

RESILIO

Country Report

Netherlands



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RESILIO Country Report – The Netherlands

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1. Introduction

The Netherlands¹ is a solid constitutional democracy based on the rule of law. It ranks fifth in the World Justice Project's (WJP) rule of law index after the four Nordic countries.² Judicial independence is perceived to be high with a largely efficiently functioning justice system and relatively limited backlog. The Netherlands is one of the least corrupt countries in the world, ranking 8th in the Transparency International Index.³ There is a high level of media freedom in the Netherlands (see section 2.2). Checks and balances operate satisfactorily, and governmental powers are effectively limited by the legislature, judiciary, audit and review, and non-governmental checks.⁴

There has traditionally been a belief in the primacy of the political process and democratically elected legislature, with less room for judicial review and 'activist' intervention by courts.⁵ Finding negotiated political solutions, reflecting the Dutch *poldercultuur*, has traditionally been valued more than the idea of individual rights and the resolution of conflicts by courts.⁶ This can be attributed to the relatively peaceful, liberal, and tolerant history that did not necessitate the same fierce struggle for the protection of fundamental rights against a central government as in other countries, as well as a rather homogeneous population.⁷ One illustration of the limited resonance of judicial review is that general administrative courts were only established in 1974. In addition, the Netherlands has traditionally had fewer courts, judges, and lawyers than Ger-

many.⁸ Nonetheless, since the 1970s, there has been an increase of rights talk and litigation as a result of a process of emancipation and individualisation (see section 2.1).⁹

The level of fundamental rights protection is also relatively good. Several improvements strengthened the institutional infrastructure of fundamental rights protection over the last 15 years, including the establishment of the Children's Ombudsman (2011), the replacement of the Equal Treatment Commission by the Netherlands Institute for Human Rights (2012), and a first National Human Rights Action Plan (2013). The Constitution contains a Bill of Rights which also includes social rights, albeit formulated as obligations of conduct rather than enforceable individual rights enjoying direct effect.¹⁰ There is a strong missionary spirit to be a guiding country and set an example, whereby fundamental rights and the protection of the rule of law operate as 'a moral cornerstone' of foreign policy. This is also illustrated by Article 90 of the Constitution, which states that 'the government promotes the development of the international legal order.' Dutch foreign policy in 2023, for instance, stipulates that the protection and promotion of human rights, the democratic rule of law, and the international legal order are at the core of the Dutch foreign policy.¹¹ This (idealist) internationalist attitude 'to do good' is part of a historical tradition that goes back to the seventeenth-century Dutch jurist Hugo Grotius, but also reflects the national interest of a small and open trading country. There is great pride among politicians and government officials that The Hague is the legal capital of the world.

While the Netherlands scores high on most factors, it scores relatively low in the World Justice Project (WJP) index for order and security (ranking 25th), especially because of a low score on the sub-factor ‘People do not resort to violence to redress personal grievances.’ While all scores are between 0.83 and 0.87, the score for criminal justice is 0.75, having decreased from 0.80 in 2016-2018. This can primarily be attributed to the (in)effectiveness (0.55), timeliness (0.69), and impartiality of criminal investigation and adjudication. One related concern is the growing power and monopolisation of organised crime activities in the trafficking of drugs, women and weapons, resulting in fierce violence, intimidation, and threats against public prosecutors, judges, lawyers, administrators, and the police. The Marengo trial, in which Ridouan T. is the primary suspect, serves as an illustration. The lawyer and brother of a crown witness, as well as the journalist Peter R. De Vries, were assassinated in connection with this case. In addition, one lawyer was convicted for the unlawful disclosure of information to the suspect, while another has been in detention for weeks under similar suspicions.

2. Analysis of the country case along the RESILIO model

2.1 Most important systemic factor: judicial resilience

Of the three systemic factors, judicial resilience is the highest. There is a relatively high level of perceived judicial independence among the general population and companies. Respectively, 70% and 72% consider the courts’ and judges’ independence to be ‘fairly or very good’.¹² In the Netherlands, there are three levels within the judicial hierarchy: the Supreme Court and three different supreme administrative courts; four courts of appeal; and eleven district courts. The three highest administrative courts¹³ are second-line courts of fact, while the Supreme Court is the third-instance cassation court, which examines questions of law only. The independent Council for the Judiciary (*Raad voor de rechtspraak*) plays an important role in guaranteeing the quality of the justice system and the independence of judges while also allocating financial resources to courts. A National Selection Committee for Judges, consisting of six judges and six non-judges, selects candidate judges who are appointed for life by the executive on the proposal of the Minister of Justice. The European Commission’s 2023 rule of law report discusses several (proposed) reforms to strengthen judicial independence,

including a proposal to eliminate the possibility for judges to be members of the national or European Parliament.¹⁴

