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Judicialization of Politics in The Netherlands: Towards a Form of Judicial Review

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ABSTRACT. The growing complexity of modern Dutch society and the development of international law, especially in such areas as fundamental human rights, have resulted in a judicialization of politics in many fields. In this article we discuss the peculiar nature of these developments in The Netherlands, focusing on the role of administrative law. We predict that judicial power will grow, probably resulting in the introduction of judicial review of statutes and growing political concern with judicial appointments.

Introduction

On 23 October 1985 the European Court of Human Rights made a decision in the *Benthem* case (*ECHR* 23 October 1985, AB 1986, no. 1) that caused much turmoil among Dutch judicial authorities and legal scholars. Mr. Albert Benthem owned a garage in a village called Noordwolde. In 1976 he applied for a licence under the Nuisance Act of 1952 for operating an installation for the delivery of liquid gas to motor vehicles, involving the use of a surface storage tank with a capacity of 8 cubic metres. The Regional Health Inspector advised against granting the licence, because of what were considered excessive risks to neighbouring houses. The municipal council, nevertheless, granted the licence. The Health Inspector subsequently lodged an appeal with the Crown (in this case, as head of the executive, the Minister of Public Health and Environmental Protection).

When such an administrative appeal is brought before the Crown, the Crown does not make a decision until the Administrative Litigation Division of the Council of State (*Afdeling Geschillen van Bestuur van de Raad van State*) has looked into the matter and prepared an advisory decision. The Crown's decision or a Crown's Decree, (*Koninklijk Besluit*), almost never departs from the Litigation Division's advice.

In 1979 the Crown decided that Mr. Benthem should be refused the licence; the decision of the municipal council was quashed. Subsequently, Mr. Benthem was

ordered to cease operating his installation by the municipal authorities. He appealed against this decision, but the decision was confirmed by the Crown. Meanwhile Mr. Benthem filed an application with the Commission on Human Rights, claiming that his case had not been heard by an independent and impartial tribunal, contrary to the requirement of Article 6 para. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, Treaty of Rome, 1950). In its decision the European Court ruled that Article 6 para. 1 indeed was applicable because in this case a civil right was at stake. Thus the Court had to determine whether the proceedings in appeal to the Crown satisfied the requirements of Article 6. The Dutch government stated that the Crown followed the Litigation Division's advice in the vast majority of cases. This did not provide, in the Court's view, the determination by a tribunal of the matters in dispute, because the Crown still is entitled to depart from the advice. Thus the Crown—hierarchically superior to the Regional Health Inspector and to the ministry's Director General, who had submitted the technical report to the Litigation Division—could not be seen as an independent and impartial tribunal that guarantees a judicial procedure.

As a result of the judgement of the Court, the Dutch legislature had to abandon the provision in many statutes of an appeal to the Crown. The Administrative Litigation Division of the Council of State was subsequently upgraded to an independent administrative court (*Tijdelijke Wet Kroongeschillen*, 1987). This change of law caused by the Court's judgement is an example of the judicialization of politics in The Netherlands; as a result of this decision some disputes can no longer be decided by the Crown, but instead have to be referred to a truly independent administrative judge.¹

In The Netherlands politics has been increasingly judicialized: there has been a substantial "transfer of decision-making rights from the legislature, the cabinet or the civil service to the courts" (Vallinder, 1992:1). [See, also, pp. 91–99, this issue—Ed.] Not only did the ECHR further the protection of civil rights against the Dutch executive; decisions of the Dutch Supreme Court (*Hoge Raad der Nederlanden*) have also been of great importance. This development in The Netherlands is not unique. The Dutch government, legislature, and judiciary have been propelled by international developments and the perhaps not fully expected dynamics and consequences of international treaties, like those on human rights. In the following sections we will give some examples of this tendency to shift decision-making competence from political to judicial bodies. We will end with some remarks on one of the major points in which Dutch constitutional law differs from that of adjacent countries: the absence of constitutionally sanctioned judicial review of Acts of Parliament.

The Advance of Administrative Law

The roots of the Dutch Constitution (*Grondwet*) lie in the *Trias Politica*, the separation of the legislative, administrative, and judicial powers. Though the first Constitution of 1814 has been changed and enlarged many times—the last important revision of the Constitution was in 1983²—several concepts of the *Trias Politica* still remain (Kortmann, 1990: 30). Constitutional development has brought changes in different fields, including the extension of the catalogue of fundamental rights, the superiority of self-executing provisions of treaties, and the maturation of administrative law. But not only have the contents changed, so have the interpretation and nature of some provisions. For example, originally human rights were consid-

ered to guarantee an individual's right to defend one's self in the field of criminal law; nowadays these rights make it possible to demand the conditions for the fulfilment of these rights from the government (Akkermans et al., 1988: 30).

