanation: While Justice and Security’s 2020 budget identifies concern for the rule of law as its first policy priority, this mainly concerns the content priorities of the department’s budget.⁴² The European Commission, on the other hand, has developed a rule-of-law agenda⁴³, which announces several concrete measures to strengthen the rule of law in the European Union. The Council recommends developing a similar agenda in the Netherlands.

It must be ensured that the ‘Rule of Law’ policy agenda does not become an obligation imposed from above. For this reason, the Council sees opportunities for fleshing out and implementing the agenda at grassroots level: involved citizens and local government.

Possible elements of the rule-of-law agenda

About the legislative power, or the government and parliament

Diagnosis: Legislation contains open standards and framework rules or arises from agreements. As a result, there is a shift towards those who are going to set the standard. This erodes the legislature’s function. Even so, there is no turning back: social issues are complex, knowledge is fragmented, politics has become more volatile and the legislator is not the only one in the driving seat. In the last few decades, economic rationality has prevailed over the rule of law

42 This includes the administration of justice, legal aid, tackling subversion, prohibiting subversive organisations, child pornography and sex tourism, an experimental closed ‘coffee shop’ (cannabis café) chain, debt strategy, combating discrimination, human trafficking and prostitution policy and sexual crimes. Source: Lower House, session year 2019-2020, 35 300 VI, no. 2, p. 8 *et seq.*

43 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *Strengthening the rule of law in the Union. A blueprint for action*, 17 July 2019. The Commission states that a robust political and legal culture that supports the rule of law in each Member State is the best safeguard for the rule of law. The Commission believes that awareness of the general public, transparent and accountable policy and legislation, sufficient knowledge of case law on the rule of law and the role of civil society, including independent media, are important in promoting this political and legal culture.

when assessing what the public interest entails. These developments are influencing how the legislature performs its duties.

- Work on a renewed architecture of the legislative function and the legislative process in the modern rule-of-law state, for example by seeking advice on this from the Council of State and other advisers.
- Adopt measures to compensate for the changes in the legislator's duties. Strengthen corrective capacity. Strengthen the research function of the Lower House.
- Appoint MPs as rapporteurs on the rule of law⁴⁴, who evaluate those legislative policies from a rule-of-law perspective.

About the executive power, or public administration

Diagnosis: The public administration needs room to act to address social issues and provide services. While doing so, it is important not to lose sight of the rule-of-law nature of decision-making and implementation. The administration sometimes feels that rules get in the way or that its powers are too limited to deal with an undesirable situation.

According to the Council, making and implementing decisions under the rule of law means that there must be an open and thorough process in which all relevant information, values and interests are weighed up against each other and a decision is then made on what is desirable in the 'public interest'.

- Set a good example by observing the rule-of-law perspective when tackling social issues and providing services.
- Facilitate the conversation between the administrator and official environment: what do they need from each other to arrive at a rule-of-law culture and decision-making? Where do they find common ground and where do they differ? How can the civil servant be loyal to policy and at the same time reflect the values of the rule of law in their work?
- Ensure advice on the rule of law is provided to the administration at all stages of a decision-making process.
- Provide regular learning opportunities in which public administration and civil servants are offered insights into political-administrative relations and basic constitutional relations.

44 Cf. Article 30A of the Standing Orders of the Lower House of the States General.

About the judiciary

Diagnosis: The court is regularly asked to rule on cases that raise an underlying fundamental question. The judge is forced to set substantive standards in this way. The judicial system is also under pressure and at risk of becoming overburdened. Not all disputes need to be resolved through expensive court rulings.

- The function of the judicial system must therefore be revisited: what does our judicial system mean and on which principles must it be organised?
- Investigate the possibilities of relieving the burden on the judicial system in light of its function.

About the civil service

Diagnosis: Administrators have become demanding in terms of loyalty from the civil service, civil servants are being drawn into the political domain. The focus of the advice is shifting from advising on policy content to guiding the administrator through the forces at play.

Civil servants' awareness of the rule of law is sometimes lacking in administrative practice.

- Develop regular times for attention to and education in political-administrative relations and principles of the rule of law, for all civil servants working in policy and, where relevant, in implementation.
- Build counterforces into the policy process to test feasibility, enforceability and sustainability under the rule of law.

About the media

Diagnosis: The core quality of the Dutch media landscape is its pluralism. The media are an influential power; through pluralism, they are also directly their own counterpower. Pluralism ensures representativeness of perspectives. But the media's earnings model is under pressure.

- As a government, contribute towards safeguarding a pluralistic media landscape.
- Guarantee journalistic independence (for example, protection of sources).

In 2020, the Council for Public Administration and the Council for Culture will publish a joint advisory report on which public values and functions of local media (public and private) should be safeguarded – and how – with a view to preserving and stimulating a local democracy in which everyone is heard and seen.

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