Dutch courts have played an important role in upholding the rule of law and protecting fundamental rights, despite the prohibition of constitutional review (Article 120 of the Dutch Constitution). Since the 1970s, the courts have played an important role in highly sensitive issues not addressed by the legislature, including wrongful life, wrongful birth, adoption, and euthanasia.¹⁵ The judiciary’s contribution primarily stems from the monist approach to international treaties, as a result of which treaties automatically become part of the national legal order and do not need to be incorporated or transformed into national legislation (Article 93 of the Constitution). Article 94 of the Constitution even gives international law precedence over national law by allowing courts to rule domestic law provisions inapplicable when they are incompatible with treaty provisions. The possibility of treaty review has resulted in an especially prominent role for the European Convention on Human Rights (ECHR). There is currently a governmental proposal to amend the constitution to abolish the prohibition of constitutional review to improve judicial protection, enhance the social and political importance of the Constitution, and strengthen the rule of law.

One recent example is the high-profile judgment of *Urgenda*. In this case, the Dutch Supreme Court ordered the State to reduce greenhouse gas emissions by at least 25 percent (compared to the 1990 levels) by the end of 2020. It relied on, among other things, Articles 2 (the right to life) and 8 (the right to respect for private life and home) of the ECHR.¹⁶ Likewise, after a reference for a preliminary ruling to the EU Court of Justice, the Council of State concluded that the nitrogen PAS programme was inconsistent with the EU Habitats Directive.¹⁷ The consequences of this judgment were significant and many construction, agricultural, and infrastructure projects had to be stopped. Prime Minister Rutte referred to the ‘nitrogen crisis’ as the biggest challenge in his tenure. Another recent judgment concerns the ‘*nareismaatregel*’ measure restricting the possibilities for close family members of successful asylum seekers to join them without needing to seek asylum. As a result of this measure, family members of a status holder with an asylum permit had to wait six months longer before they could come to the Netherlands. In February 2023, the Council of State ruled unequivocally that this measure violates Dutch and European law.¹⁸ The government

collapsed in July 2023 primarily as a result of disagreement among the coalition parties in relation to this issue of family reunification.

The Dutch judiciary is, however, under pressure with considerable staff shortages (approximately 800 judges and 200 public prosecutors) and a high workload.¹⁹ Judges also complain about the Council for the Judiciary and the one-sided focus on meeting production targets, especially because funding is based on the delivery of judgments.²⁰

Judicial resilience is the most important systemic factor, partly because the institutional and constitutional resilience factors have weakened in recent decades. With respect to the former, the weakening of public administration and public service ethos should be highlighted. The new public management trend since the 1980s and the outsourcing to consultants has hollowed out public administration. A recent survey also indicates that nearly half of Dutch civil servants experience (very) high levels of pressure from politicians also because of high media pressure. Political and/or organisational interests often thwart official professionalism. Hence, 64% of the consulted civil servants indicated that they see little or no room for contradicting ministers. This also impacts the quality of the rule of law.²¹ One example is the deliberate neglect of EU law and the fudging of figures on the licensing of fishermen using electric pulse methods. EU regulations allowed only 5% of the fishing fleet to use new electric pulse techniques. In practice, the Netherlands managed to raise this percentage to a quarter, despite concerns from government officials that the licensing is *contra legem*. These signals were ignored by higher level officials and politicians because of political and social pressure.²² This example illustrates a growing trend of the executive to use partial and temporary quick-fix solutions (*geitenpaadjes*). Such a solution was also sought in relation to the nitrogen crisis mentioned above. Following the PAS judgment of the Council of State, the government introduced a partial construction exemption. The Council of State, nonetheless, concluded that this exemption was also not in conformity with EU environmental law.²³