However, constitutions stemming from the *Trias Politica* can have different forms, witness the French and the American Constitutions. The original Dutch Constitution incorporated the French version of the idea of separation of powers, in which the democratic element of political decision-making was dominant. In essence, majority rule determined political questions and therefore the outcome of the legislative process. The question of constitutional incompatibility had to be decided by Parliament itself, not by the judiciary; the judiciary merely was the *bouche de la loi*, which should strictly apply legislation without its own interpretation.

Thus, contrary to the American version given by Hamilton (see Kramnick, 1987), where the divisions of powers led to a system of checks and balances, the French and the Dutch versions led to a *separation* of powers (Cliteur, 1989). That might be one of the reasons why in the nineteenth century little emphasis was given to possible mistakes of the executive or the legislature. One could not imagine that these bodies would make mistakes or make decisions that were unjust or disproportionately disadvantageous for individuals or groups of citizens. Dominant legal doctrine considered democratic decision-making the best guarantee against these kinds of failures (Struycken, 1910; Stroink, 1990: 5).

More recently has come the realization that, for instance, withdrawing a subsidy could be unjust; that changes in zoning regulations can be unduly disadvantageous to individual citizens; or that either granting or denying a licence can involve abuse of power by the executive. Starting in 1887, some statutes provided for a right to appeal against decisions of the executive. Usually, decisions had to be appealed to the next hierarchically superior authority or to a special administrative court. Gradually several special administrative courts were introduced, each with a limited jurisdiction based on a specific statute. The Dutch legislature did not create administrative courts with general jurisdiction. Therefore, today the field of administrative law is considered rather chaotic and complicated, and hard for the ordinary citizen to understand (Scheltema, 1986: 39; Kortmann, 1990: 253).

The increasing demand for civil rights against the executive led to the AROB Act of 1976 (*Administratieve Rechtspraak Overheidsbeschikkingen*, Administrative Jurisdiction on Public Authorities' Decrees). This statute grants individuals the right to appeal against any decree of a public authority to the newly formed Judicial Division of the Council of State (*Afdeling Rechtspraak van de Raad van State*) if no other special administrative court is available for an appeal. Since then the Judicial Division has energetically built a strong position by elaborating on the general principles of proper administration (*beginselen van behoorlijk bestuur*) in its case-law (Stroink, 1990: 5). The AROB Act proved to be very important. Appealing to the Judicial Division became so popular that the work-load of this court became unmanageable: in the near future lower administrative courts will be created and incorporated into the ordinary courts of first instance. Implementation of this project started on 1 January 1994. The final piece of this development may be that the coming reorganization of the judicial system will lead to the creation of a chamber of the Supreme Court dealing with cassation in administrative law cases (Rammelink, 1992: 15). Therefore, not only the number of decisions by which the public authorities can influence the position of individuals and groups of individuals has grown in the last decades, but also the possibilities of appeal against these decisions, and of having these appeals decided by an impartial judge.

The Role of the Supreme Court

The Dutch Supreme Court has come far from the *bouche de la loi* ideology of the nineteenth century (Hirsch Ballin, 1988; Schoordijk, 1988). The Supreme Court always had some influence on the law, merely by the interpretations given to statutes in the Court's decisions. These interpretations, of course, set precedents, both for the Court itself and for lower courts. But the important task of looking after the uniformity of the law has gradually come to be equalled by the Court's function of developing the law. Starting with the famous decision in *Lindenbaum v. Cohen* (HR 31 January 1919, NJ 1919, 161, *WvR* 10365; see Van Koppen, 1990), the Supreme Court has taken up the role of deputy legislator. That very decision, in which the Supreme Court widened the definition of tort from a mere breach of written rights or duties to breach of duty of care, made a bill with the same subject superfluous.

In recent years the Supreme Court has given new interpretations to existing statutes or has formulated new rules for unforeseen problems, making legislation unnecessary, even on issues where a clear political majority in Parliament would have produced legislation relatively swiftly. More important, the Court produced case law on issues, such as the right to strike, euthanasia, and abortion, where Parliament was unable to pass legislation. The Supreme Court decisions play such an important role in these matters because of certain peculiarities of Dutch politics.

For a long time, the Dutch government has been built on a coalition of two or three, sometimes even five, political parties. No party has ever achieved a majority in Parliament. When one of the coalition parties agrees with the opposition on a hot issue, and could join with the opposition to create a majority vote on the issue, that party still has to consider the opinion of its coalition partner(s) in order to avoid the risk of breaking up the coalition. So even if there is a majority in the Parliament as a whole for a political choice on a certain issue, it is not certain that that choice will be made. More often the decision on these issues is postponed, and the Supreme Court has to fill the gap (see Van Koppen, 1990; 1992).³

The permanent coalition character of Dutch government also introduces compromise into the content of legislation. Clear-cut legislation on controversial issues would often endanger cooperation within the coalition. This means that compromise gives a diffuse and vague nature to legislation. Statutes, then, often need extensive interpretation before they can be applied in practice, and the judiciary has an important role in many controversial matters (Schuyt, 1988: 332).

