

Selected procedural issues - IATJ conference October 2014

Recusal and excusal - presentation by Wouter van Nispen tot Sevenaer (court of appeal Den Bosch, The Netherlands)

Terminology: Recusal and excusal

Situation in which a judge is unqualified to perform legal duties because of a possible conflict of interest or lack of impartiality.

Every citizen has the right to an impartial tribunal i.e. judge (article 6 ECHR)

Active / passive role of the judge

Active = judge asks to be excused (EXCUSAL)

Passive = a party challenges a judge as unqualified to perform legal duties because of a possible conflict of interest or lack of impartiality (RECUSAL).

In the Netherlands excusal and recusal have two separate, but very similar, procedures

Numbers

Submitted motions to recuse in The Netherlands

	2006	2007	2008	2009	2010	2011	2012
COURT OF 1 ST INSTANCE	226	210	278	283	388	450	518
COURT OF APPEAL	<u>33</u>	<u>38</u>	<u>80</u>	<u>85</u>	<u>107</u>	<u>107</u>	<u>121</u>
TOTAL	259	248	358	368	495	557	639

Motions granted

	2006	2007	2008	2009	2010	2011	2012	
COURT OF 1 ST INSTANCE	15	16	35	15	16	33	38	Avg. 7%
COURT OF APPEAL	<u>1</u>	<u>1</u>	<u>4</u>	<u>0</u>	<u>5</u>	<u>3</u>	<u>4</u>	Avg. 3%
TOTAL	16	17	39	15	21	36	42	

Total nr of cases: 1,7 million in 2006 - 1,9 in 2009 – 1,8 in 2012

Total nr of judges: 2.500 (2012)

Why the increase? “Van Rossum report” (research commissioned by the Dutch Council for the Judiciary)

Judges say:

- Citizens are more assertive
- Lawyers lack quality and substance: they just go where fashion and their clients dictate

Lawyers say:

- Judges are too blame, or at least the way they handle cases. Increased workload has resulted in a less thorough and careful treatment of cases.

Active / excusal (“verschoning”)

In theory

- Refusal to hear or decide a case is criminal offense
- Judge has to submit request to be excused
- Recusal chamber decides
- Grounds are the same as with recusal (I’ll explain them there)

In practice

- Informal, before case is heard
- What to do when reasons for excusal become apparent during hearing?

Result of informal handling: hardly any case law.

At the moment subject of debate; not so much the informal recusal, but the method of attribution of cases to judges. The way that happens is very informal too. General trend towards more transparency of working methods of judiciary and what happens behind the scenes.

Passive / recusal (“waking”)

Recusal of whom?

One judge, the active chamber, the entire court?

When?

- Before, during, or after the hearing, but
- No longer after the court has ruled, and
- Not before a judge has been appointed to the case (yes, this does happen!)
- **IN ANY CASE: As soon as grounds for recusal arise or become apparent**

Why?

Lack of impartiality

- Subjective test
- Objective test

Frequent considerations by the recusal chamber

- Burden of proof: Presumption of impartiality
- Procedural decisions: *as a rule* not grounds for recusal
- Not a court of appeal: the test is *not* if the recusal chamber agrees with the main chamber
- Motion to recuse submitted too late

How?

- In writing, with an explanation of the reasons
- During a hearing: oral motion also accepted

The recusal procedure

- Judge may accept the recusal and resign the case: new judge and new date for hearing
- If not:***
- Main procedure is stayed
- Excusal chamber is convened
 - o Three members
 - o Preferable one of each 'team' (section)
 - o But: the judges are from the same court.

Role of the judge being challenged

- The right to submit written statement
 - Right to appear
- Questions
- o Appear before the recusal chamber or not?
 - o In robes or plain clothes?
 - o Party or object of scrutiny?

Finally: some issues

(1) The stay of the main proceedings prolongs the duration of the case

- o Solution
 - Standby-chamber
 - Other countries: motion to recuse does not stay the main proceedings
 - Repeat players may be denied possibility of second motion

(2) Members of the recusal chamber work in the same court house: (appearance of) lack of impartiality of the recusal chamber?

- o Solution
 - trial being held in which the courts of appeal of The Hague and Amsterdam hear each other's cases