With respect to constitutional resilience, one could point to decreasing public and political support for the government and institutions to operate within the limits and checks provided by the constitution.²⁴ Politicians are increasingly and deliberately stretching legal and treaty

boundaries to buy time or to enable political deals, as illustrated by the *nareismaatregel*. In doing so, the government knowingly undermines the legitimacy of the judiciary because courts are forced into the position of a bogeyman or as inconvenient obstacle to policy making. Political (in)action or deliberate disregard of (international) rules frequently results in predictable court judgments bringing policy or legislation into line with the law. Politicians directly and indirectly contribute to the politicisation of justice. This is also visible in the growing criticism of (the legitimacy of) international courts, especially the ECtHR.²⁵ What is more, the Dutch parliament recently adopted a motion denouncing legal actions taken by interest groups protecting specific interests (such as Urgenda), with major consequences for the public interest. The motion calls on the government to set further standing requirements for such groups in relation to their representativeness of (public) interest they protect.²⁶

2.2. Most important subsidiary factor: media resilience

Of the three subsidiary factors, media resilience performs better than civic or political resilience. The Netherlands ranks 6th in the World Press Freedom Index, having risen 22 places to the position it had in 2021 before the assassination of journalist Peter R. de Vries.²⁷ There is a high level of media freedom in the Netherlands as a result of constitutional and legislative safeguards, as the 2023 European Commission rule of law report details.²⁸

Media is traditionally independent and enjoys high trust among the majority of the population. This reflects wide governmental and popular support for press freedom and the freedom of expression, with hardly any limitations on the spread of information and opinions. A diverse range of national and regional daily newspapers exists, as well as an independent public broadcasting service (NOS) and several commercial broadcasting companies with their own news bulletins. The Foundation for Public Broadcasting (NPO) distributes and finances airtime between various broadcasters representing distinct groups of society. The Foundation can sanction a broadcaster's non-compliance with the journalistic standards in the NPO code. A newly established (September 2022) advisory board encourages plurality through an amended assessment for new and existing broadcasters and media providers. The media regulator (*Commissariaat voor de Media*) is independent and operates with sufficient resources.²⁹

While there has been a decline in regional journalism in recent years, investigative journalism has grown. New outlets and platforms such as Follow the Money and De Correspondent have been established in addition to existing providers such as Investico and De Groene Amsterdammer.³⁰ Investico, a non-profit organisation partly funded by independent donors, describes its mission in the following terms: ‘We strengthen the democratic rule of law by feeding public debate. Not by presenting whipped-up scandals, but by providing insight in news and investigative stories into how decisions are made in social issues that are important to the Netherlands; where implementation may derail and how control works. Investico offers a counterweight to the short-sightedness and incident-focusedness that often dominate the social debate.’³¹ Grants for investigative journalism are offered by the Stimulation Fund for Journalism and the Special Journalism Projects Fund.

There are also four specific concerns in relation to media resilience: polarisation; (fake news on) social media; access to governmental information; and media ownership.

- Polarisation has increased in recent years, especially in relation to migration, climate change, and agriculture as well as the COVID-19 pandemic. This has led to a more hostile environment for the media, resulting in criticism from populist parties on the far left and especially the far right as well as threats and physical and verbal violence against TV crews and photographers.³² Reporters Without Borders (RSF) even notes that this has resulted in self-censorship by some journalists or a reluctance to cover particular issues.³³

- A second concern is disinformation on social media. More than one third of the Dutch population relies on social media platforms without ‘any editorial firewall’ as their most important source of news.³⁴ News dissemination is also affected by abuse and trolling.

- A new Open Government Act (*Wet Open Overheid*) replaced the *Government Information (Public Access) Act* in 2023. It is not uncommon that government information arrives late or in an incomplete fashion³⁵ A recent illustration of the reluctance to enhance transparency is Ministry of Health, Welfare and Sport’s refusal to reveal the information in a highly controversial deal about the purchase of COVID-19 mouth masks, despite a court order to do so.³⁶

- A fourth concern relates to (transparency of) media ownership with only three media companies holding 74% of market share in the radio sector and 77% in TV, while two companies hold 94% of the newspaper market share.³⁷ The Media Pluralism Monitor recognises a very high risk of concentration.³⁸ A merger between media companies RTL and Talpa was blocked by the Dutch competition authority partly because of disadvantages for consumers, such as higher prices.