In the last two decades coalition parties became even more bound to each other through the introduction of the *regeerakkoord* (government agreement), an extensive written document on all major and many minor political issues. The agreement not only binds members of the cabinet, but also members of the parliamentary majority. Voting against any government proposal covered by the agreement is considered a breach of political contract and endangers the coalition. The government agreement, made in covert negotiations, in fact binds members of Parliament to cabinet decisions and thus turns the traditional dualism between cabinet and Parliament into a monistic ruling by the cabinet. This enables the government to run bills through Parliament by sheer political force, sometimes producing acts of low quality. In such political circumstances the Supreme Court may receive a new function: guardian of the quality of the law (Van Koppen, 1990).

Considering the growth of the public policy-making function of the Supreme Court, it is not surprising that politicians nowadays seem to pay more attention to

appointments to the Supreme Court than they have for decades. According to the law, Parliament has an almost decisive influence on the appointments to the Supreme Court, because it is the Parliament's⁴ competence to put forward a list of three nominees, from which the Crown (in fact, the cabinet) has to choose. In practice, however, co-optation takes place. When there is a vacancy in the Supreme Court, the Court draws up a list of six candidates, who are recommended for the new position. Thereupon Parliament, without any discussion or public attention, puts the first three candidates of that recommendation list on the list of nominees, from which the number one always is appointed by the Crown (Van Koppen and Ten Kate, 1987; Van Koppen, 1990).

All justices appointed after World War II have had a very low political profile, compared to appointments in the nineteenth century. No specific strategy or political prevalence can be discerned, when we set aside lawyers with extreme points of view who have no chance of being appointed. Nevertheless we cannot rule out that, in private, the sitting justices, when they draw up the list of candidates, take into account the recommended lawyers' political affinity and philosophy of life in order not to depart too much from the proportional composition of the Lower House of Parliament. This could explain why the Supreme Court has succeeded up till now in maintaining this co-optation system.

In the summer of 1991 a Christian Democratic member of Parliament started to ask questions about the procedure for the appointment of justices of the Supreme Court. The reason was that this politician had the impression that too many judges and justices were adherents of one of the opposition parties (D66, a mildly liberal party).⁵ For the first time this question was heavily covered by the press. This might indicate that in the near future appointments to the Supreme Court will not take place so automatically and unobtrusively as they have in the past. The Supreme Court promised to give more biographical data on the candidates in the future, and we may expect more debate about future appointments to the Supreme Court.

From National Law to International Law

Since World War II Dutch law has become more and more intertwined with international law, international treaties, and the law and case law of supranational institutions. This development has significantly restricted Dutch political autonomy, largely because many important decisions are no longer made in The Hague but in Brussels, as a result of Dutch membership in the EC, and because the government and the legislature are bound to the case law of some international courts. The fact that the interpretation of many treaties is reserved for independent international courts has had a rather unexpected impact on Dutch politics, especially in the field of fundamental human rights.

A major step to the internationalization of law was made in the 1953 change in the Constitution, which explicitly stated that national law shall not be applied if it is incompatible with a self-executing provision of a treaty.⁶ So the Constitution made it possible to subject national law, including constitutional law, to certain provisions of treaties, with no distinction between treaties that entered into force before or after the enactment of the national law. Through the following decades this primacy of treaties was properly taught in the law faculties, but was of no great practical importance. The Supreme Court tried to avoid any reference to international law by giving an interpretation, sometimes rather strained, of a comparable constitutional provision that corresponded to the international treaty. The year

1980 was a turning-point, partly due to the spin-off of the academic courses (van Dijk, 1988: 181). The Supreme Court began openly to review national law's compliance to international law, especially to the European Convention of Human Rights (for examples, see van Dijk, 1988).⁷

After 1980 many citizens started to use the right to appeal individually to the European Court of Human Rights for alleged violation of the Convention. This resulted in judgements of the European Court in which Dutch national law was considered to be in conflict with specific provisions of that Convention (van Dijk, 1988). International and supranational law, as interpreted by either the European Court or the EC Court, has a considerable influence on national law, for instance by prohibiting the legislature from making any rule that is in conflict with that interpretation.⁸ So, one of the major components of the judicialization of politics can be found in the restriction of government authority by the development of international and supranational law and the case law of the international courts.

Towards Constitutional Review?