Regarding the other subsidiary factors, it can be noted that political resilience has become weaker since the start of the millennium. Events such as 9-11 and the Pim Fortuyn revolt have led to a rise of populism and coarsening of politics. Threats against and intimidation of – especially female – politicians which (partly) led to the resignation of the Minister of Finance and political leader of the liberal party D66 Kaag in July 2023 are also cause for concern.

The current Second Chamber of parliament consists of 21 political parties indicating a volatile electoral system. The increasing importance of (social) media leads to a “drama-democracy” whereby parliamentary attention is primarily driven by media headlines.³⁹ These developments, including the high turnover and thus limited experience of MPs, have an impact on the co-legislative role of the Second Chamber. The required legal expertise to critically assess legislative proposals, the limited collective or institutional memory, as well as the limited popularity of being involved in the rather technical exercise of legislation have meant that less attention is paid to legal quality and the consistency of legislation with fundamental rights.⁴⁰ Fundamental rights have primarily been discussed in parliament in relation to other countries in the context of Dutch foreign policy.⁴¹

This has also resulted in a weakening of civic resilience, accompanied by lower levels of trust in the ability and reliability of the democratic system and its institutions. This stems from several crises, including the childcare benefits scandal (*toeslagenaffaire*) (see section 3). Another parliamentary inquiry into natural gas extraction in Groningen – which led to earthquakes and damage to housing – concluded in 2023 that financial gains took precedence in decision-making over safety concerns.⁴² As a result of these two crises, as well as the earlier mentioned nitrogen affair, the Dutch population is increasingly questioning the ability of central government and politics to handle important societal challenges. Nevertheless, people’s trust in their government is still

relatively high in the Netherlands in comparative OECD terms, even though considerably lower than in Nordic countries such as Finland or Norway.⁴³ It is also positive to mention that the Dutch population (still) values the constitution and fundamental rights, reflected by a relatively high membership of human rights organisations.⁴⁴ At the same time, rights consciousness is low in Dutch society with limited knowledge about the Constitution and fundamental rights in comparison with neighbouring countries.⁴⁵ Fundamental rights are often considered irrelevant in domestic political debates and public discourse and are frequently seen as yardsticks for other countries (i.e. 'human rights exportism').⁴⁶

2.3. Most important contextual factor: economic resilience

Economic resilience is the most important contextual factor in the Netherlands. This includes the ability of the national economy to efficiently satisfy the needs of a society, creating circumstances fostering social peace and public order. The Netherlands ranks 11th in an index on GDP per capita, combining data of the IMF, World Bank and the UN.⁴⁷ It occupies the 10th place in the UN human development index.⁴⁸ Unemployment is relatively low (3.5%) and has considerably decreased in the past years.⁴⁹

Economic inequalities remain limited and have further decreased, with the Netherlands sharing 6th place with Belgium and the United Arab Emirates with a GINI index value of 26%.⁵⁰ The risk of poverty and social exclusion remain relatively limited in comparison with other European countries, even though recent figures suggest that poverty is on the rise given the high inflation rates, a result of increasing food and energy prices.⁵¹

Connected to rule of law, the favourable economic circumstances allow for quite elaborate compensation schemes to address damage resulting from governmental (in)action, including the childcare benefits scandal (section 3) and damage caused by natural gas extraction in Groningen⁵²

3. Impact of crises on the rule of law: the childcare benefits scandal

The childcare benefits affair or scandal has left its marks on the resilience of the rule of law in the Netherlands. In a nutshell, the scandal involved the unjustified termination and recovery of childcare subsidies for alleged fraud by

the Tax Administration. The alleged fraud often consisted of often only minor mistakes that frequently stemmed from misinformation by childcare centres and agencies. Especially problematic was that the anti-fraud system was based on a discriminatory risk classification model involving amongst others the nationality of applicants. Consequently, around 26.000 parents had to pay back (parts of) the amount, sometimes summing up to tens or even hundreds of thousands of euros. This affected many families and children, leading to losses of jobs or homes or out-of-home placement of children.

The parliamentary committee of inquiry concluded in January 2021 that fundamental principles of the rule of law were violated by the executive (Tax Administration), legislature and the judiciary alike.⁵³ In its report 'Unprecedented injustice', the committee expressed its amazement and even deep indignation at the denial of justice to victims by all three state powers. The committee noted that the executive primarily had favoured efficiency and legality in terms of preventing fraud and abuse by operating a harsh system that failed to take into account people's interests and individual circumstances. The legislature had failed to introduce a hardship clause, while also paying insufficient attention to the principle of good governance and proportionality. Administrative courts had neglected their important function of (legal) protection of individual citizens.

Following the publication of the committee's report, the government resigned in January 2021. The government subsequently introduced measures to prevent similar cases in future, while struggling to compensate affected families and persons. The scandal has also led to reflection on the part of the Administrative Division of the Council of State as well as the administrative divisions of district courts.⁵⁴ In its reflection report, the Division concluded that it had stuck to the all-or-nothing approach for too long, and that could and should have abandoned this policy earlier. The Division offered its apologies for failing to provide parents with legal protection. Lower administrative courts equally lamented their own role in the scandal in the context of a working group established in 2021.⁵⁵ Several commentators also noted that administrative courts have been (too) deferential to the executive and legislature in the migration law area.⁵⁶ The reflections and subsequent political and academic discussions led to a recognition of the importance of the human dimension and customisation (*maatwerk*) within administrative law. More specifically, the Division

consequently adopted a new – and more judicial protection-oriented – proportionality principle applying the structured three-pronged test (suitability, necessity, and fair balance) so that judicial review of administrative decisions is more intense.⁵⁷

4. Conclusion

The Netherlands continues to be a solid constitutional democracy based on the rule of law, marked by a high level of (perceived) judicial independence, limited corruption, and media freedom. The major sources of rule of law resilience have been the judiciary and the media, with the economy being the most important contextual factor. The judiciary has been particularly forthcoming in compensating for the executive or legislature's failure to respect the rule of law and fundamental rights. This has resulted in prominent court judgments in various areas where political compromise has been difficult to achieve, most notably the environment and climate change, as well as migration and asylum. There is a high level of media pluralism and independence, with a recent growth in investigative journalism.

Sources

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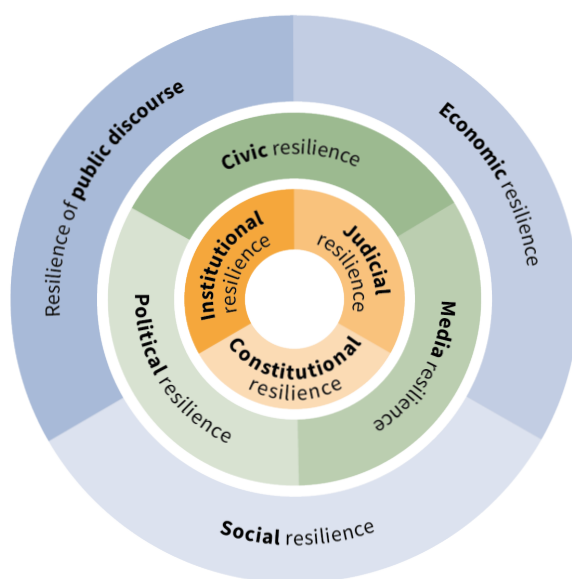
About the project

RESILIO aims to identify institutional and societal factors that make the rule of law more resilient, thus adding a constructive contribution to academic and policy debates. It draws on a “thick” definition of the rule of law, understood as closely connected to democracy and fundamental rights. The resilience of the rule of law means that the rule of law can experience hazardous events or incremental threats without losing its core function, structure and purpose.

About the paper

This paper is part of the **RESILIO Country Report series**. It is a collection of compact analyses that assess the source of rule of law resilience in each EU member state by examining the most prominent resilience factors, using the analytical framework of the RESILIO model.

RESILIENCE FACTORS



RESILIO offers a multi-layered model of the rule of law resilience. Systemic dimension (orange) reflects upon the resilience of the legal setup; subsidiary dimension (green) looks at the phenomena and tendencies present in societies as possible facilitators; and contextual dimension (blue) analyses the broader habitat, determined by structural and systemic variables like economic growth, social cohesion, and general political climate. RESILIO also takes into account the horizontal effects of unpredicted and unprecedented crises that can affect all dimensions of rule of law resilience with different intensity.

While each factor is necessary for a resilient rule of law, they are only sufficient in combination.

The considerations in this paper are compatible with the developed conceptual model of the resilience of the rule of law. They focus on **social resilience** as a contextual factor strengthening the rule of law.

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For more information, visit the project website: www.iep-berlin.de/en/projects/future-of-european-integration/resilio/