As we noted, the Dutch Constitution stems from a tradition in which there is no supremacy of the judiciary over the legislature. Since 1848 the Dutch Constitution has included the principle that the judiciary is not allowed to review the compliance of any Act of Parliament with the Constitution.⁹ Any Act of Parliament supersedes the provisions of the Constitution and the principles that are incorporated in the Constitution. The decision of the Parliament's majority makes an Act inviolable. This rule has been restricted to Acts of Parliament explicitly. By contrast, all the ordinances of lower legislature bodies, those of the provinces, the local governments, and so on, have to be in accordance with higher ones, Acts of Parliament and the Constitution. In that sense there is judicial review by judges in different layers of the judiciary that very often finds ordinances of lower bodies incompatible with an Act of Parliament or the Constitution.

An important argument for the inviolability of Acts of Parliament was that Parliament itself, as the representative of the people, was best equipped to judge if a certain Act of Parliament was incompatible with the Constitution. This opinion had many strong adherents in the first half of this century (Struycken, 1910). Nevertheless, discussion of the appropriateness of judicial review revived from time to time. During the preparation of the 1983 revision of the Constitution, a draft to create a form of judicial review was even circulated. In the event no constitutional review was incorporated in the Constitution, but ever since that time the discussion has continued.

The discussion of judicial review was fed by the increasing influence of international law on the case law of the Supreme Court and the lower courts. Nowadays we find ourselves in a peculiar situation: an Act of Parliament can be declared incompatible with self-executing provisions of international treaties, but not with the Constitution. This holds even when in the treaty and in the Constitution essentially the same principle is included in about the same words.¹⁰ This inconsistency is nearly impossible to explain to non-Dutch scholars (Kortmann, 1990: 336).

Another argument in favour of the ban on judicial review, the argument that Parliament itself is able to maintain a certain degree of quality in its legislative function, has become less convincing during recent years. As we mentioned earlier, the decreasing dualism between government and Parliament and the speed and pressure under which some drafts have passed Parliament have occasionally

resulted in botched-up legislation.¹¹ A notorious example is the so-called Harmonization Act of 1988, in which the rights of students were curtailed in a retrospective way. Ultimately an appeal to the judiciary failed, because the principle that an Act of Parliament is inviolable was upheld by the Supreme Court. The Court, however, noted that some aspects of the Harmonization Act were in conflict with general, though unwritten, rules of law and announced that it would not exclude a sort of judicial review in the future (Van Koppen, 1992). It is not our purpose to sum up all the pros and cons that arise from the discussion on the question of the judicial constitutional review.¹² What matters here is that there is an overall tendency towards a form of judicial review or the creation of a constitutional court (Kortmann, 1990: 336; Stroink, 1990: 25; Cliteur, 1989: 1375; van Boven, 1990: 149). At the annual meeting of the Dutch Lawyers Association in June 1992, a clear majority favoured abandoning the prohibition on constitutional review. The fact that most West European countries have a constitutional court will inevitably play a role, especially now that these constitutional courts "are intervening in legislative processes at an increasing rate" (Stone, 1990: 89).

Conclusion

The growing complexity of modern society and the development of international law, especially in such areas as fundamental human rights, have resulted in a judicialization of politics in some fields. We may assume that this tendency has not yet stopped, given the ongoing discussion about judicial review and the relatively unique position of The Netherlands at this point. This increase in the judiciary's power may also have some less favourable aspects. For example, until now the appointments to the judiciary in The Netherlands have had a relatively unpolitical character, but it is not certain that this will continue in the future. So perhaps the benefits of judicialization of politics may partially be overridden by the politicization of the judiciary.

Notes

1. We only use the word "judge" when the decisive authority, as in this case, can be seen as impartial and independent.
2. The 1987 revision is not relevant here.
3. In about the same way the EC Court had to decide questions that presumably were within the competence of the Council of European Ministers, because that Council too often failed to reach a clear political decision (Kortmann, 1990: 159).
4. To be exact: the Lower House of Parliament, as with the House of Commons in the United Kingdom or the Bundestag in Germany.
5. Unfortunately we could not find out whether or not this is true.
6. Now Art. 94 Constitution.
7. Though the Dutch Supreme Court is not considered to be a constitutional court, it is striking that the protection of fundamental human rights is also one of the areas in which the German Constitutional Court has been most involved in policy-making (Landfried, 1992: 4).
8. The only way to evade this situation would be to denounce the treaty, which is not an easy way out.
9. See Article 120.
10. See for instance Article 1 of the Constitution and Article 26 of the International Treaty on Civil and Political Rights.

11. See, for example, Damen and Hoogenboom, 1989, on the extremely hurried legislation on the internment of refugees, after the Supreme Court considered this practice to be unlawful detention.
12. For a recent survey of these arguments, one is referred to, for example, Cliteur (1989), van Boven (1990), and Stroink (1990).

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